



**Periodontist Dental Centre v Andres Holzeimer & another; Koinange (Interested Party)
(Environment and Land Appeal 5 of 2022) [2022] KEELC 2686 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 5 OF 2022**

MD MWANGI, J

JULY 5, 2022

BETWEEN

PERIODONTIST DENTAL CENTRE APPLICANT

AND

ANDRES HOLZEIMER 1ST RESPONDENT

KIKANNO COMPANY LIMITED 2ND RESPONDENT

AND

GRACE NJERI KOINANGE INTERESTED PARTY

(In respect of the Notice of Motion Application dated 4th May 2022, seeking to stay the orders of the Chief Magistrate's Court at Nairobi Milimani Commercial Courts (Hon. A.N Makau) pending the hearing and determination of the Appeal against the said ruling.)

RULING

Background

1. The application before me is by the Appellant/Applicant and is dated 4th May 2022. It prays basically for 2 orders that:-
 - A. That this Honourable court be pleased to stay the orders of the Chief Magistrate's Court at Nairobi Milimani Commercial Courts (Hon. A.N. Makau (P.M) made in the ruling dated and delivered on 27th April, 2022 in MCCC/E13183 of 2021 - The Periodontist Dental Centre -vs- Andres Holzeimer and Another, pending the hearing and determination of the Appeal against the ruling of the court.
 - B. That this Honourable Court be pleased to set aside the orders of the Chief Magistrate's Court at Nairobi Milimani Commercial Courts (Hon. A.N. Makau (P.M) made in the ruling dated



and delivered on 27th April, 2022 in MCCC/E13183 of 2021- The Periodontist Dental Centre –vs- Andres Holzeimer and Another pending the hearing and determination of the Appeal against the ruling of the court.

2. The application is based on the 13 grounds on the face of it and on the Supporting Affidavit of Dr. Tonnie Kituku Muli, as well as the supplementary affidavit sworn on 30th May 2022.

The Applicant’s case.

3. The Appellant/Applicant in this matter has lodged an appeal by way of the Memorandum of Appeal dated 4th May 2022 against the ruling and order of the Chief Magistrate’s Court at Nairobi Milimani Commercial Courts (Hon. A.N. Makau- P.M) dated 27th April 2022 in MCCC E13183/2021 seeking to set aside the said ruling of the Magistrate’s court in its entirety. Pending the hearing and determination of the said appeal, the Appellant prays for the stay and setting aside of the ruling and that the rent payable in respect of the suit premises be deposited in court. The suit property is L.R. NO. 214/562 House No 3 Muthaiga (hereinafter referred to as ‘the suit premises’).
4. The Applicant herein is a tenant in the suit premises having entered into a tenancy agreement with the 2nd Respondent on 31st May 2021. The Applicant runs a dental clinic in the suit premises.
5. The circumstances giving rise to this litigation are that on 15th October 2021, a firm of Advocates acting on instructions of the 1st Respondent wrote a letter to the Applicant demanding to be shown a copy of the tenancy agreement signed with the 2nd Respondent herein and further that all the rent should henceforth be paid into an account stated in the letter. The Advocates for the 1st Respondent informed the Appellant that the 1st Respondent owned 80% shares of the suit premises while the 2nd Defendant owned the remaining 20% shares hence the demand that rent be paid into a joint account supposedly in the names of the two parties.
6. The Applicant who had no contractual relationship with the 1st Respondent was hesitant and instead chose to file the case before the Chief Magistrate’s Court seeking injunctive orders as the 1st Respondent had even gone ahead to actuate the threat to instruct auctioneers to proclaim the Applicant’s properties on account of failure to deposit the rent as directed.
7. The Chief Magistrate’s court in its ruling on the Applicant’s application for an interim injunction, on 27th April 2022 ordered all the parties including the Applicant to keep of the suit premises until the matter was fully heard and determined or pending further orders of the High Court in the pending appeal.
8. The Applicant avers that it stands to suffer irreparable loss and damage in the event that the order of the Chief Magistrates Court is not stayed. The Applicant through its director, Dr. Tonnie Kituku Muli deposes that it is ready to deposit the monthly rent in respect of the suit premises in court if so ordered pending the hearing and determination of the appeal. The Applicant had made a similar offer before the Chief Magistrate’s court.
9. The 1st and 2nd Respondents and the Interested Party who was joined into these proceedings; all filed their responses to the Application by the Appellant.
10. The application had been certified urgent and was therefore heard orally, in open court on 20th June 2022.
11. The 1st Respondent in his replying affidavit sworn on 25th May 2022 brought out an issue which I need to bring to the fore even as I make the ruling in this matter.



12. The 1st Respondent deposed that there is in existence a Judgment dated 24th June 2019, in regard to the suit premises where the High Court (Hon. Justice Grace L. Nzioka) found that the 1st Respondent is entitled to 80% ownership of the suit premises. Further that the High Court in the said judgement had ordered that any rent received should be shared proportionately.
13. The Judgment of the High Court had been appealed from to the Court of Appeal and by the consent of parties therein, an order of status quo made. The 1st Respondent however, makes 3 observations in respect of the status quo orders made in the Court of Appeal matter, that: -
 - i. The same lapsed after 60 days as stated therein;
 - ii. The status quo as of 19th December 2019 is that the alleged tenant (Applicant herein) was not in the suit premises thus subsequent entrance therein allegedly in May 2021 is a violation of the court orders; and
 - iii. In any event if there is any breach of these status quo orders, the Applicant had no basis to file the new suit giving rise to the this application but to file a court application at the court of appeal.
14. The Interested Party too brought out the issue of the existence of the two other cases, namely HCCC 821/1996 and Court of Appeal Civil Application No. 264/2019. The Interested Party points out that the Applicant in this matter is not a party to either of the two mentioned cases.
15. The Interested Party's position is that the status quo orders issued by the Court of Appeal are still operational. According to the Interested Party, the decision of the Chief Magistrate's Court that is appealed from herein was tantamount to reviewing and or setting aside the status quo orders issued by the Court of Appeal.
16. The Interested Party submitted that maintaining the status quo as ordered by the Court of Appeal meant that the situation should remain as it existed on 19th December 2019. Therefore, the Estate of the registered owner of the suit premises, Joseph Karuga Koinange (represented by the Interested Party) who had full possession, use and control over the suit premises continues in possession and using the same pending the hearing and determination of the intended appeal. The 2nd Respondent adopted the same position as that of the Interested Party.
17. At the hearing of the application, the court was told that the 2nd Respondent is the authorized agent of the Interested Party. Their position as expressed by their Advocate in his submissions before this court is that the Learned Magistrate sat on appeal, unilaterally reviewed and or set aside the status quo orders issued by the Court of Appeal and further went ahead to determine matters of ownership of the suit property, that were not in issue before the said court.

Issues for Determination.

18. Having heard the submissions of the parties in this matter, I am of the opinion that the issues for determination in this matter are: -
 - a. Whether the Appellant/Applicant is entitled to an order of stay of the ruling/order of the Chief Magistrate's Court pending the hearing and determination of the Appeal herein; and if so, whether the court should make an order directing that the rent payable in respect of the suit premises be deposited in court.
 - b. Whether this court should summarily set aside the order of the Chief Magistrate's Court as prayed for by the Appellant/Applicant.



Analysis and Determination.

A. Whether the Appellant/Applicant is entitled to an order of stay of the ruling/order of the Chief Magistrate's Court pending the hearing and determination of the Appeal herein; and if so, whether the court should make an order directing that the rent payable in respect of the suit premises be deposited in court.

19. The Appellant/Applicant herein is a tenant who finds himself in the midst of a conflict that he has no real stakes in. The Appellant/Applicant innocently entered into a lease agreement with the intention of running his business only to find himself at the centre of the property dispute between the 1st Respondent and the Interested Party.
20. The Applicant as a law abiding citizen of Kenya and as any reasonable person would, rushed to the Chief Magistrate's Court seeking the protection of the law. The Chief Magistrate's Court after hearing the application by the Applicant made a rather devastating order. The Honourable Magistrate ordered the Appellant and all other parties in the case to stay away from the suit premises until the hearing and determination of the main suit. The Applicant argues that the Learned Magistrate misconstrued the issues before her thereby arriving at a wrong decision in the ruling delivered on 27th April 2022.
21. The Applicant submitted that the issue that was before the Magistrate's Court was whether the intended levying of distress for rent by the 1st Respondent against the Applicant was lawful. The Applicant has no stake and actually claims none in the ownership of the suit property. The Applicant's case had nothing to do with the ownership of the property. The Applicant had expressed its willingness, just like in this case, to abide by any orders that the Honourable Magistrate would make in respect of the payment of rent. The Applicant was ready to deposit the rent payable every month in court if so ordered.
22. The Applicant prays that this court stays the order of the Learned Magistrate pending the hearing and determination of its appeal. Its 3rd prayer indeed is that it be allowed to deposit the monthly rent in court.
23. One issue that this court cannot run away from or close its eyes to is the existence of the status quo orders endorsed by the Court of Appeal after the parties consented. This court is not only bound by the doctrine of precedence but also by the hierarchical system of our courts, which is an essential component and tradition of our judicial system. This court is obligated to respect the pecking order in the Kenya judicial system.
24. The 1st Respondent and the Interested Party who are the parties in the matter before the Court of Appeal are apparently unable to agree on the interpretation of the status quo orders. They are surreptitiously inviting this court to make the interpretation of the status quo orders. This court declines the invitation. It is only the court that issued the orders that has the mandate to interpret them if the parties cannot agree. Parties should go before the Court of Appeal for the interpretation of the status quo orders.
25. In the meantime, shall this court turn the other way and leave the Applicant at the mercy of the disputants?
26. The Appellant/Applicant sought an order of interlocutory injunction before the Magistrate's Court to restrain the 1st Respondent from attaching its properties in exercise of the remedy of distress for rent. The remedy of distress for rent under section 3 of the *Distress for Rent Act*, is available only in cases of rent arrears where a lease or tenant-landlord relationship exists between the parties.



27. The Court of Appeal in the case of *C.Y.O Owayo – vs- Gorge Hannington Zephania Aduda t/a Aduda Auctioneers & Another* (2007) eKLR cited various instances in which distress for rent may be illegal. The court stated that:-

“We must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury’s Laws of England, 4th Edition Volume 13 paragraph 368 it is stated:

“368. Circumstance in which distress is illegal

An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.

The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise a distress levied or proceeded with contrary to the law of Distress.....”

28. Though the court at the interlocutory stage is not required to make any conclusive or definitive findings, in this instance, it is clear that the action of the 1st Respondent against the Appellant/Applicant was not as a result of rent arrears. It was motivated by other considerations. The Appellant/Applicant has been paying rent to the 2nd Respondent who is the authorized agent of the Interested Party.
29. The 1st Respondent’s claim of entitlement to 80% of the rent payable should have been directed to the Interested Party, not the Appellant/Applicant.
30. In the well-known case of *Butt –vs- Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal categorically stated that the exercise of the discretion to grant an order of stay pending appeal should not be refused if there are good grounds for granting it merely because a better remedy may become available to the Applicant at the end of the proceedings. The court is bound to consider the special circumstances of the case and its unique requirements. If there are no overwhelming hindrances, a stay of execution order must be granted.
31. I have carefully considered the unique circumstances of this case and the precarious position that the Appellant/Applicant finds itself in. I am satisfied that the Applicant herein brought the application without unreasonable delay. Further the Applicant has sufficiently demonstrated that substantial loss may result in terms of loss of business, goodwill and clientele unless the order for stay of the ruling/order of Chief Magistrate’s court is granted.
32. This court will therefore issue the order of stay of execution as sought by the Appellant/Applicant in this case. Accordingly, the Appellant/Applicant shall continue operating its business in the suit premises and paying rent in accordance with the lease agreement with the 2nd Respondent pending hearing and determination of the appeal.



B. Whether this court should summarily set aside the ruling/order of the Learned Magistrate.

33. Prayer 5 in the Appellant's Application in essence calls upon this court to summarily set aside the ruling/order of the Learned Magistrate that it has appealed from. This court declines that prayer. It has no basis in law. The appeal shall be heard as provided for under the *Civil Procedure Act* and the *Rules*.

Conclusion

34. The conclusion of this matter is that the Appellant/Applicant's Application is therefore allowed in terms of prayer 3 only. An order be and is hereby issued staying the orders of the Chief Magistrate's Court at Nairobi Milimani Commercial Courts (Hon. A.N. Makau (P.M) made in the ruling dated and delivered on 27th April, 2022 in MCCC/E13183 of 2021 – 'The Periodontist Dental Centre – vs- Andres Holzeimer and another', pending the hearing and determination of the Appeal against the ruling of the court. The Appellant/Applicant shall continue operating its business in the suit premises and paying rent in accordance with the lease agreement with the 2nd Respondent pending hearing and determination of the appeal.

35. The costs of the said application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2022

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Andala h/b for Mr. Mukungi for the Appellant/Applicant

Mr. Abdullahi for the 1st Respondent

Mr. Kagongo for the 2nd Respondent & Interested Party

Court Assistant: Hilda

M.D. MWANGI

JUDGE

