



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.CIVIL APPEAL NO. 89 OF 2014

TITUS KIEMA.....APPELLANT

=VERSUS=

NORTH EASTERN WELFARE SOCIETY.....RESPONDENT

RULING

Outline

1. There is before court for determination an application by Notice of Motion dated 4.5.2016 seeking orders that the Appellant/Applicant be granted an order of injunction pending the hearing and determination of the appeal filed herein. The injunction is sought to restrain the Respondent by itself agents, employees or anybody acting under its instructions from evicting and or interfering with the applicant's peaceful and quiet occupation of the suit premises occupied on a tenancy. The application is supported by an affidavit of the Applicant/Appellant which largely repeats the grounds of the application and aver that after this courts ruling dated 11.3.2016, declining stay of execution pending appeal, the Respondent have attempted to evict, his family members staying in the premises by destroying the washrooms and removing doors and the roof.

2. The contention of the Applicant is that the Respondents are not his landlords and therefore lack the *locus standi* to claim rent and be entitled to same rent as the property remain registered in the name of a deceased person.

3. It was further contended that unless an injunction is issued, the Respondent will proceed and carry out the illegal eviction and the very purpose of the appeal shall have been spirited away. An offer was then made for the payment or rent as and when the same falls due.

4. In opposition to, the application the Respondent file both grounds of opposition and notice of preliminary objection whose tenure and effect were that this court lacked the jurisdiction to entertain the appeal and all applications grounded on the appeal including the application for injunction pending appeal and that the application lacks merit, totally defective, a non-starter, null and void and should be struck out.

Historical background:

5. By a plaint dated 28/1/1992 the plaintiff, now appellant, moved the magistrate's court seeking order

that the Respondents are not his landlords and therefore amenable to be restrained by an order of injunction from levying distress, evicting the plaintiff or in any other way interfering with the plaintiffs quiet occupation of the suit premises. The plaint was subsequently amended and a prayer was introduced to seek a set off in the sum of kshs.624,800/= being alleged repair costs to the premises. That suit came up for hearing before the trial court which on the 11.6.2014 delivered a ruling by which the court found that it had no jurisdiction to entertain the matter. That decision aggrieved the appellant who filed this appeal together with an application under order 42 Rule 6 seeking stay pending appeal. This court considered that application and by a ruling dated 11.3.2016 declined the prayers and dismissed the application.

6. That dismissal of the application gave rise to the acts alleged against the Respondent by the current application now seeking injunction pending appeal.

Analysis and determination:

7. An injunction, whether sought interlocutorily pending the outcome of a suit of an Appeal is governed by now well settled principles. It remains a temporary injunction and the rules set in **GIELA -VS- CASMAN BROWN LTD. [1973] EA 358** must apply with modifications depending on whether or not it is an appeal or a suit. In **CHARTER HOUSE BANK LTD -VS- CENTRAL BANK OF KENYA & OTHERS [2007]EKLR** the Court of Appeal said.

“The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory.”

8. In **PATRICK NJERI & OTHERS -VS- NATIONAL BANK OF KENYA LTD. [2007] eKLR** Vishram J, as the then was, enunciated the principles that guide a court in granting injunction pending appeal to include:-

- a) **An order of injunction pending appeal is discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.**
- b) **The discretion should be refused where it would inflict greater hardship that it would avoid.**
- c) **The applicant must show that to refuse the injunction would render the appeal nugatory.**
- d) **The court should also be guided by the principles in GIELA -VS- CASMAN BROWN LTD.**

9. Essentially the primary consideration of the court is to make a determination that safeguards the rights of the appellant in the appeal even when it is to be noted that a trial court has made its determination of the matter.

10. Before me, Mr. Mogambi, submitted, while relying on the decision by my sister, **Mary Kasango J**, that the consideration is on the balancing scale of the justice in the case and not those principles as laid in **GIELA -VS- CASSMAN BROWN LTD.** I am afraid that my reading of Judge Kasango's decision does not purport to say so. That decision reviewed, several decision by the court of appeal with unanimity that the High Court has jurisdiction to grant an injunction pending of appeal. A keener reading of that decision lead one to the conclusion that the bigger consideration is the balance of convenience between the parties. The judge said :-

“As correctly submitted by the defendant, (NSSF) is a well known established institution with innumerable assets. On the other hand the plaintiffs are individual tenants who may vacate defendant premises making recovery of any service charge difficult. The defendant would in my view always be in a position to make good any refund of service charge, if indeed plaintiff were

successful in their intended appeal.”

11. It is however to be noted that in that decision, what was sought to be stayed was payment of service charge unlike in the present suit where what is sought is an injunction restraining eviction which the Applicant says has not been sanctioned by the court. Not sanctioned by the court because what the trial court did was to decline jurisdiction but without ordering eviction.

Looked at the other way, the applicant seeks that this court, as an appellate court, grants to it what it failed to get before the trial court pending the determination of the appeal.

12. It cannot be lost sight of that an injunction being an equitable remedy is only available to a party who has done equity and come to court with clean hand. In the matter before me the applicant concedes that since 1992, when he filed the suit in the lower court, he has not paid a cent towards rent on the basis and contention that the Respondents are not his landlords. He has equally never made any tender to the person he considers his landlord or indeed availed the sum in an escrow account to be availed to the person entitled at the end of it. That to me is what equity would call a person with unclean hands. My view and opinion is that a person who considers himself a tenant can only maintain that position and seek to be protected as such when he pays rent.

13. It is not enough, that he has carried out repairs without evidence that he was permitted to so do. Additionally in the record of the application filed in this file there is exhibited an agreement of sale by which the Respondent is said to have brought the property at a price and consideration of Kshs.40,000/=. That evidence remains challenged to this point in time.

14. On the balance between the appellant's interest in the appeal and possible hardship to the Respondent, I take notice that the Respondent claims ownership of the suit property while the appellant has impliedly said and repeated that he does not personally live on the suit premises but only his, undisclosed family member, lives there.

15. I entertain doubt and am not persuaded that the appellant has demonstrated any loss he stands to suffer, personally, if the injunction is not granted and that such loss is irreparable by an award of damages. He is content to say that if the injunction is not granted his family members will be evicted not himself. In fact it has not been alleged that he has no other residence nor that his family cannot get an alternative accommodation.

16. To the contrary a grant of injunction will ensure the appellant's continued occupation of the premises for free and to the detriment of the persons entitled to the income even if it is later on proved not to be the Respondent. It would have presented a different scenario had the appellant offered to avail all the accumulated arrears of rent. He has not done so and there is not a guarantee that he cannot vacate at any time and leave the Respondent with no prospects of recovery of the arrears or rent.

17. Balancing the interest of the parties in this matter, I find that granting an injunction would visit hardship upon the Respondent more than it would avoid on the Applicant.

18. On the appeal being defeated or rendered nugatory, I note that the appellants' only claim on the suit premises is not the title as such, but a claim that he has incurred costs in repairs. That sum has been quantified and can always be proved at trial should the appeal succeed and the matter be taken back to the magistrate's court. This determination does not fit on the second requirement in *GIELA -VS- CASMAN BROWN* that the injury the applicant stands to suffer will be irreparable by an award of damages. That being my finding the fate that stares on the face of the application is that of failure.

19. All in all I find that I am unable to exercise my discretion in favour of the applicant to grant the application dated 4.5.2016 with the consequence that I dismiss the same with costs.

Dated, signed and delivered at Mombasa this 13th day of May, 2016.

In the presence of:-

Mr. Kaluwe for Mogambi for Appellant.

Hassan for Respondent.

P.J.O.OTIENO

JUDGE