



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 108 OF 2017**

**GITONGA DANIEL MBAABU (Suing as the**

**Administrator of the Estate of JULIUS MBAABU-Deceased) ..... PLAINTIFF**

**-VERSUS-**

**WAMBU WAINAINA ..... 1ST DEFENDANT**

**EVANS M. MAABI t/a**

**MURPHY MERCHANTS AUCTIONEERS ..... 2ND DEFENDANT**

**-AND-**

**WESTMALL SUPERMARKET LIMITED ..... 1ST AFFECTED PARTY**

**PEDESTAL BUSINESS COLLEGE ..... 2ND AFFECTED PARTY**

**RULING**

*(Application for an injunction pending appeal; plaintiff as tenant having sued the landlord and seeking orders of mandatory injunction to be reinstated in the premises pending hearing of the suit; orders granted; applicants filing an application to set aside that order claiming that they are now the new tenants and the order of reinstatement was made without them being heard; application to set aside the order of reinstatement dismissed; applicants filing a notice of appeal and now seeking an injunction pending appeal; whether one can apply for injunction pending appeal; no bar to an injunction pending appeal being granted among the prayers for stay of execution pending appeal; principles to be applied; substantial loss; no demonstration of what substantial loss the applicants stand to suffer; mere statement that one will be evicted without demonstrating the actual loss to be suffered is no sufficient; application dismissed)*

1. The subject of this ruling is the notice of motion application dated 8 October 2018, filed by two persons describing themselves as “affected parties” (hereinafter “the applicants”). They seek orders of injunction pending appeal. The said application is opposed.

2. By way of background, this suit was commenced through a plaint filed on 30 March 2017. The plaintiff pleaded that he was a tenant of the 1st defendant on the Plot No. MSA/BLOCK XVI/154 (hereinafter, “the suit property”) where he averred he has operated for 20 years operating a boarding and lodging business. He pleaded that 1<sup>st</sup> defendant issued to him a termination notice on 20 December 2013 upon which he (plaintiff) filed a reference to the Business Premises Tribunal, being BPRT Case No. 4 of 2014. He pleaded that while the case was pending, the 1st defendant, through the 2<sup>nd</sup> defendant, an auctioneering firm, removed his goods from the suit property and proceeded to close the entrance with a permanent metal door, thus effectively evicting the plaintiff. He pleaded that as a result, he suffered direct loss of about Kshs. 5,577,000/= and was losing business at the rate of Kshs. 250,000/= per day. In the suit, he asked for a mandatory injunction compelling the 1st defendant to reinstate him to the premises, prohibition to stop the defendants from letting the property, a declaration that the plaintiff is tenant of the 1<sup>st</sup> defendant on the suit premises, and damages. Alongside the plaint, the plaintiff filed an application dated 30 March 2017, seeking prohibitory orders restraining the defendants from letting or parting with possession of the suit property, and a mandatory injunction compelling the 1st defendant to reinstate the plaintiff’s tenancy, pending hearing and determination of the case. The application was heard and the above prayers allowed by Omollo J in a ruling delivered on 14 June 2017.

3. It is after that ruling was delivered that the applicants came into the picture. They filed an application dated 19 July 2017 vide which they sought the setting aside and review of the ruling of 14 June 2017, and in lieu thereof, that the plaintiff and the defendants be restrained from interfering with their quiet possession of the property. Their application was premised on the grounds that on 28 and 29 March 2017, the applicants entered into lease agreements with the 1<sup>st</sup> defendant over the suit premises for a term of 5 years and 3 months. They stated that

they had taken possession of the premises and they were condemned unheard. They argued that given the ruling of 14 June 2017, they risked being evicted. That application was heard by Omollo J. She delivered ruling on 20 September 2018 dismissing the application. Aggrieved by this decision, the applicants filed a Notice of Appeal followed by this application. What they seek is contained in prayer (c) of that application which is drawn as follows :-

*c) That pending the hearing and determination of the appeal, an injunction pending appeal be issued restraining the plaintiff, and the defendants, their servants, employees or assigns or agents from interfering with the quiet and peaceful occupation of the affected parties in the building standing on Block Mombasa/XVI/154.*

4. The applicants state that they genuinely believe that they have an arguable appeal and have set down what they intend to argue on appeal. They have claimed that as a result of the ruling, there is a real and imminent risk that they will be evicted from the suit property before the appeal is heard. They aver that such an action will prejudice them and that the substratum of the appeal will be lost. They contend that the court is under a duty to preserve the substratum of the intended appeal, so that if the appeal is successful, it is not rendered nugatory. They have further averred that they have a right of appeal, which right ought to be protected by this court, and that it is in the interests of justice and fairness that the order of injunction sought herein are granted, so that if they succeed on appeal, their success does not become a pyrrhic victory.

