



**REPUBLIC OF KENYA**

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

**Civil Application No. 61 of 2006**

**GATATHA FARMERS CO. LTD.....1<sup>ST</sup> APPELLANT**

**MASTERWAYS PROPERTIES LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NZOMO MUIYA..... RESPONDENT**

**RULING**

When the applicant/appellants moved to this court on 6/2/06, they sought stay of execution of the order by the Subordinate Court, made on 31/1/06 pending the determination of their appeal filed in court on the same date as this application. They also sought a temporary injunction to restrain the Respondent from carrying out any construction works whatsoever on the 1<sup>st</sup> Appellant's building on Plot No. 209/2524, without the 1<sup>st</sup> Appellant's authority, until the appeal herein is determined.

The application, brought under Order 41 rules 4 and 6 of the Civil Procedure Rules is on the grounds that the Subordinate Court allowed the Respondent herein to carry out unauthorized structural works on the appellant's building which involve demolition of walls thereby endangering the structural integrity of the building and that of the other tenants: that unless the application is granted substantial loss would be occasioned to the appellants and a disaster may ensue if dangerous structural works affecting the walls of the building being undertaken by the respondent are allowed to go on; and that just demands that the respondent be stopped from unlawfully vandalizing the 1<sup>st</sup> appellant's building without any authority.

The application is supported by an affidavit by George Njoroge Muturi of even date, to which are annexed various documents and correspondences between the parties as well as the Ruling by the lower court which is the subject matter of the appeal herein and this application.

The Respondents oppose the application, vide their Replying Affidavit dated and filed in court on 10/2/06.

I have carefully read the pleadings and entire documentation in this application. The first caution I had to remind myself is not getting into the merit or demerits of either the suit at the subordinate court or the appeal herein. I have to confine myself to the merits of this application, which seeks stay of execution of the Subordinate Courts Ruling, dated 31/1/06 and an injunctive order restraining the Respondent from carrying out any construction works on plot No. 209/2524 without the appellant/applicant's authority pending the appeal herein.

Careful reading of the Respondent's pleadings and the annexures thereto leave me with no doubt that the respondent is very economical with truth. This is evident from the correspondence between the Respondent and the appellant/applicants on the subject matter of what was, and what was not, approved by the applicants.

Whereas there is no doubt, from the correspondence between the parties that the appellant/applicants approved change of user of the premises from motor vehicle spare parts shop to Kenchic Cafeteria, there is no evidence of the appellants/applicants approving renovations involving interference with structural integrity of the said premises. And that is where the learned Magistrate erred in implying, in her Ruling, that approval of change of user meant approval of modifications of the premises, and further that such modifications did not require the appellant/applicant's approval.

It is not necessary to stress the point that as a tenant, the Respondent needs the authority and approval of the Landlord – the applicants herein to carry out any modifications herein – to carry out any modifications in the premises. More so, when the so called modifications involve interference with the walls of the building upon which the safety of the entire building depend.

I have no doubt, from the pleadings that the Respondent is not telling the whole truth about the nature of the modifications it is undertaking in the premises herein. If the renovations do not interfere with the structural integrity of the building why seek the approval of the plans from the City Planning Department, as the Respondent purportedly did vide their plan and application for permission to renovate the premises, dated 5/1/06? It is trite knowledge that no permission or approval is required from the City Planning Department if one is simply going to paint the premises or install new shelves.

I must also stress that the subordinate court overlooked the condition upon which the purported City Council approval was granted, assuming that such an approval was there when the suit and application that went before the lower were dealt with at that level.

From the authority to repair, dated 5/1/06 the approval was subject to the Respondent having received consent for the same from the Landlord/applicant herein. As I have said earlier on, the only approval granted by the applicant was for change of user, nothing else. The Subordinate Court based its Ruling on evidence not on record, and implied approval of that which the Respondent never sought from the appellant/applicants and hence that which was never consented to by the applicants herein.

I must at this stage state that I am not unaware of the dangers and risks to which unsafe buildings and structures expose each and every resident of this country. Lives have been lost, and untold damage occasioned to innocent Kenyans and others through unapproved building structures. Hence, the more reason why when it is stated on oath, as herein, that demolition of walls of the premises herein risks danger and disaster, this court has an obligation to forestall such an eventuality until both the appeal herein and the suit in the Subordinate Court are heard on merit and determined.

Aside from the above public interest, the purpose of temporary interlocutory injunctive orders is to preserve the substance of the main suit. I intend, through this Ruling to promote that noble principle.

Accordingly, and for all the above reasons, I grant the application herein, in terms of prayer Nos. 3 and 4 of the Notice of Motion herein.

I further order that the Respondent do pay the costs of this application.

DATED and delivered in Nairobi this 28<sup>th</sup> Day of March, 2006.

O.K. MUTUNGI

**JUDGE**