

REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
CIVIL CASE NO. 96 OF 2003

WAMBUGU MOTENDE & COMPANY ADVOCATES PLAINTIFF

VERSUS

GIMCO LIMITED & ANOTHER DEFENDANT

RULING

The application before me is brought by way of a Notice of Motion dated 16th October 2003 filed on the same date. In it the applicant seeks an order to stay execution pending an intended appeal as well as an order restraining the Defendant/Respondent from levying distress or attaching the Plaintiff/Applicant's property pending the hearing and determination of the appeal. The applicant also seeks an order for costs.

The suit under which the application is brought is consolidated with H.C.C.C. No. 301 of 2003 filed by the Applicant against the Defendant and one Joseph Gikonya t/a Garam Auctioneers. Both claims arise from the same facts and relate to the Plaintiff/Applicants occupancy in the premises known as L.R. No. 209/1846 in respect of which the Defendant in H.C.C.C. 301/2003 is the managing agent. The Applicant's complaint is that the Defendants are threatening to evict the Applicants from the premises and also repossess parking bays used by the Applicants by virtue of their occupancy. Also that distress has been levied by way of proclamation and Defendants/Respondents are threatening to auction the applicant's properties namely office furniture and equipment. The applicant's claim that the distress is illegal and unlawful in that the rent to which the distress relates was not incurred by the applicants but by a previous tenant. Similar orders were sought in a Chamber Summons dated 3rd February 2003 but were denied when the same was dismissed by the Learned Justice G.B.M. Kariuki on 6th October 2003.

The Defence and counter claim in H.C.C.C. No. 301/03 avers that the Applicants are illegal tenants with no locus standi there being no privity of contract between them and the Respondents. They counterclaim against the Applicant, John Wachira Wambugu and Aprotect (the real tenant) for a dismissal of the suit, payment of outstanding and accruing parking fees and an order for eviction from the premises. In their defence and counterclaim in H.C.C.C. No. 96 of 2003 the Respondents claim as against the said parties, inter alia, rent due and accruing, mesne profits and eviction from the premises.

It is not in dispute that the Applicant occupies the premises without any lease of any kind and without paying anything. The first question that comes to mind is whether in those circumstances the applicant has any right of action against the Respondents. From the facts of the case, which have been dealt with at length in previous applications as earlier mentioned and which applications have been dismissed, it seems to me that the applicants have no sustainable claim as against the Respondents. In their affidavit in support of the Chamber Summons dated 3rd February 2003 sworn by John Wachira Wambugu the Applicants admit that they have no direct tenancy with the Applicants and their contention that they were the sub-tenants of the 3rd Defendant by counterclaim has not been proven. They have not shown that their occupancy of the premises in the first instance had the approval of the Respondents. The record shows that the Applicants did attempt to regularize their occupancy in circumstances in which the Respondents appeared willing to accommodate them, if only to recover the outstanding rent arrears standing at Kshs.5,040,754.75 at the time. The Applicants frustrated such accommodation by their failure to honour an undertaking to pay those arrears which was the only condition on which the Respondents would consider giving them a tenancy over the premises in question. I consider that negotiations between the Applicants and the "real tenant" Aprotect are not binding on the Respondents. However the letter dated 26th August 2002 from the Applicants to the 1st Defendant/Respondent undertaking to pay the said tenant's rent arrears worthy of note. In it the Applicants undertook to pay the arrears and gave a cheque for that purpose which was dishonoured on presentation. In that letter they expressly assumed the

liabilities of Aprotech as shown in paragraph five of the same which reads

“We also trust that you shall from now henceforth deal with us on the issue of rent account/service charge etc”.

This, coupled with the continued occupation of the premises without raising any claim as against Aprotech for their present predicament is indicative of their admission of liability under the counter claim.

That notice of appeal has been lodged is not in itself a ground warranting an automatic stay of execution pending appeal. The Applicants must show this court that they have an arguable appeal which if stay is not granted would be rendered nugatory. They have not even filed a Memorandum of Appeal to give the court an indication of what sort of appeal they intend to bring. The application before the Honourable Justice Kariuki was dismissed mainly on the ground that the Applicants had not established a prima facie case against the Respondent. The applicants are illegal tenants who have continued to enjoy the premises without paying any rent. They come to the court with dirty hands and I see no arguable appeal against the Learned Judge’s ruling of 6th October 2003. I accept the Respondents Counsel’s submission that the present application is brought purely as an attempt to obtain orders which have already been denied. Consequently I find that the application fails and dismiss the same with costs to the Respondents.

M.G. Mugo,

Ag. Judge

18.02.2004