

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 246 of 1999

IEGFRIED HOFSTETTER PLAINTIFF

Versus

PETER KLAUS OKIKO DEFENDANT

Coram: Before Hon. Justice Mwera
Asige for Defendant/Applicant
J. Munyithya for Plaintiff/Respondent
Court clerk – Kazungu

R U L I N G

The defendant filed a notice of motion dated 2.10.2002 under O.41 r.4, O.50 r.2 and Section 3A Civil Procedure Act with the main prayer:

1. That there be a stay of execution of the orders of 20/9/2002 arising from a notice of motion dated 19.1.1999 pending final determination of an appeal intended against that ruling.

The plaintiff's application dated 19.1.1999 sought summary judgment under O.35 rr. 1, 2, 8 and Section 3A Civil Procedure Act, as per the plaint. In the plaint it was averred that by agreement dated 4.3.1995 the plaintiff demised to the defendant some residential accommodation on plot subdivision No. 7006 SECTION 1 M.N. MBA for 10 years @ DM 51600 per annum payable in advance by remittance of the rent into the plaintiff's account at a bank in Roseheim, Germany. That the rent was never paid amounting to DM 222402.45 as at 01.03.99. So the plaintiff prayed for vacant possession of the premises plus rent arrears etc.

The plaintiff swore an affidavit in support of his prayer for summary judgment. On 20/9/2002 Khaminwa J granted the orders sought by the plaintiff. It is this ruling in issue now. The record has a notice of appeal dated 24.9.2002 and seemingly the appeal itself has not been filed. But the present notice followed an initial 14 – day stay w.e.f. 20/9/2002. No party told the court why it has taken this long to have the application disposed of. However, it was supported by a lengthy affidavit by one Gaudencia Okiko, a former wife of the applicant who deponed that she was well-acquainted with the facts of the dispute in issue by having been involved in the transaction relating to the leased premises in question. She had the applicant's authority to swear the affidavit on 3/10/2002.

Gaudencia deponed that the ruling of 20/9/2002 gave the plaintiff vacant possession of the premises as well as the claimed rent arrears. That the plaintiff, a German resident who lived there, had no known address in Germany. That he had no known occupation there either or assets in Kenya. That the defendant had been denied opportunity to have the suit heard on merits and instead the court determined it as an interlocutory stage. It was even guessed that the plaintiff would likely sell the subject property and leave Kenya for ever. That the defendant wished to exercise his right of appeal. That if the orders were not granted he would lose substantially having improved the property immensely, and acquired a purchaser's lien over the subject property. And lastly that the defendant was ready to furnish any security ordered by the court. Mr. Asige followed the same course in arguing this application.

On substantial loss Mr. Asige told the court that the defendant had paid DM 30,000 towards the purchase of the property and he had greatly improved the same. Asked what valuation had been presented to evidence the alleged improvement, the court was told that none was available. Similarly the claim that the defendant had paid money in Germany to the plaintiff with a view to buy the said property (see

annextures G.03, 4) was not supported by a sale agreement at all. Anyway the court was asked to maintain the status quo until the intended appeal was finally determined.

The court was urged to disregard the replying affidavit by the plaintiff sworn on 5/12/2002 in Germany and seemingly commissioned by Mr. Namachanja, an advocate at Mombasa. Mr. Munyithya did not seem to have a response to this rather clear misstep. But the four (4) grounds of opposition dated 5/11/2005 remained, and Mr. Munyithya urged the court to look at them side by side with the replying affidavit of 22.10.2002 properly sworn in Germany. That seemed the prudent course to follow and that is the one followed in this application. Mr. Munyithya told the court and Mr. Asige did not appear to rebut the position that the other affidavit sworn in Germany and commissioned at Mombasa was further to the one of 22.10.2002 and it was filed by leave of the court. It had defects though as to where it was sworn and where it was commissioned. Reference was made to a further affidavit of 11.8.2003 which was not easily traced on the file.

Mr. Munyithya told the court that there had been no decree/order drawn following the ruling of 20/9/2002, from which an appeal would spring. He went on to comment on the Court of Appeal Rules regarding filing of proper notices there and urged this court to conclude that the notice of appeal filed here had lapsed. This court had a difficulty in finding that it was competent to determine here that argument. However, the submission was adjourned to another date. But in the meantime Mr. Munyithya did not wish to submit further. He adopted his earlier submission and asked the court to regard his clients four (4) authorities filed on 1.7.2003 and determine the application. To Mr. Asige, the said authorities only touched on the Court of Appeal Rules and not on provisions and requirements under O.41 r.4 Civil Procedure Rules.

It is correct to say that the four authorities Mr. Munyithya asked the court to see are all concerned with Rule 5 (2) (b) of the Court of Appeal Rules – on staying execution of a decree of the High Court pending an appeal before the Court of Appeal. Of course there is always much to be learnt from that court's decisions in such areas, particularly as to the underlying principles enunciated. But when it comes to the planks used in erecting structures under the said Rule 5(2) (b) and O.44 r.4 Civil Procedure Rules, the choice differs e.g. while in Court of Appeal the focus will inter alia be on whether the appeal will be rendered nugatory unless the stay orders are granted, here the approach includes suffering substantial loss if the stay orders are not granted. But be that as it may, does the defendant get the orders sought here or not?

To answer that question this court has gone over the history of this case and the arguments put forth. The court has similarly perused the affidavits – both in support by Gaudencia Okiko, the former wife of the applicant (sworn on 3/10/2002) and the plaintiff's replying affidavit sworn on 22/10/2002. Both affidavits are about facts each party knows about the subject property and therefore relevant and admissible. The view of this court is that the stay orders sought do not issue. Whether the plaintiff resides in Germany, he has no known occupation/assets there or here in Kenya is not the issue. The fact is that he is the owner of the subject property here in Kenya and his rights over it cannot be denied without cause and basis. The ruling of 20/9/2002 gave judgment to the plaintiff as the learned judge saw it fit. The defendant is not denied the right and opportunity to challenge it on appeal – some 3 years now gone. If the defendant is apprehensive, and there was no evidence of that, that the plaintiff may sell the property in issue, then if he has a genuine cause he can place a caveat or other impediment on it. It has however been observed above, and the learned judge did on 20/9/2002 that the defendant had shown no evidence that he had a purchaser's lien, right or interest over the subject plot. In any case he seemed not to have paid any of the claimed rent arrears. Apparently the plaintiff does not appear to have been keen to extract an order/decreed following that ruling. Essentially the defendant remains a tenant who has not or is not paying rent yet he continues to occupy the plaintiff's property. That should be unfair whichever way one looks at it. He claims having improved the property, probably without the plaintiff's authority if he indeed did that, but again no proof of such improvement. So what substantial loss will he suffer if stay orders are refused? This court sees none. It appears that it is the plaintiff suffering substantial loss when no rents are paid.

In sum the stay orders are refused. However if the defendant still feels that a stay do issue as he goes on

appeal, then he is ordered to pay all outstanding rents up to the date hereof in the next 60 days. Otherwise stay orders are refused.

Costs to the plaintiff.

Orders accordingly.

Delivered on 15/9/2005

J.W. MWERA

JUDGE