5. The affidavit in support of the application is sworn by Martin Wandie, the director of the 2nd affected party. He has inter alia deposed that as a result of the ruling, there is a real and imminent risk that the applicants will be evicted from the suit property and the substratum of the appeal will be lost.

6. The plaintiff has opposed the application vide grounds of opposition and a replying affidavit. In the grounds, he has averred that the affected parties are strangers to this suit, and they do not have legal capacity to participate in these proceedings. He avers that the issue of the occupation of the subject premises was ruled upon with the grant of the order of mandatory injunction and the same has not been varied and/or set aside. In his affidavit, he deposed inter alia that in the ruling that is being subjected to appeal, the court observed that the applicants had not demonstrated that they were in possession of the suit premises. He deposed that the 1<sup>st</sup> defendant continues to make the suit premises inaccessible by sealing it with metal bars, building blocks and concrete. He believes that there is a conspiracy between the applicants and the 1<sup>st</sup> defendant. He avers that giving the order will be negating the ruling of 14 June 2019.

7. I invited counsel to canvass the application by way of written submissions and I have taken note of the submissions filed.

8. Mr. Gikandi, learned counsel for the applicants, submitted that this court is guided by Order 42 Rule 6 sub rule (1) and (2) as read with Section 1A, 1B and 3A of the Civil Procedure Act. Counsel further referred me to the decision in *MM Butt vs. Rent Restriction Tribunal Civil Application No. 6 of 1979* and *D.J Lowe & Company vs Prime Bank Limited, Mombasa HCCC No. 235 of 2010*. He submitted that the applicants have at all material times been the tenants of the 1st defendant in the suit property. He further submitted that the applicants have already filed their notice of appeal, and for this reason alone, their prayers sought herein ought to be allowed so as to maintain the status quo and the substratum of the appeal. Counsel submitted that if the order of injunction pending appeal is not granted, the plaintiff will execute the decree against the applicants causing irreparable loss to them, as by the time the appeal is determined, the subject matter of the appeal shall have eroded. He argued that as such, the court should, as a matter of the judicial practice, grant the application herein.

9. On his part, Mr. Omwenga, learned counsel for the plaintiff, submitted that the application is bad in law, and an abuse of the court process for the reasons that the affected parties are seeking injunction pending appeal which cannot be granted, as temporary and interlocutory injunctions are provided for in Order 40 of the Civil Procedure Rules. Counsel submitted that neither Order 40 nor Order 42 provides for injunctions pending appeal as prayed for in the instant application. Mr. Omwenga submitted that the court order issued against the 1st defendant on 14 June 2017 is not an order which can be executed because it is a mandatory injunction compelling the 1st defendant, to reinstate the plaintiff's tenancy in the suit property. Counsel further submitted that this court should not entertain their dubious attempts to obscure justice by making one application after another at the expense of the plaintiff. He submitted that if at all the applicants had interest in the suit property, they should have applied to be enjoined as interested parties to the suit. He submitted that the courts have a duty to maintain the status quo pending appeals, however, the status quo prevailing in the subject premises is the 1st defendant's overt act of contempt of the court order dated 14 June 2017. Counsel further submitted that the mere filing of an appeal does not automatically entitle the applicants to the orders sought. Counsel submitted that the applicants have not met the conditions of Order 42. In conclusion, Mr. Omwenga submitted that the case of *MM Butt vs. The Rent Restriction Tribunal* is not relevant to this application as this was an appeal against a tribunal refusal to grant an injunction against an eviction.

