



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L APPEAL NO. 20 OF 2020**

**FULTON VENTURES LIMITED T/A**

**DELOUNGE ENTERPRISES.....APPELLANT**

**VERSUS**

**PACIFICA GLOBAL ENTERPRISES LIMITED.....1<sup>ST</sup> RESPONDENT**

**F. G. NJUGUNA T/A FEMFA AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**[NOTICE OF MOTION DATED 10<sup>TH</sup> SEPTEMBER, 2020]**

1. The Appellant moved the Court through the Notice of Motion dated 10<sup>th</sup> September, 2020 seeking for a stay of execution of the order made on the 25<sup>th</sup> August, 2020 in **Eldoret Chief Magistrate Environment & Land Case No. 33 of 2020**, pending the hearing and determination of this application, and thereafter pending the hearing and determination of the appeal. The appellant also seeks for injunction order restraining the Respondent from harassing the Appellant in the use of **Eldoret Municipality/Block 8/828**, and compelling them to release the Appellant's properties distressed under the notice dated the 29<sup>th</sup> February, 2020 and to allow the Appellant back on the said land, pending the determination of the application and thereafter the appeal. The application is based on the four (4) grounds on its face and supported by the affidavits sworn by **Benson Mwenda Kimemia** on the 10<sup>th</sup> September, 2020 and 27<sup>th</sup> October, 2020.

2. The application is opposed by the Respondents through the replying affidavit sworn by Alice Makonjo Nyaswenta on the 16<sup>th</sup> September, 2020.

3. That the application having been filed during the vacation period was first handled *ex parte* by the duty Judge, Environment & Land Court, Nakuru, who on the 11<sup>th</sup> September, 2020 certified it urgent and granted temporary stay of execution of the order made on the 25<sup>th</sup> August, 2020 in **Eldoret Chief Magistrate ELC No. 33 of 2020**, pending the interpartes hearing of the application. That the duty court directed that the application be served for interpartes hearing. The court thereafter gave directions on filing and exchanging written submissions.

4. The learned Counsel for the Appellant filed their submissions dated the 27<sup>th</sup> October, 2020. The Counsel submitted that the Appellant has complied with **Order 42 Rule 6 of the Civil Procedure Rules** and established sufficient cause for the grant of the prayers sought. That if the orders sought are not granted, the Appellant will suffer substantial loss as the 1<sup>st</sup> Respondent will take over the premises and rent it out to another tenant making it unavailable by the time the appeal is determined. The learned Counsel cited the decision in **Antoine Ndiaye Vs African Virtual University [2015] eKLR**. The Counsel submitted that the Appellant had filed the application without undue delay and the 1<sup>st</sup> Respondent cannot claim to have already rented out the premises as the 28 days in the Lower Court order had not lapsed. That further, a stay of execution order had been issued by this Court following the filing of the appeal. That no lawful dealings over the premises could take place and such engagement could be voided under the *lis pendis* doctrine. The Counsel referred to the definition of *lis pendis* in the **Black's Law Dictionary, 9<sup>th</sup> Edition** and cited the decisions in **Bellamy Vs Sabine [1857] 1 De J 566**, **Mawji Vs US International University & Another [1976] KLR 185**, on the application of the said principle. The learned Counsel also referred to the decisions in the cases of **Kamau Mucuha Vs The Ripples Ltd [Civil Application No. Nai. 186 of 1992] [Unreported]**, and **Jaj Super Power Cash and Carry Ltd Vs Nairobi City Council & 2 Others Civil Appeal No. 111 of 2002**, **Kabundi Vs Trust Bank Ltd [1993] eKLR**, in support of their submissions that the new tenant should be removed from the premises, and the Appellant be placed into possession pending the hearing and determination of the appeal. The Counsel cited the decision in **Rural Electrification Authority Vs Nicolas Muturi Murathe [2019] eKLR**, and submitted that the Court has the discretion to issue the injunction sought and restore the Appellant into possession.

