



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 102 of 2005

AUGUSTUS MULI t/a FUN & JOY CO. AND NYALI HIGH SCHOOL
APPELLANT

- Versus -

1. CHEMUSIAN COMPANY
LIMITED

2. REGENT MANAGEMENT LIMITED
RESPONDENTS

Coram: Before Hon. Justice Mwera

Gikandi for Applicant

Omondi for Respondents

Court clerk – Kinyua

RULING

The notice of motion dated 23/11/2005 was filed here by the appellant under Order 41 rule 4, Order 50 rule 1 Civil Procedure Rules and Section 3A Civil Procedure Act for the principal order:

1. That there be a stay of execution of the orders made by the Business Premises Rent Tribunal (BPRT) on 21/10/2005 pending the hearing and determination of the appeal herein.

Mr. Gikandi told the court that, the Business Premises Rent Tribunal had dismissed the applicants' application dated 7/9/2005 seeking an injunction to restrain the landlord/respondents from proceeding with the distress for rent against him.

And that if the stay is not ordered the applicant will be exposed to all manner of exploitation, harassment and even eviction. That as a result the applicant would suffer substantial loss and the students using the subject premises as a school would suffer loss and inconvenience.

Mr. Gikandi added that their strongest plank on appeal will be that the learned Chairman had ruled that she had no jurisdiction to entertain complaints coming from premises used as schools since Cap. 301 did not cover these.

Mr. Omondi on his part told the court that dismissal of sought orders i.e. restraining the landlord from levying distress for unpaid rents did not warrant a stay because there was no order to be enforced following such a dismissal which deserved to be stayed.

And further that the appellant once upon a time filed MBA HCCC No. 101/05 seeking the same orders as he sought before the Business Premises Rent Tribunal and they were refused on 30/6/2005. The court nonetheless allowed the applicant to remain on the premises to the end of the school year for the sake of the students but he had to pay rents. Mr. Omondi submitted that the rents were not paid and more importantly the applicant having failed to get orders from this court, he ran to an inferior tribunal seeking the same orders – a type of conduct that is hardly dignified or to be countenanced. On his part Mr. Gikandi responded that his client has paid rents and he respects this court. Both sides produced case law that may be resorted to if need be.

The arguments from both sides having been duly appreciated together with the circumstances of this case, the stay order sought will not issue. The applicant has not shown what substantial loss he will suffer in case the respondent's rents are paid. He sought an injunction against seeking those rents by way of distress and the learned Chairman of Business Premises Rent Tribunal declined to grant it, whether she interpreted Cap 301 properly or not regarding its application to premises used for a school, notwithstanding. Demonstrating to this court that the applicant will suffer substantial loss is the core of Order 41 rule 4 Civil Procedure Rules, when one seeks stay orders pending appeal. The applicant has not demonstrated that, let alone making an offer of security for due performance. Accordingly he cannot get the orders.

This court also regarded the fact that on 30/6/2005 by its ruling in MBA HCCC 101/2005, it declined to grant orders which, it was told were based on a similar prayer as one which the Business Premises Rent Tribunal dismissed on 21/10/2005 . Those proceedings were not exhibited here and the applicant at no time referred to them either in the supporting or supplementary affidavit here.

Mr. Gikandi who did not appear to dispute Mr. Omondi's position on this, simply said that his client respected this court as being superior to the Business Premises Rent Tribunal but maintained that he was right to come here for protective orders in case the tribunal was not sitting at Mombasa but he proceeded there as soon as it began sitting.

Looking at the whole issue however, even if the Business Premises Rent Tribunal is seised of exclusive jurisdiction under Cap 301, coming to this court for protective orders, loosing the prayers, then going to the tribunal for the same orders sounds mischievous - particularly if that very applicant returns to this very court after he has lost before the Business Premises Rent Tribunal. Because the prayers were said to be the same, whether in wording or substance and the applicant lost, giving the stay now would amount to something of a travesty of justice, especially that nothing was said of the goings – on back and forth in the present application.

In sum this application is dismissed with costs.

Delivered on 11/1/2006.

J.W. MWERA

JUDGE