



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 950 of 2005

ABIGAEL WANJIRU MBIRI.....PLAINTIFF

VERSUS

DAKIANGA DISTRIBUTORS LIMITED..... RESPONDENT

R U L I N G

This Chamber Summons, dated 14/6/06, under Order 24 r 2 (2), 41 r 4(1) of the Civil Procedure Rules; SS 63 (e) and 3A of Cap. 21, Laws of Kenya, seeks the following orders:

- 1.
2. Already spent
3. Stay of execution of the Tribunals orders adopted by the Chief Magistrate's Court as earlier granted pending **interpartes** hearing of this application and eventual appeal.
4. An order reinstating the appellant back into the suit premises forthwith pending hearing of this application.
5. The Tribunal's order as adopted by the Chief magistrate Court, Kisii be declared null and void and set aside at the court's instance.

The application is supported by an Affidavit by Justus Munyinyi of even date, and is on the grounds, **inter alia**, that:

- (a) There is pending before this court an Appeal no. 950/05 against the decision of the Tribunal.
- (b) Given that the appellant was running a hotel and restaurant business the order to vacate in the circumstances explained in the memorandum of Appeal was misdirected and in error;
- (c) The appeal is arguable and has very high chances of success;
- (d) Appellant will be rendered nugatory should the respondent be allowed to remove the appellant from the suit premises altogether and through unorthodox means.
- (e) Appeal will suffer irreparable loss as he has no alternative premises to move into immediately

suitable for her kind of business.

(f) Appellant is willing to abide by any conditions/terms the court may impose for the due execution for the stay.

In opposition, the Respondents aver that the eviction was properly carried out, vide a court order; that the applicant's application has been overtaken by events as the premises in question have already been leased to a 3rd party for 3 years; that the application is defective, misconceived and does not lie, it lacks merit and should be dismissed.

The facts – sequence of events – in this case need to be stated for proper grasp of the import of the issues at hand.

On 14/1/05, the Appellant/Applicant filed a Reference, for determination by the Business Premises Tribunal in which she challenged a quit notice to vacate the suit premises which was determined in favour of the Respondent on 10/11/05. The applicant/Appellant, through her lawyers, lodged an appeal against the said Tribunal's decision. This appeal was lodged on 1/12/05. The Tribunal had ordered the appellant to vacate the suit premises on 1/1/06, which was unjust because being a business premises, the appellant needed more time for alternative premises. The purported termination notice was defective and unenforceable because the Respondent issued another notice intending to renew the tenancy on 8/6/05.

On 14/12/05, appellant obtained stay orders pending fixing of **interpartes** hearing on 20/12/05, but when parties appeared before the court, the hearing was fixed for 8/5/06, and the interim orders of stay extended till that date. Unfortunately, the court was not sitting on 8/5/06, but by consent, the parties agreed that the matter be heard on 2/6/06, on the mutual understanding that the Respondent would not execute.

Secretly, and in bad faith, the Respondent went, by way of an application [which is unusual in such matters] obtained **ex parte** orders before the Chief Magistrate, Kisii, by misleading the Magistrate's court that there was no appeal against the Tribunal's order and removed the appellant's goods and equipment from the suit premises on 26/5/06.

Since then, the goods have been lying outside the suit premises as the Respondent has refused re-entry in spite of the stay orders having been reinstated.

Having carefully gone through the pleadings herein, and considered the submissions of the learned counsel for both sides, I have reached the following findings and conclusions.

Without pre-empting the outcome of the appeal, the confirmation, by the Chief Magistrate, Kisii, of the Tribunal's decision was obtained by either fraud or misrepresentation and or non-disclosure of critical fact, namely that there was already an appeal against the Tribunal's decision, of which the Respondent was fully aware. This is evident from the above facts where both parties had agreed on 8/5/06 to have the hearing on 2/6/06. Further, despite that knowledge, the Supporting Affidavit by the Respondent during the confirmation by the Chief Magistrate failed to disclose the existence of the appeal against the Tribunal decision for which the Respondent was seeking adoption, by the Kisii C.M.'s Court.

Of even greater concern, again from the pleadings before me, the appellant/applicant was not notified of the date of the confirmation by the Kisii Magistrate's Court, of the Tribunal's decision. The relevant law requires that parties shall be notified – notice shall issue – for the court's confirmation of the Tribunal's decision by the court.

Without dwelling on matters which call for full hearing, suffice it to say that both the confirmation by the Chief Magistrate's Court and the eviction of the Appellant, in purported enforcement of the Tribunal's decision, are null and void.

This court takes grave note of the flagrant disregard of this court's stay orders, and undertakes to ensure

that such conduct, by the Respondent, and his associates, does not recur.

All in all, and for the reasons above, I grant the prayers in Chamber Summons herein, dated and filed in Court on 14/6/06.

Accordingly, I grant the following orders, as per the application herein. Namely:

1. Prayer Nos. 3, 4 and 5.
2. Respondent to bear the costs of this application.

In conclusion, this court will not stand by and watch a party [here the Respondent], enjoying the fruits of that party's wrong doing, especially non-compliance with court orders.

DATED and delivered in Nairobi, this 7th Day of February, 2007.

O.K. MUTUNGI

JUDGE