5. The learned Counsel for the Respondent filed their submissions dated 30<sup>th</sup> October, 2020. The Counsel submitted that the Lower Court order of 25<sup>th</sup> August, 2020 required the Appellant to deposit **Kshs.1,466,812** in an account to be operated by the parties advocates in 14 days and in default, the Respondent was permitted to take over the premises thereby terminating the tenancy or lease. That the 14 days from the

25<sup>th</sup> August, 2020 lapsed on the 9<sup>th</sup> September, 2020 without the Appellant making the required deposit or seeking for enlargement of time to do so. The Counsel further submitted that the mandatory injunction order sought cannot be issued in favour of the Appellant by compelling the Respondent to release the distressed goods to it as the Appellant was in rent arrears that precipitated the distress. The Counsel referred to the decision in the case of **Joseph Kaloki T/a Royal Family Assembly Vs Nancy Atieno Ouma [2020] eKLR**, and submitted that the Appellant has not met the conditions for issuance of mandatory injunction.

That the order for stay of execution (**enforcement**) of the orders made on the 25<sup>th</sup> August, 2020 has been overtaken by events as the 1<sup>st</sup> Respondent has taken over the premises following the Appellant's failure to make the deposit in 14 days, and has since let it to a third party on the 10<sup>th</sup> September, 2020. The learned Counsel cited the decision in the case of **James Ndungu Gathenji & 3 Others Vs Gitahi Gathenji & 3 Others [2018] eKLR**, and submitted that as the application has been overtaken by events, and it should be dismissed.

The Counsel further submitted that the tenancy agreement between the parties has already been terminated and a new tenant has taken over the premises. That the order of injunction to restrain the Respondent sought by the Appellant was predicated on the existence of tenancy which no longer exists. That the order cannot be issued and the application dated 10<sup>th</sup> September, 2020 should be dismissed with costs.

6. The issues for determinations by the court are as follows:

***(a) Whether the Appellant has made a reasonable case for stay of execution, mandatory and temporary injunctions orders or either or some of them, to issue at this stage.***

***(b) Who pays the costs?***

7. The Court has carefully considered the grounds on the application, affidavit evidence, written submission by Counsel, the Superior Court decisions cited and come to the following findings;

(a) That from the Memorandum of Appeal dated 10<sup>th</sup> September, 2020 filed contemporaneously with the Notice of Motion subject matter of this ruling, the appeal herein is over the ruling/order of 25<sup>th</sup> August, 2020 ***“in respect of the applications dated 10<sup>th</sup> March 2020, 30<sup>th</sup> April 2020 and 16<sup>th</sup> June, 2020”***. That the Appellant seeks for the following prayers in the Memorandum of Appeal;

***“1. An order allowing the applications dated the 10<sup>th</sup> March, 2020 and 30<sup>th</sup> April, 2020.***

***2. An order dismissing the application dated the 16<sup>th</sup> June, 2020.***

***3. Costs of the appeal and applications be awarded to the appellants.”***

(b) That the Court has perused the ruling of the 25<sup>th</sup> August, 2020 which is annexed to the Appellant's supplementary affidavit sworn on the 27<sup>th</sup> October, 2020 and marked “A” and noted that the learned trial Magistrate has summarized the prayers in each of the three applications, the affidavit evidence, Counsel's submissions and the issues for determinations. That the orders made by the trial Court are as follows;

***“1. Within 14 days from the date of this ruling, both Counsel shall open a joint interest earning account with a reputable bank wherein the Plaintiff shall deposit Kshs.1,930,000, less Kshs.463,188 being rent deposit held by the 1<sup>st</sup> Defendant. For avoidance of doubt, the Plaintiff shall deposit Kshs.1,466,812.***

***2. Upon the Plaintiff depositing the said amount, the Defendant to unconditionally release all items carted away from the premises on the 29<sup>th</sup> February, 2020 to the Plaintiff.***

***3. Upon depositing and release of the items envisaged in orders 1 and 2 above, within 14 days whichever comes later, the Counsel shall enter into a consent as to the mode of payment of rent accruing during the pendency of the main suit.***

***4. Upon expiry of the 14 days as envisaged in order 3 above, the interim orders granted on 10<sup>th</sup> March, 2020 shall lapse and the 1<sup>st</sup> Defendant shall be at liberty to take possession of the premises to avoid further losses.***

