



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. APPEAL NO. E002 OF 2021

MONICA MUKUHI KHIRRECU.....1ST APPELLANT

EUNIKEM CONSULTANTS KENYA.....2ND APPELLANT

VERSUS

CALEB OMBOGA MOTURI.....RESPONDENT

(An appeal from the orders of the Hon. CM. Mr. Edwin Mulochi issued on

14th December, 2020 in Kajiado CMC Tribunal Case No. E1 of 2020)

RULING

By a Notice of Motion Application dated the 5th January, 2021 brought pursuant to Order 40 Rule 2 of the Civil Procedure Rules, the 1st Appellant seeks the following orders:

1. That a stay of execution for the orders issued in Kajiado CMC Tribunal Case No. E1 of 2020 to the effect that;

a. The 1st Appellant be and hereby restrained either by myself, agents, servants and employees from harassing, intimidating, evicting, interfering, restraining, trespassing, wasting, destroying, blocking, denying access, removing goods and/or any manner interfering with the Tenant/Applicant's quiet possession of the suit premises located on L.R. No. KJD/KAPUTIEI NORTH 69174 (Mumochi House Shop 1).

b. The OCS Kitengela Police station be and is hereby ordered to ensure compliance of the court orders as well as maintain peace and good order of the said orders.

Be granted pending the hearing and determination of this Application.

2. That an injunction be granted maintaining the status quo pending the hearing and determination of this Application.

3. That this court be pleased to set aside the orders issued on 14th December, 2020 by the lower court pending hearing and determination of this Application.

4. That any other orders that shall meet the ends of justice.

5. That the costs of this Application be provided for.

The Application is premised on the summarized grounds that since the eviction of the Respondent from the premises on 11th November, 2020, the 1st Appellant has found a new tenant, who moved in after paying the requisite deposit and three months' rent in advance. She contends that unless the instant application is heard as a matter of urgency, the Kitengela OCS will proceed to prejudice and evict a paying tenant who is not a party to this suit, and resultantly plunge the 1st Appellant to depths of despair, untold suffering, anguish, irreparable damage including deprivation of her livelihood seeing that the Respondent already has arrears in excess of Kshs. 170,000/=. Further, unless the Application dated 4th January, 2021 is heard before the 6th January, 2021 when summons to appear have been issued to the Kitengela OCS to explain why they have not executed the 14th December, 2020 orders, this Application will be rendered nugatory. She claims the balance of convenience clearly weighs in her favour owing to the substantial amount of money involved and there has been no inordinate delay in bringing this Application. She is willing to abide by any conditions and terms as the court may deem fit to impose. Further, the Respondent vide the OCS Kitengela Police Station is likely to evict an innocent paying tenant who is not a party to this suit, and has been a

tenant before the orders of 14th December, 2020 were issued.

The application is supported by the affidavit of MONICA MUKUHI KHIRRECU where she explains that the Respondent was directed by the Business Premises Rent Tribunal to pay rent for the premises pending determination of the suit. She claims the Respondent has not paid rent as from March, 2020 culminating in the rent accrual of KShs. 170,000/-. Further, he has not been paying rent for the period the matter was pending in the Business Premises Rent Tribunal, from 2018, except for intermittent months. She explains that the Respondent has been abusing the order issued by the aforementioned Tribunal and as for the period September, 2020, he attempted to deceive as well as defraud her of the rent by paying Kshs. 30,000 into her Equity Account through a conduit and thereafter reversing the Bank Transaction claiming the amount was sent to a wrong account. She confirms serving the Respondent with a notice of termination and demand letter on 11th November, 2020 in line with Section 4 of the Landlord and Tenant (Shop, Hotel and Catering Establishment) Act. Further, the Respondent failed to serve her with an objection to the notice of termination and failed to file a reference. She contends that on the day of eviction, counsel for the Respondent was present and failed to serve an objection. She reiterates that she will suffer great prejudice as the Respondent has failed to pay rent.

The application was opposed by the Respondent who filed a replying affidavit where he deposes that he is a tenant of the Appellants herein. He contends that the Appellants admit a new tenant moved into the suit premises on the 12th November, 2020. Further that this was a clear contravention of the Business Premises Rent Tribunal order issued on the 20th December, 2018 and reiterated at paragraph 2 of the Tribunal order issued on the 5th July, 2019. He avers that the orders issued by this court staying the orders issued by the Magistrate court on the 14th December, 2020 ought to be reviewed and or set aside due to non-disclosure of the information. Further, that an order of stay issued herein ex-parte (by the Appellate court) have a net effect of locking him out of the suit premises and further, buttress and or ratify the contempt of court by virtue of the existent BPRT orders that the Appellants herein contravened when they illegally evicted him. He insists the Appellants ought to have approached court or the Tribunal for them to legally evict him. He confirms that the Appellants illegally kicked him out of the suit premises. He denies being in rent arrears nor that any termination notice was served upon him as alleged. He is further unaware of the orders issued by the Business Tribunal on the 11th October, 2019 in his favour. He reiterates that there exists a valid court order issued by the Business Premises Rent Tribunal (BPRT) on the 20th December, 2018 and reiterated on the 5th July, 2019 preventing Landlord/Appellant herein from evicting him from the suit premises which order was not appealed against nor overturned. Further, that the Tribunal case being BPRT No. 73/2019- Kajiado has substantively been heard and was pending fixing a Judgment date. He states that the Appellant has since the 11th November, 2020, broken into and removed goods from the suit premises into a room behind the said premises in total contravention of the Business Premises Tribunal order issued on the 20th December, 2018 with an intention of giving out the suit premises to another tenant. Further, in light of the Ruling delivered by the Employment and Labour Relations Court Milimani in ELRC Petition number 100/2019 on the 30th October, 2020 by Lady Justice Maureen Onyango, finding that the BPRT as constituted lacked quorum, the Magistrate court became the only recourse left for him to challenge the illegal eviction. Further, if the orders are not vacated, he stands to suffer irreparable harm as he had built the said Hotel business from scratch and made improvements thereon to a tune of Kenya shilling seven hundred thousand.

