



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njue v Kiura (Environment & Land Case E002 of 2022)
[2022] KEELC 14933 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14933 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E002 OF 2022
A KANIARU, J
NOVEMBER 16, 2022**

BETWEEN

ATANASION NDWIGA NJUE APPLICANT

AND

PATRICK NJIRU KIURA RESPONDENT

RULING

1. What is before me for determination is a notice of motion dated February 16, 2022 and filed on February 17, 2022. The Application is expressed to be brought under Order 40 Rules 1 of the *Civil Procedure Rules* and Section 15 of *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya.

Application

2. The application came with four prayers but prayers one and two (1 & 2) are now moot. The prayers for consideration are therefore as follows;

Prayer 3: That pending the hearing and determination of this appeal herein the respondent be barred from evicting or terminating the applicant's tenancy LR Embu/ Municipality/1172/916.

Prayer 4: That the OCPD Embu to ensure compliance with this order.

3. The application is premised on the grounds that the applicant is a legitimate tenant who has paid over Kenya Shillings Three Million as rent to the respondent since 11th January 2020. It was stated that the Business Premises Rent Tribunal had made an error in finding that the applicant was not a tenant and he was therefore in danger of being evicted on 21.2.2022. It was contended that the applicant would suffer immense loss as he had invested heavily in the business, which was his only source of livelihood.



It was equally stated that the applicant has an arguable appeal with high chances of success and further that the landlord was in contravention of the order issued on 11.4.2021.

4. The application was accompanied by a supporting affidavit filed on 11.2.2022 duly sworn by the applicant. He deposed that he had filed a complaint before the Business Premise Rent Tribunal against the respondent on 6.8.2021 and at the same time sought interim orders via an application dated 6.8.2021, which orders were granted on 11.8.2021. The tribunal had however dismissed his application on grounds that he was not a bonafide tenant. Being aggrieved by the said orders, he filed the present appeal.
5. He further deposed that he had an arguable appeal with high chances of success for reasons, inter alia, that the respondent had been receiving rent from him and he recognises him as a tenant contrary to the tribunal's findings; the respondent had received rent of close to 3 million over the period; the parties had entered into rent payment agreements with him; the respondent had failed to issue him with rent receipts but there was evidence of payment amounting to Kshs. 600,000/=; the law recognises both oral and written tenancy agreements; and finally that the respondent had done introductory letters to service providers recognising him as a tenant.
6. The applicant further averred that he had not been able to obtain the tribunal's ruling for reason that the file had been missing. He further deposed that the respondent had verbally informed him to vacate the premises on or before 21.2.2022 and it was his contention that he would suffer loss if evicted as the business was his only source of livelihood.
7. The respondent opposed the application by filing a replying affidavit on 30.5.2021. He averred that the memorandum of appeal was incompetent and ought to be struck out. He averred that the application filed had material non-disclosure of facts which were fundamental in determination of the application. He deposed that the applicant had filed a reference before the tribunal in Embu BPRT No. E0011 of 2021 *Atanasio Ndwiga vs Patrick Njiru Kuria* in which the tribunal had dismissed the reference and made a finding that there was no landlord/tenant relationship between the parties. It was said that the tenant had been condemned to pay costs of the suit but had failed to do so.
8. To him, the applicant was a trespasser. He claimed to have filed a suit against him for trespass in Embu ELC CMCC No. E061 of 2021 *Patrick Njiru Kuria vs Atanasio Njue*. He denied ever leasing out the property to the applicant and instead stated that he had entered into a lease agreement with one Paul Theuri Mutahi concerning the suit property, which lease is said to have commenced on October 1, 2015. The respondent denied receiving any money from the applicant and maintained that the tenancy agreement alluded to is between him and the said Paul Theuri Mutahi. He was of the view that the application was an attempt to defeat the course of justice and was unmerited. He further argued that the applicant had failed to show evidence why the orders sought ought to be granted. According to him, the continued occupation by the applicant was incapacitating him financially as he was not getting returns for the said parcel of land.
9. The respondent also made reference to application dated May 19, 2022 which he claimed to be an abuse of the court process and an afterthought. He alleged that the applicant was in defiance of court orders issued on March 2, 2022 in which the court had ordered him to serve the documents on him but he had failed to. He also stated that the applicant had failed to take steps to obtain proceedings in the tribunal in order to file a record of appeal. He called upon the court to uphold its dignity and safeguard sanctity of its orders. In conclusion he urged the court to dismiss both application and award him costs.
10. The applicant filed a supplementary affidavit on June 27, 2022. He denied being a stranger to the respondent and maintained that the respondent received huge amounts of money from him and ought to explain why he was receiving money from a stranger. He further argued that his application was



competent as he had a right to appeal before the court after losing the case at the Business Premise Rent Tribunal. In relation to the case filed by the respondent in Embu CMCC No. 61 of 2021, he claimed to have filed a preliminary objection challenging the court's jurisdiction to handle the matter and was of the view that the said case was yet to be determined. But according to him the case was a candidate for dismissal. He further contended that he had been on the suit premises for a period of three years and questioned why the respondent had not explained his failure to evict him. He maintained that he would suffer irreparably if evicted, unlike the respondent who was said to be a person of means.