***5. Costs shall be in the cause.”***

(c) That the Appellant, who is the Plaintiff in the Lower Court matter, is the one who had filed the applications dated 10<sup>th</sup> March, 2020 and 30<sup>th</sup> April, 2020 seeking for primarily orders compelling the Respondents, who are the Defendants in that matter, to release the goods distressed on the 29<sup>th</sup> February, 2020 and to be put back into the premises. The Respondent had filed the application dated the 16<sup>th</sup> June, 2020, seeking to have the interim order of injunction issued on 10<sup>th</sup> March, 2020 to be discharged. That the two main prayers in the applications dated 10<sup>th</sup> March, 2020 and 30<sup>th</sup> April, 2020 are more or less the same with **prayers 3 and 4** of the Notice of Motion subject matter of this ruling, and **prayer 1** in the main appeal as seen in the Memorandum of Appeal. That in case the two prayers **3 and 4** are granted, the effect would be to decide the main appeal without hearing it.

(d) That at this stage, the court should be cautious not to make any final findings at the interlocutory stage that appears as a

determination of the pending appeal, which is yet to be set down for hearing. That the Court is of the view that can be attained through dealing with **prayer 2** of stay of execution of the order made on the 25<sup>th</sup> August, 2020. The learned Counsel for the Respondent has submitted that that prayer cannot be granted, or is not available to the Appellant as it has been overtaken by events following the Appellant's failure to deposit the amount directed, and the handing over of the premises to a third party on the 10<sup>th</sup> September, 2020. That the Counsel for the Appellant's position is that the application was filed without delay, the Appellant would suffer substantial loss and the Respondent could not have leased out the premises before the lapse of 28 days. That the Court has considered the positions taken by both Counsel on the running of time and sequence of the events under the ruling of 25<sup>th</sup> August, 2020. That it is evident that the time and events under **Orders 2, 3 and 4** were predicated upon **Order 1** being complied with first within 14 days. That the 14 days to comply with Order 1 from 25<sup>th</sup> August, 2020 lapsed on or about 9<sup>th</sup> September, 2020. That the moment the time for complying with **Order 1** lapsed without the deposit of **Kshs.1,466,812** being complied with, the other events or activities of unconditional release of the items carted away on the 29<sup>th</sup> February, 2020 and the entering of a consent by counsel on the mode of payment of rent accruing during the pendency of the main suit as directed under **Orders 2 and 3** had no foundation to be based on in the ruling. The situation could have been different had the Appellant moved the trial Court for enlargement of time to comply with **Order 1**, or had the parties proceeded to file a consent that addressed and compromised the said issues and sought its adoption by the court.

(e) That while it is true the Appellant moved this Court on the 10<sup>th</sup> September 2020, which is about sixteen (**16**) days after the ruling of the 25<sup>th</sup> August 2020, and that period would not ordinarily amount to undue delay, it nevertheless appears that on the same date, the 1<sup>st</sup> Respondent who had already taken possession of the premises, let it out to a third party. That the Court agrees with the Appellant's Counsel submissions and the position of the Superior Court's decisions cited that alienation or change of legal status of subject matter of a suit should not be allowed to take place when the suit is pending without the Court's leave. That where it occurs, appropriate orders should be issued upon the court being moved in deserving cases. That had the Appellant complied with the dictates of **Order 1** of the ruling of 25<sup>th</sup> August, 2020, then the 1<sup>st</sup> Respondent would not have had any reasonable cause not to have released the items distressed, and not to have waited for consent to be filed as directed in **Orders 2 and 3** before proceeding to let the premises to a third party.

(f) That in view of the findings above, the Court comes to the conclusion that the Appellant's Notice of Motion dated 10<sup>th</sup> September, 2020 is without merit and the same fails. That pursuant to **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, the Respondents are entitled to costs of the application.

8. That flowing from the foregoing, the Appellant's Notice of Motion dated 10<sup>th</sup> September, 2020 is hereby dismissed with costs.

It is so ordered.

**DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 21<sup>ST</sup> DAY OF APRIL, 2021.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Appellant: No appearance.

Respondents: No appearance.

Counsel: Mr. Mogambi for the Appellant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.