The application was canvassed by way of written submissions but it is only the Respondent who filed his.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 5th January, 2021 including the respective affidavits as well as the annexures thereon and submissions, the only issue for determination is whether the Appellants are entitled to the orders as sought.

The Respondent in his submissions avers that the present application is fatally defective as there exists no prayer for stay of execution of the lower court orders, pending the hearing and determination of the Appeal herein. He reiterates that parties are bound by their pleadings and there is no prayer sought, capable of being granted by the court. He further submits that the Reference that had been filed and which is still pending before the BPRT, operated as an automatic stay from eviction by the Landlord. Further, the issue as to the pendency of Reference before the rent Tribunal has not been disputed by the Landlord. He states that from admission that the Tenant was evicted in November, 2020, during the pendency of the reference, confirms the Appellant is in contempt of court. Further, they cannot turn around and urge court to protect the present tenant who occupied the premises out of an illegality. He urged the court to dismiss the Notice of Motion and Appeal in its entirety.

In the current scenario, I note the Appellants have sought for stay of execution and injunction pending the outcome of the instant application. From a perusal of the instant application including the grounds and annexures thereon, I note the fulcrum of the dispute herein revolved around a landlord/tenant relationship culminating in the Respondent lodging a claim at the BPRT. From perusal of annexure 'MMK5', I note the BPRT on 11th October, 2019 had directed the Respondent to continue paying rent pending the outcome of the suit therein, which the Appellants claim he failed to do, leading them to serve him with a notice of termination in November, 2020 and thereafter evicting him. The Respondent thereafter sought for an injunction from the Resident Magistrate's Court, Kajiado which orders were granted on 14th December, 2020 which is subject to the Appeal herein. What is interesting is that injunctive orders were sought after the Respondent had already been evicted. Insofar as the Respondent claims the present application is fatally defective as there exists no prayer for stay of execution of the lower court orders, pending the hearing and determination of the Appeal herein, I opine that since prayer no. 4 sought for any orders that shall meet the ends of justice, this court is bound to focus on substantive justice.

The Court of Appeal in the case of *Mugah vs. Kunga [1988] KLR 748*, upheld the practice of issuing status quo orders in land matters and stated thus:'

court deemed just and fair. In the interest of balancing the scales of justice prior to the site visit, the trial court deemed it fair to grant status quo orders, which it is perfectly entitled of doing in exercise of its general discretionary powers..... Thirdly, that status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessary under status quo orders. While appreciating the case quoted by the Appellant Walter Anyango T/A Anyango Ogutu & Co Advocates Vs Barclays Pension Services Limited & Another [2019] eKLR to the effect that status quo orders are tantamount to injunctions, it is clear that the circumstances in that case were of a special character so that the effect of an injunction and a status quo order, would have the same effect. Indeed, in the case of Msa Misc Appln. (J.R) No. 26 of 2010. The Chairman Business Premises Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd (UR), the court agreed that in certain circumstances, a prohibitory injunction may end up having the same effect as an order for status quo. This does not however mean that an injunction and a status quo order are one and the same thing, merely, that in certain circumstances, particularly where the order sought is one of a prohibitory injunction, it may happen that the effects of a that injunction and a status quo order may be similar. Since the court was dissatisfied that the Applicant (Plaintiff) had failed to satisfy the conditions precedent to a grant of the injunctive orders sought, it was proper to deny those orders but instead to make an order for the preservation of status quo pending determination of the main suit.'

See also the cases of Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R and Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012.

In this instance, I note the Respondent admits the Appellants already evicted him out of the suit premises. Further, the Appellants admitted that they have leased the suit premises to a third party who is not in these proceedings. The Respondent has made a strong case for dismissal of this application for stay but it is my view that there is already a Memorandum of Appeal on record and so as not to render the same an academic exercise, I am of the view that in order to balance the scales of justice, it is pertinent to preserve the substratum of the suit by making an order of status quo in this instance so as to enable the parties ventilate on the Appeal. It has emerged that the Respondent is already out of the suit premises and there is a third party therein. Further, I note the Respondent declined to comment on certain annexures in the supporting affidavit which actually touch on the fulcrum of the dispute as they relate to payment of rent, but as a court, I will not disregard them.

In the circumstance, while associating myself with the quoted decisions, I will not allow the application as framed but direct that the obtaining status quo be maintained wherein no party should interfere with the suit premises, pending the hearing and determination of the Appeal. I further direct that the hearing of this Appeal be expedited.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE