



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 565 OF 2008

MWITIRITHIA TRADING CO. LTD.....APPELANT

VERSUS

JAMES TITUS KISIA RESPONDENT

RULING

Mwitirithia Trading Co. ltd, the applicant herein, has taken out the notice of motion dated 14th April 2009 pursuant to the provisions of order XLI rule 4 of the civil procedure Rules. In the aforesaid Motion the applicant has beseeched this court to issue the following orders.

- I. *The applicant to be given leave to appeal against the ruling and order of this court made on 8/4/09.*
- II. *An order of stay of execution of the aforesaid order and for reinstatement of the interim injunction issued on 28/11/08 pending appeal.*
- III. *Costs of the application.*

The motion is supported by the affidavit of John Ndungu Gachioga.

James Titus Kisia swore a replying affidavit to oppose the motion.

The facts leading to the filing of the motion are short and straightforward. The applicant took out the notice of Motion dated 27/11/08 in which it had prayed for a temporary order of injunction pending appeal and for leave to appeal out of time. The Motion was heard and dismissed by this court on 8th April 2009. Being dissatisfied with the dismissal order, the applicant has now filed a notice of appeal to intimate its intention to challenge the decision before the court of appeal. The motion dated 27/11/08 was dismissed on the basis that there was no competent appeal and on the ground that there were no good reasons. The applicant was provoked to take out the motion dated 27.11.2008 by the decision of Mochache D., the chairperson Business Premises Rent Tribunal dated 26th September 2008. Basically the respondents' notice to terminate the tenancy between him and the applicant was allowed.

Mr. Weloba, learned advocate for the applicant urged this court to allow the Motion in order to preserve the applicant's interest pending appeal. It is Mr. Weloba's submission that the applicant's intended

appeal will be rendered nugatory if the order for stay is not granted.

Mr. Mutisya learned advocate for the Respondent urged this court to dismiss the motion on the ground that there is no substantive suit upon which the application can be based. It is also argued that the notice of appeal lodged with the Registrar has not been signed by the Deputy Registrar hence the same is incompetent under rule 74(1) of the court of Appeal Rules. It is the submission of Mr. Mutisya that the application can only be entertained by the court of Appeal and not this court.

I have considered the rival submissions. I have further taken into account the material placed before me. The application before this court in my mind appear to seek for two orders. First, an order for leave to appeal against the order of this court given on 8/4/09.

Secondly, an order for an injunction pending appeal. Let me start by considering the first prayer. I have already stated that the Motion dated 27.11.2008 was dismissed on 8/4/09. That motion was brought under the provisions of Order XLI rule 6 of the Civil Procedure rules. It is obvious from the provisions of order XLII rule 1 of the civil procedure rules that leave must first be sought to enable one appeal against a decision made under order XLI rule 6 of the Civil procedure rules. The application may be made informally at the time of making the order or formally within 14 days from the date of delivering of such an order. The Motion dated 27.11.2008 was dismissed on 8/4/2009. The Motion seeking for leave to appeal was filed on 14th April 2009. The Motion was therefore timorously filed. What remains is whether I should grant leave. The court's discretion whether to grant or refuse leave is unfettered. I must appreciate the fact that a party has an undoubted right to have his day in court. I have already stated that the application was timeously filed. There is no evidence that the application was filed out of spite. I grant the applicant leave to appeal against this court's order of 8/4/2009.

Having come to the conclusion that the applicant is entitled to leave, let me now address my mind to the second prayer. The applicant has prayed for an injunction pending appeal. It has been argued that this court is functus officio. With great respect, I do not think so. The court of Appeal put the record straight in **Butt =Vs. Rent Restriction Tribunal [1982] K.L.R. 417.**

At pages 419-2- Madam J.A had this to say

“It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particulars circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson V church [No. 2] 12 Ch D [1879] 454 at P 459. In the same case, Cotton LJ said at p. 458:-

“I will state my opinion that when a party is appealing exercising his undoubted right to appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Magarry J, as he then was, followed Wilson [supra] in Erinford properties limited V Cheshire county council [1974] 2 AII ER 448 p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney general V Emerson and others 24 QBD [1889] 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.”

I will apply the above statement of law to this matter now before this court. It is obvious that if I do not grant the order of injunction pending appeal the appeal will be rendered nugatory. I must issue the order to avoid the appeal being rendered useless.

Having come to the conclusion that the order should be granted, the law requires that security for the due performance of the decree must be provided for. Unfortunately, none of the parties addressed me

over this issue.

I grant the order of injunction pending Appeal. I direct the applicant to deposit in an interest earning account in the joint names of the learned

advocates appearing in this matter a sum of ksh.100,000/- within 10 days from the date hereof. In default the motion shall stand dismissed.

Dated and delivered at Mombasa this 5th day of May 2009.

J. K SERGON

JUDGE

In open court in the presence of Mr, bosire for Respondent and Miss Muthuri for Applicant.