10. I have given due consideration to the averments set out in the pertinent affidavits as well as the submissions made in respect thereof by learned counsel for the parties. The background facts that have resulted in this application are not disputed. The applicants applied for a review of the ruling dated 14 June 2017, and the same was dismissed by the ruling dated 20 September 2018. The applicants have filed a Notice of Appeal and now seek an injunction pending appeal.

11. Before I go far, I wish to address Mr. Omwenga's submissions, that one cannot seek an injunction pending appeal. Indeed, Mr. Omwenga seemed to suggest that the only injunctions that can be issued are interlocutory injunctions pending hearing of a suit pursuant to Order 40 of the Civil Procedure Rules.

12. When a party appeals, he/she is at liberty to seek various orders pending hearing of the appeal in issue. When you look at Order 42 Rule 6 on stay of execution pending appeal, there is no definition of what "stay of execution" may entail. A stay may come in many forms. It can be by way of staying an order of payment of a sum of money, or stay of an order of eviction, or such other stay depending on the circumstances of the case. I see no reason why a stay cannot also come in the form of an order of injunction. Indeed, under Order 42 Rule 6 (6) there is an explicit power given to the High Court to grant a temporary injunction in exercise of its appellate jurisdiction. Injunctions are not therefore only restricted to interlocutory injunctions pending hearing of a suit. An order of stay pending appeal may also take the form of an order of injunction, meaning, an order or forms of orders stopping or compelling a particular action. I therefore see nothing wrong with a prayer for an injunction pending appeal, being sought as one of the remedies comprising of "stay pending appeal."

13. Thus the applicants are entitled to urge the court for an injunction pending appeal. The next question is whether they have made out a case for grant of one.

14. I will go back to the history of the case. It will be recalled that the plaintiff sought a mandatory order of injunction compelling the 1<sup>st</sup> defendant, as landlord, to reinstate him back into the premises pending hearing of the suit. The court allowed this prayer. The applicants then came to set aside this prayer, which application was rejected. What this means is that what subsists is the order to reinstate the plaintiff to the premises. I understand that it is this order that the applicants want stayed. The effect of the stay would mean that the applicants be the ones in possession of the premises pending the hearing of the appeal.

15. The principles for grant of stay are set out in Order 42 Rule 6 (2) which provides as follows :-

*“6. (2) No order for stay of execution shall be made under sub rule (1) unless—*

*(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

16. From the above, three issues stand out, that is firstly, a demonstration of substantial loss; secondly, provision of security; and thirdly, a conviction that the application has not been made after unreasonable delay. I am aware that the applicants tried to demonstrate that they have a good appeal but this is not among the considerations set out when this court is determining an application for stay of execution pending appeal. I will thus only assess this application based on the three principles set out under Order 42 Rule 6 (2) above.

17. On the first aspect, that of delay, the ruling in issue was delivered on 20 September 2018 and this application was filed on 8 October 2018. I think one can say that there has not been unreasonable delay.

18. The other issue, which I think is the most important, is demonstration of substantial loss. I regret that the applicants have not stated much as to the nature of loss that they stand to suffer so that this court can assess whether it qualifies to be termed as substantial. All the applicants have said in their affidavit is that they risk imminent risk of eviction. Unfortunately, the applicants have not informed this court when they moved into the premises, what they have done in the premises, and what they do every day in the premises. The mere claim that they stand to be evicted without a demonstration of what effect the eviction is going to have, in the circumstances herein, does not qualify as a demonstration of substantial loss. I observe that within the ruling of 20 September 2018, Omolo J, doubted whether at all the applicants were in the premises. In as much as the applicants may argue that this is among the issues they want to appeal to the Court of Appeal, I think that this finding is material, for even within this application, the applicants have not demonstrated that they are in possession of the premises and what sort of business they are undertaking there. I reiterate that it is not sufficient for one to merely state that they stand to suffer substantial loss without there being a demonstration of what this loss is going to be.

19. I am for the above reasons not persuaded that the applicants have demonstrated that they stand to suffer substantial loss if the order of injunction pending appeal is not allowed. Not being so convinced, it is not necessary for me to consider the issue of security.

20. I find no merit in this application and it is hereby dismissed with costs to the plaintiff. The effect is that the mandatory order compelling that the plaintiff be put into possession pending hearing of the suit remains.

21. Orders accordingly.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF MAY 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**