



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELCA NO 19 OF 2021

AGNES MANAGEMENT LTDAPPELLANT

VERSUS

JOYCE JEPLETING REINHARD

MAKINI AUCTIONEERS AGENCIES.....RESPONDENTS

RULING

The application is dated 11th January 2020 and is brought under Article 159(2)(d) of the Constitution, Section 1A and 1B, 3 and 3A, Order 42 Rule 6(1), Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. The application be certified urgent and service be dispensed with, and be heard and determined ex-parte in the first instance.
2. Pending the hearing and determination of this application, the honourable Court be pleased to grant temporary stay of execution of the judgment and decree of the court delivered on 22nd December, 2020 in Malindi CMCC No.E118 of 2020 Agnes Management Ltd versus Joyce Jepleting Reinhard & Another.
3. Pending the hearing and determination of this appeal, this honourable court be pleased to grant a temporary stay of execution of the judgment and decree of the court delivered on 22nd December, 2020 in Malindi CMCC No. E118 of 2020 Agnes Management Ltd versus Joyce Jepleting Reinhard & Another.
4. Costs of the application be provided for.

It is based on the grounds that, the trial court delivered a judgment and a decree in Malindi CMCC No. E118 of 2020 on the 22nd day of December 2020 against the appellant herein. However, the appellant being aggrieved by the said judgment and decree has lodged an appeal before this court which appeal is now pending for determination. The applicant has an arguable appeal with good prospects of success for the reasons inter alia that the learned trial magistrate erred in law by failing to appreciate the application of the doctrine of frustration in the law of contract having clearly found that the said contract was frustrated by force majeure. The learned trial magistrate erred in failing to consider and appreciate the uncontroverted evidence that pointed to the court how the novel corona virus had affected the business of the appellant so as to invoke the doctrine of force majeure. The trial magistrate erred in law and fact in misapprehending the important dates of the corona virus pandemic that were important to the business hence arrived at a wrong judgment. The learned trial magistrate erred in law and in fact by failing to consider the appellant's written submissions and the authorities therein cited hence arriving at a wrong decision. The learned trial magistrate erred in law and in fact by dismissing the suit despite finding that the appellant had overwhelmingly and successfully demonstrated that Covid-19 fitted perfectly in the circumstances anticipated in the contract. The learned trial magistrate erred in law and fact by failing to rule that the motor vehicle as proclaimed by the 2nd respondent was a property of someone else other than the appellant herein despite being supplied with overwhelming evidence. That this appeal will be rendered nugatory if the stay is not granted as prayed for the reasons that the continued interruptions of the distress process when the appellant is trying to run a lodge business would adversely and severely affect the applicant's operations and prejudice the applicant which is trying to arise in the middle of the pandemic. That going by the previous proclamation made by the second respondent, the intentions are to attach much more than what is to be recovered and to completely ground and embarrass the appellant's director. The appellant has paid to the respondent over five million six hundred thousand (Kshs.5,600,000) in rental deposit which is recoverable from the 1st respondent which honestly beats logic the passion or aggression with which the respondent seeks to recover rent. The applicant is apprehensive that the 2nd respondent would not be in a position to refund the monies if the intended appeal is successful. That the balance of convenience clearly weighs in favour of the application in this matter owing to the amount of deposit held by the respondent. The application was brought without undue delay.

The respondent submitted that the application is bad in law, frivolous and aimed at denying her her legitimate expectation in form of rent. That she is the registered owner of Plot No. 654 Watamu and owner of the premises standing thereon formerly known as "Mawimbi Lodge". That they entered into lease agreement with applicant who has defaulted in paying rent as per the terms of the tenancy and is now in arrears to the tune of Kshs.1,200,000 since November 2020 to date(copy of the tenancy agreement marked (JJR1). That the applicant filed Malindi

CMCC No.E118 of 2020, seeking injunctive orders against her and a declaration that the lease agreement had been frustrated pursuant to the force majeure (Covid 19 Pandemic) which orders were not issued. The applicant sought to have rent reduced from Kshs.400,000 per month to Kshs. 160,000 which prayer was not granted. The trial court rightly noted that the applicant negotiated the terms of the lease agreement while she was aware of the Covid 19 situation in the country and went ahead to sign it. The trial court also noted that the lease agreement commenced in May 2020 two months after signing the agreement and ever since the applicant has been in operation and in fact the hotel is fully booked. The court rightly also noted that the applicant did not present any evidence to prove the losses incurred due to Covid 19 or inability to operate the hotel. The plaintiff's case having failed and the court indicating that she could proceed to distress rent, she went ahead to demand rent for November, 2020, December, 2020 and January 2021 totalling to Kshs.1,200,000 since rent is payable on 5th of every month as per lease agreement (copy of demand letter marked as JJR 2). The applicant agreed to pay rent but insisted on paying for November 2020 which she paid Kshs.400,000 and he acknowledged receipt. That instead of paying the balance of Kshs.800,000 the applicant made their own interpretation of the judgment and even threatened to deduct an amount of Kshs.69,355 accrued through a water bill of a previous tenant yet she has disclosed to them that she has entered into payment arrangement (copy of letter dated 8.1.2021 marked as JJR 4 and reply dated 8.1.2021 marked as JJR 5). That the applicant is blowing hot and cold since apart from appealing and seeking stay, they have gone ahead to ask her to give them her bank account number in order to pay the rent for November, 2020 an amount they purported not to have and being excessive. That the demeanour of the applicant is that of a tenant who does not want to comply with the terms of the contract and wants to pay rent at her own terms.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution or proceedings are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“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.”*

The appellant needs to satisfy the Court on the following conditions before he can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by the court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“. . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds of the application, the trial court delivered a judgment and a decree in Malindi CMCC No. E118 of 2020 on the 22nd day of December 2020 against the appellant herein. However, the appellant being aggrieved by said judgment and decree have lodged an appeal before this court which appeal is now pending for determination. That the applicant has an arguable appeal with good prospects of success for the reasons inter alia that the learned trial magistrate erred in law by failing to appreciate the application of the doctrine of frustration in the law of contract having clearly found that the said contract was frustrated by force majeure. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled the grounds to enable me grant the orders. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 4TH OCTOBER 2021.

N.A. MATHEKA

JUDGE