11. The suit was canvassed by way of written submissions. The applicant filed his submissions on June 27, 2022. His submissions were a re-affirmation of the averments in the application and his supplementary affidavit. In addition, he faulted the tribunal for failing to declare him as a tenant, when according to him, the evidence showed that he was a sub-tenant who was duly recognised by the respondent. He also argued that he will suffer irreparably if evicted as his business will be finished yet he had bank loans that he was repaying using the said business. He maintained that the respondent would not suffer any loss if stay is granted as the rent payable to him was known and that further, he continued to receive the monthly rent. Lastly, he contended that the court had similar powers as the tribunal and therefore urged the court to exercise the said powers and protect him from the arbitrary eviction.
12. The respondent filed his submissions on October 7, 2022. He gave a summary of the pleadings filed before the court and identified three issues for determination by the court. The first was whether the orders sought ought to be granted. He relied on the case of *Giella vs Cassman Brown & Co. Ltd* (1973) E.A 358 which set out the three limbs for grant of an injunction. Further reliance was made on the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) eKLR where the court stipulated what entails a prima facie case. The respondent submitted that he was the owner of the property and contended that the applicant's continued occupation of the property infringes on his right to possession and occupation. He further maintained that he has a right to enjoy his rights under his title as the registered proprietor and was of the view that the applicant had not established a prima facie case with a probability of success. He submitted that in the event the court is inclined to consider him as a tenant, then he should be condemned to furnish the court with security in form of rent accrued over the years.
13. On whether the applicant shall suffer irreparable damage that cannot be compensated by way of damages. The respondent submitted that the applicant ought to demonstrate that he will suffer harm that cannot be quantified in monetary terms or cannot be cured. He relied on the case of *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (2014) eKLR where the court expounded on what entails irreparable damage. The respondent maintained that as the owner of the property, he continues to suffer as a result of the applicant occupying the said premises without paying any dues.
14. On the third limb, which is the issue of balance of convenience, he was of the view that the applicant's failure to demonstrate that he will suffer irreparable damage shifted the balance of convenience in favour of him and he relied on the case of *Charter House Investments Ltd vs Simon K. Sang and others* Civil Appeal No. 315 of 2004. He further urged the court to opt for the lower rather than the higher risk of injustice. He submitted that the higher risk was in granting the orders sought which would amount to an injustice to him.
15. The respondent further submitted that the applicant was a trespasser as he had failed to furnish the court with any documentary evidence to prove that the property belongs to him. He was instead accused of furnishing the court with evidence of a lease agreement between him and one Paul Theuri Mutahi, who was not a party to the application. With that, he submitted that by virtue of being a trespasser, then the court ought not to grant him audience.



16. In conclusion, the urged persuaded the court to grant him mesne profits as he was being deprived of the right to earn a living as the applicant was not paying rent. He urged the court to dismiss the application and appeal with costs to him.

Analysis And Determination

17. I have considered the application herein, the reply, and the rival written submissions. Though the application is brought under Order 40 Rule 1 of the *Civil Procedure Rules 2010*, it seeks interim orders pending the hearing of the appeal and which is provided for under Order 42 Rule 6(6) of the Rules. However I find the defect is curable under Order 51 rule 10 where it is stated as follows;

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule...No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

18. The correct provision therefore being Order 42 Rule 6(6) provides thus;- “Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
19. The principles for grant of temporary injunction pending appeal were laid down by the court in the case of *Patricia Njeri & 3 others vs. National Museum of Kenya* [2004] eKLR where it was stated that;-
- a. An order of injunction pending appeal is discretionary which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358.
20. The first consideration is whether the appeal is frivolous. The applicant herein has already commenced the process of filing an appeal. From the grounds on the memorandum of appeal filed herein, the appeal does not appear frivolous. A matter is frivolous if it has no substance; or it is fanciful; or where a party is trifling with the Court; or when to put up a defence would be wasting Court’s time; or when it is not capable of reasoned argument. (See the case of *Madison Insurance Company Limited -vs- Augustine Kamanda Gitau* [2020] eKLR). Having looked at the intended appeal, I am of the view that it is not frivolous, at least having regard to the grounds on the memorandum of appeal.
21. The second issue for consideration is whether the grant of the injunction would inflict more harm than it would avoid. The applicant herein has deposed and also submitted that he is a legitimate tenant who has paid over Kenya Shillings Three Million as rent to the respondent since January 11, 2020 and as such he would suffer immense loss considering that he has invested heavily in the business. He further said it was his only source of livelihood. He submitted that he will suffer irreparably if evicted as his business will be finished yet he had bank loans that he was servicing using the said business. On the other hand, the respondent deposed that the applicant is a trespasser. However I note that the respondent despite terming the applicant as a trespasser, has failed to dispute the documents alleged to have been authored by him introducing the applicant as a tenant. There are further petty cash vouchers produced in support of the assertion that the applicant is a tenant. Without determining the merits of



the application, I am of the view that in the circumstances, the balance of convenience tilts in favour of the applicant. Disallowing the application, in my view, will inflict great hardship on the applicant who has already filed an appeal. On the flip side, I find that no hardship will be inflicted on the respondent as the rent will still be payable. If the same is not paid, there is recourse provided for under the law. The circumstances of the case demand for a status quo to be maintained pending determination of the appeal.

22. As to whether the appeal will be rendered nugatory if the orders sought are not granted, the court in the case of *George Otieno Gache & another -vs- Judith Akinyi Bonyo & 5 others* [2017] eKLR while discussing “nugatory” in an application for orders of injunction held as thus;-

“

“(19) In *Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited* [2014] eKLR), the Court held;

“As for the second requirement, we have to ensure that the word “nugatory” has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (*Reliance Bank Ltd versus Nor Lake Investment Ltd/* [2002] IEA 227. Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

[20] Thus in determining whether an appeal will be rendered nugatory or not the Court must consider what is sought to be stayed and whether if allowed to happen the situation is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

23. The applicant intends to challenge the decision by the tribunal to the effect that he was not a tenant. The respondent in the replying affidavit deposed that the applicant is a trespasser. It is clear that one of the issues which will be for determination is whether the applicant is a tenant as provided for under the relevant laws. The orders as issued have the effect of evicting the applicant from the premises. In my view, allowing the orders to remain will cause an irreversible situation. The applicant herein has customers who visit the business and who might end up moving away. Further, the applicant deposed that he is servicing loans. Its my considered view that in the circumstances of this case, disallowing the application will indeed make the appeal nugatory as it will be a worthless venture. It would be hard to reverse the situation to its current state. It is clear from the nature of the business the applicant operates, it will be hard to get customers back after the appeal. For this loss damages may not be sufficient.
24. As to the applicant satisfying the principles in *Giella vs. Cassman Brown* [1973] EA 358, in the said case, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a *prima facie* case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”



25. A *prima facie* case was defined in the case of *Mrao Limited -vs- First American Bank of Kenya & 2 Others* [2003] e KLR as follows;

“A *prima facie* case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

26. As I have already stated elsewhere, the intended appeal is not frivolous. This is clear the perusal of the grounds on the memorandum of appeal. The appeal indeed raised arguable issues, one of which is whether the applicant was a tenant for the respondent. As such, on the material presented before this court, including the annexures to the supporting affidavit and also the memorandum of appeal, it is clear that there exists an issue which calls for explanation from the respondent. Therefore, the intended appeal amounts to a *prima facie* case.

27. Further as I have already pointed out, the applicant being the current occupier of the suit premises, and further considering the nature of the business, he stands to suffer irreparable loss which cannot be compensated by way of damages. He deposed that he will suffer irreparably if evicted as his business will be finished yet he had bank loans that he was servicing using the said business. He maintained that the respondent would not suffer any loss if stay is granted as the rent payable to him was known and further he continued to receive the monthly rent. In my view, by the fact that the applicant will have to close his business means that he will lose customers. Regaining them might be hard. This court is alive to the fact that in some businesses, customers do become loyal and once lost, its hard to regain them. Further, it is not disputed that the applicant has taken loans and that the business was his source of livelihood. It therefore means that closing the business will indeed cause the applicant to suffer irreparable injury which would not adequately be compensated by an award of damages.

28. Further I take into account that the applicant is the current occupier and payment of rent is not very much denied. I find that the applicant has a right to have his case determined and to further appeal up to the higher court. In the circumstances the balance of convenience tilts in favour of the applicant. The respondent will not suffer any prejudice.

29. Ultimately, I find the prayer for orders of injunction pending appeal in terms of prayer 3 merited. As for the prayer 4, the applicant did not depose as to why the same ought to be granted. In my view the civil procedure rules or rather the law has its own mechanisms to ensure compliance with the orders of the court. The applicant did not prove that the respondent will refuse to comply with the orders. If at all he refuses to

30. Comply, then the applicant has a recourse in law. I therefore decline to allow prayer 4.

31. In view of the foregoing I allow the application in terms of prayer 3 of the application. I however make no orders as to costs. Parties are bound by the pleadings and the applicant did not pray for cost of the application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF NOVEMBER, 2022.

In the presence of Waititu for Ataka for respondent and Hei for Mugambi Njeru for applicant.

Court assistant: Leadys

A.K. KANIARU

JUDGE

