



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 144 OF 2012

1. DR. JOHN CHAMIA
2. DR. AJONI ADEDE
3. BENSON CHEROMOI
4. MARY KARANI T/A ROMA ENTERPRISES
5. CHARLES OPULU
6. CHRISTINE KIPSANG
7. SANDRA MWACHIA PLAINTIFFS

V E R S U S

1. THE BOARD OF TRUSTEE NATIONAL SOCIAL SECURITY FUND
2. KIRAGU & MWANGI LIMITEDDEFENDANTS

RULING

1. This Court by judgment delivered on 19th December 2013 found that the Defendant was entitled to increase service charge and to demand the same from its tenants, the Plaintiffs. That judgment vacated interlocutory injunction issued to restrain the Defendant from recovering backdated service charge.
2. Plaintiff filed a Notice of Appeal against that judgment. By Notice of Motion dated 28th January 2014 Plaintiffs seek an order be issued to restrain Defendant by injunction from levying distress, enforcing or in any way trying to recover the backdated and increased extra service charge against the Plaintiff pending hearing and determination of the appeal.

3. The application is made on the grounds that Plaintiff will suffer irreparable loss and their intended appeal will be rendered nugatory; and that Defendant unilaterally carried out an audit of service charge for the years 2009 and 2010 contrary to lease agreement.
4. Defendant opposed the application and sought for its dismissal on the grounds that the amount demanded from the Plaintiff depended on the size of space they occupy and that the amount claimed from each Plaintiff ranged between Kshs. 10,000/- to Kshs. 69,000/-. Further Defendant submitted that it is an established institution which would be able to repay the amount if the appeal was successful whereas the Plaintiff were individual tenants and there was the risk that they would vacate the premises and thereby make it difficult for Defendant to recover the amount.
5. What is sought by Plaintiffs is an injunction pending appeal. The purpose of granting such an injunction was discussed in the case OTIENO –Vs- OUGO & ANOTHER (No. 2) (1987)KLR viz-

“1. The established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action.

2. The object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal if successful from being nugatory.”

6. I have had occasion to consider the jurisdiction of the Court in granting an injunction pending appeal in the case JIMMIESON MKUMBO MBOGHO T/A ZIOTECH MOTORS –Vs- BARCLAYS BANK LIMITED [2014]eKLR where I found as follows-

“Whether the Court has jurisdiction

It is now well established that the High Court has jurisdiction to grant an order of injunction pending appeal even in instances where the application for interlocutory injunction had been heard on merit and dismissed.

The case that has guided Kenyan courts in that regard is the case of ERINFORD PROPERTIES LTD VS CHESHIRE COUNTY COUNCIL [1974] 2 ALL ER 448 where it was held that it would not be incompatible for a court which had dismissed an application for injunction to grant the unsuccessful applicant injunction pending the hearing of an appeal against the dismissal. That case was cited with approval by the Court of Appeal in MADHUPAPER INTERNATIONAL LTD VS KERR [1985] KLR 840 where it was held that a judge who dismisses an application for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending the hearing of the intended appeal so as not to render the decision of the appellate court, should the appeal be successful, nugatory.

The principle enunciated in those two leading cases has been adopted by the High Court in many cases. In the case of CHRISTOPHER NDARATHI MURUNGARU – Vs- KENYA ANTI-CORRUPTION COMMISSION & ANOTHER [2006] eKLR, the High Court, while referring to the two cases observed as follows:

“The ratio in both cases is that where a Judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal it is not necessary for the applicant to apply to the Court of Appeal and that there is no inconsistency in granting such an injunction after the dismissal.”

In Re UMOJA SERVICE STATIONS LIMITED [2008] eKLR, the court held that the High Court has jurisdiction to grant an order of injunction pending appeal. Hon. Justice Kimaru held as follows:

“That this court has jurisdiction to grant injunction pending the hearing and determination of the intended appeal is not in doubt. In Madhupaper International Limited –Vs- Kerr [1985] KAR 840 the Court of Appeal held that the High Court had jurisdiction to grant an injunction pending the hearing of an appeal even after dismissing such an application for injunction in the suit.”

In the case of RAMESH DATT VASHIST & ANOTHER V FINA BANK LIMITED [2005] eKLR the court held that:

“The test to consider when an application such as the one before is brought is as clearly stated in the MADHUPAPER case on page 846. The court of appeal having stated that the High court has jurisdiction to hear an injunction pending appeal stated:

‘There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.’”

From the foregoing cases, is clear that the High Court has jurisdiction to grant an order of injunction pending appeal.”

7. Since I have established that the Court does have jurisdiction to grant injunction pending appeal and because the purpose for granting such an injunction is to preserve the subject matter; what then is subject matter the Plaintiff’s seeking to preserve? The Plaintiffs sought a declaration that Defendant could not levy for increased service charge over their tenancies. They failed in their quest when the judgment of 19th December 2013 was delivered. As correctly submitted the Defendant (NSSF) is a well known and established institution with enumerable assets. On the other hand Plaintiffs are individual tenants who may vacate Defendant’s 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 Plaintiffs were successful in their intended appeal. In reaching my decision I am well guided by the principles espoused in the case FINA BANK LIMITED –Vs- ANIL MOHANLAL CHANDARANA & ANOTHER (2006)eKLR where the Court stated-

“Having made the finding I have made herein above I believe in the exercise of the jurisdiction of stay pending appeal the court is required to balance the scales of justice to ensure that protection of the party appealing does not erode that judgment the other has successfully obtained. In that balancing of scales of justice I find that on one side the plaintiff is entitled to be certain that if it succeeded in its appeal it is not faced with a struggle of recovery of money paid to the Defendants. On the other hand the Defendants fought a good fight and succeeded to have the Plaintiff’s suit dismissed they need an assurance that when the appeal does conclude and if in their favour they enjoy the fruits of their judgment.”

8. The balance of the rights of the parties before me is achieved by dismissing Plaintiffs’ Notice of Motion dated 28th January 2014 which I hereby do with costs to Defendant.

It is so ordered.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE