**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL APPEAL NO. 47 OF 2017**

**JOSHUA WALTER ANYANGO OGUTU**

**T/A ANYANGO OGUTU & CO. ADVOCATES.....APPELLANT**

**VERSUS**

**BARCLAYS PENSION SERVICES LIMITED.....1ST RESPONDENT**

**GIMCO LIMITED.....2ND RESPONDENT**

**RULING**

On or about 10th September, 2016, the appellant filed a reference at the Business Premises Rent Tribunal under section 12(4) of the Landlord and Tenant(Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya("the Act") against the respondents complaining that the respondents had locked up the premises that had been let to him. The appellant contended that the said premises had been locked by the respondents illegally and without notice and that he had been denied access to his files and other important documents. Together with the reference, the appellant filed an application seeking a mandatory injunction compelling the respondents to open up the said premises immediately and a temporary injunction restraining the respondents from locking, evicting him from or interfering with his peaceful occupation of the said premises (hereinafter referred to only as "the suit property") pending the hearing and determination of the reference.

The appellant's application for injunction before the tribunal was opposed by the respondents. The tribunal heard the application and in a ruling that was delivered on 13th October, 2017 struck out both the application and the reference as incompetent. The tribunal held that there was no landlord and tenant relationship between the appellant and the respondents in respect of the suit property which could have given it jurisdiction over the reference.

The appellant was dissatisfied with the said decision of the tribunal and preferred this appeal against the same. In his memorandum of appeal dated 2nd November, 2017 filed in court on 3rd November, 2017, the appellant challenged the decision of the tribunal on several grounds among others that the tribunal erred in law and fact in its finding that there was no landlord and tenant relationship between the appellant and the respondents. Together with the memorandum of appeal, the appellant filed an application by way of Notice of Motion dated 7th November, 2017 brought under sections 3A and 63(e) of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules seeking an order for status quo and a temporary injunction restraining the respondents from evicting him from the premises known as L.R No. 209/2925("the suit property") pending the hearing and determination of the appeal. This is the application which is the subject of this ruling.

The application was supported by the appellant's affidavit sworn on 6th November 2017 in which he stated that he filed a reference and an application for interim orders which were granted ex parte in the first instance by the tribunal. He stated that in a ruling that was delivered on 13th October 2017, the tribunal struck out his reference and application. He averred that he was dissatisfied with the decision of the tribunal and preferred the present appeal against the same. The appellant averred that he was apprehensive that if the respondents were not restrained, they would proceed to evict him from the suit property thereby rendering his appeal nugatory.

The application was opposed by respondents through grounds of opposition dated 12th April, 2018. The respondents contended that:

i. No cause of action had been established against them by the appellant as there was no privity of contract between the parties;

ii. The order issued by the tribunal was negative in nature and as such incapable of being stayed;

iii. The appellant had not demonstrated that he would suffer substantial loss if the orders were denied;

iv. The appellant had not shown willingness to offer security;

v. The conditions for grant of injunctive relief had not been satisfied and;

vi. The appellant was shopping for reliefs in seeking both stay and injunctive reliefs.

The application was argued on 13th November 2018 when Mr. Odhiambo appeared for the appellant while Ms. Mukami appeared for the respondents. Mr. Odhiambo submitted that the appellant was a sub-tenant of another law firm known as W'Obiero & Co. Advocates which was the respondents' tenant in respect of the suit property. He denied that the appellant was a trespasser on the suit property and contended that the appellant had been paying rent of Kshs 16,000/- to the said W'Obiero & Co. Advocates which was the head tenant. He urged the court to maintain the *status quo* by issuing the injunction sought pending the hearing of the appeal.

In her submissions in response, Ms. Mukami contended that the appellant was on the suit property illegally and without the 1st respondent's consent. She submitted that the alleged sub-letting of the suit property by W'Obiero & Co. Advocates to the appellant was without the consent of the 1st respondent which was the owner of the property. Ms. Mukami relied on section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya ("the Act") and the case of Njuguna Mwaura *v* Hajrabai Suleman [1983] eKLR and submitted that where there is no consent of the landlord for a tenant to sub-let leased premises, no tenancy exists as between the landlord and the sub-tenant and the sub-tenant becomes a trespasser. She argued further that the appellant had not offered security and had also not demonstrated that he would suffer substantial loss if the orders sought were not granted.

With regard to the prayer for injunction, Ms. Mukami argued that a prima facie case had not been established. On this point, she relied on the case of Farkhandas Nurmohamed Adbdulkader *v* Mohamed Hasham Bakarani & another [2014] eKLR. She submitted that the appellant had not shown that he would suffer irreparable injury and argued that in any event, a trespasser cannot suffer any injury if evicted.

In a rejoinder to the respondents' submissions, Mr. Odhiambo submitted that the 1st respondent was aware of the appellant's occupation of the suit property and had therefore acquiesced to such occupation. He submitted that the 1st respondent did not serve the appellant with a notice of eviction. He submitted that the appellant had practiced law since 1978 and as such evicting him from the suit property which was his place of work would occasion him substantial loss and damage. He argued that the 1st respondent should sort out any outstanding issues with its tenant, W'Obiero & Co. Advocates.

Determination.

I have considered the appellant's application together with the supporting affidavit. I have also considered the grounds of opposition filed by the respondents in opposition to the application and the submissions of counsel. What I need to determine in the application before me is whether the appellant has satisfied the conditions for grant of an interlocutory injunction pending appeal. In the case of Patricia Njeri & 3 others *v* National Museum of Kenya (2004) Visram J.(as he then was) set out the conditions to be met by an applicant seeking injunction pending appeal as follows:

> **"The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?**
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> **In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be "exercised judicially and not in a whimsical or arbitrary fashion." This discretion is guided by certain principles some of which are as follows:**
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> **a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited – Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital).**
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> **b) The discretion should be refused where it would inflict greater hardship than it would avoid (See Madhupaper supra).**
>
> **c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).**
>
> **d) The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital)."**

In Bilha Mideva Buluku *v* Everlyne Kanyere [2016] eKLR, Mwita J. stated as follows concerning injunctions pending appeal:-

> **"Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of Giella v Casman Brown 1973 EA 358, that he has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of the appellant in the appeal."**

It was common ground that the appellant was not a tenant of the respondents. The appellant admitted that he was occupying the suit property

as a sub-tenant of W'Obiero & Company advocates, which was the head tenant. As stated above, the respondents argued that the appellant was in illegal occupation of the suit property since the alleged sub-lease between him and W'Obiero & Company advocates which was not even made a party to the tribunal case was entered into without their consent. The appellant did not controvert this averment. His response was that the respondents were aware of his occupation of the suit property and had acquiesced to the same. The appellant placed no evidence before the court to prove that the respondents were aware of the sub-tenancy between him and W'Obiero & Company advocates and that they consented to or acquiesced to the same. In the case of Farkhandas N. Abulkader *v* Mohammed Hasham Bakarani & another [2014] eKLR it was held as follows concerning sub-tenancies:

> **"The landlord and tenant Act requires the tenant to obtain consent of the landlord before subletting, parting with possession of, or transferring the premises or any part thereof. No consent was sought and/or obtained by Githinji. No tenancy by him was in existence and the appellant was not a tenant but a trespasser."**

In the case of New Calabash Limited *v* Joseph Odero (2018) eKLR, the court upheld the decision of the tribunal allowing the landlord to terminate the tenancy on grounds that the tenant had breached the terms of the controlled tenancy by sub-letting the premises without the landlord's consent. See, also the case of Tecno Holdings Limited & 4 others *v* National Social Security Fund Board of Trustees (2018) eKLR.

The appellant has not convinced this court on a prima facie basis that he is occupying the suit property legally. A prima facie case with probability of success to be argued on appeal has therefore not been established. The appellant having failed to establish an arguable appeal, it is not necessary for the court to consider whether his appeal would be rendered nugatory or not. The injunction sought is not merited. The appellant has also prayed for status quo to be maintained pending the hearing of the appeal. Such order if granted would have the same effect as an injunction pending appeal which I have held that the appellant is not entitled to. I am not persuaded that special reasons exist that would justify such order.

The upshot of the foregoing is that the appellant's application dated 7th November, 2017 fails wholly and the same is accordingly dismissed with costs to the respondents.

**Delivered and Dated at Nairobi this 21st day of February 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Odhiambo for the Appellant

Ms. Mukami h/b for Ms. Barasa for the Respondents

Catherine-Court Assistant