



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 492 OF 2004

PATRICIA NJERI

JAMES MUTISYA

JAMES OMONDI

(Suing on their own behalf and on behalf of

ARTISTS MUSEUM ART STUDIO) APPELLANTS

VERSUS

NATIONAL MUSEUM OF KENYA RESPONDENT

RULING

This is an application under Order XLI Rule 4 of the Civil Procedure Rules (hereinafter referred to as “the Rules) and Section 3A of the Civil Procedure Act (Cap 21). In it, the Appellants seek in the main the following orders:

“2. THAT this Honourable Court be pleased to order a stay of execution pending the hearing of the appeal or in the alternative

3. THAT this Honourable Court be pleased to order an injunction restraining the Defendant ... from evicting or in any other way interfering with the Plaintiffs operations at the Respondent’s premises until the hearing and determination of the appeal herein.”

The matters leading to the application are straight forward.

The Appellants filed a suit in the lower court seeking a permanent injunction restraining the Respondent from evicting them or interfering with their occupation of certain premises known as Museum Art Studio. It is common ground that those premises are owned by the Respondent. At the time of filing suit, the Appellants also filed an application under Order XXXIX Rules 1, 2 and 3 of the Rules and Section 3A of Cap 21 in which they sought an interlocutory injunction to stop the Respondent from evicting them or interfering with their occupation of the premises in issue. That application was refused by the lower court. The Appellants were aggrieved by the decision of the lower court and have appealed to this court. They have brought the present application seeking temporary reprieve pending the hearing and determination of their appeal.

Mr Owiny for the Appellants urged the court to grant a stay of execution of the lower court's order or alternatively for an injunction pending appeal.

As Miss Kirimi for the Respondent pointed out, there was nothing which this court could stay. The Appellants sought from the lower court an order for injunction which was refused. That refusal did not result in any positive order that was capable of execution and the application to stay such refusal is, therefore, superfluous (See ***Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd Civil Application No Nairobi 349 of 2003 (174 of 2003 UR)***). Prayer 2 above, therefore, cannot be entertained in the circumstances. The case of ***Mukuma vs Abuoga*** (1988) KLR 645 cited by Mr Owiny is therefore not useful for the decision of the application before me.

The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

In the ***Venture Capital*** case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be "exercised judicially and not in whimsical or arbitrary fashion." This discretion is guided by certain principles some of which are as follows:

- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See ***Madhupaper International Limited vs Kerr (1985) KLR 840*** (cited in ***Venture Capital***). The Applicant must state that a reasonable argument can be put forward in support of his appeal (***J. K. Industries vs KCB (1982 – 88) KLR 1088*** (also cited in ***Venture Capital***)
- . (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See ***Madhupaper*** supra).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See ***Butt vs Rent Restriction Tribunal (1982) KLR 417*** (cited also in ***Venture Capital***).
- (d) The Court should also be guided by the principles in ***Giella vs Cassman Brown & Company Ltd*** (1973) EA 358 as set out in the case of ***Shitukha Mwamodo & Others*** (1986) KLR 445 (also cited in ***Venture Capital***).

At the hearing of the application, Mr Owiny did not proffer any arguments to show that his clients' appeal was not frivolous. Nothing was shown that the appeal would be rendered nugatory if the order was refused. Nor was it shown that if the application was refused, the Appellants would incur substantial loss. In short, the Appellants did not establish that they were entitled to the discretion sought and their application must fail.

I, therefore, dismiss the Appellants' application dated 13th July, 2004 with costs to the Respondent.

Dated and delivered at Nairobi this 10th day of August, 2004.

ALNASHIR VISRAM

JUDGE