



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC APPEAL NO. 11 OF 2016

KETAN MANSUKHLAL SHAH

ASHIT MANSUKHLAL SHAH

NIHAL MANSUKHLAL SHAH t/a

WATERSYS PROPERTIES.....APPELLANTS

VERSUS

GULF MANPOWER RECRUITING AGENCY LIMITED...RESPONDENT

(Being an appeal from the ruling delivered on 9th September 2015 by Hon.Maisy Chesang (Mrs) in CMCC 1710 of 2015).

RULING

1. The appellants/applicants are the landlords of the respondent who occupies upper Mezzanine 2 at Watersys Plaza which is erected on LR No.209/2612. The respondent filed a suit in the lower court against Watersys Properties Limited. The respondent contemporaneously filed an application for injunction seeking to restrain the defendant from removing its goods which had been attached. The application for injunction was granted. The applicants thereafter filed an application seeking discharge of the ex-parte orders of injunction and striking out of the suit on grounds that a wrong defendant had been sued. This application prompted the respondent to amend its plaint and brought in the correct parties.

2. The applicants counsel advised the auctioneers to go ahead with the attachment on the grounds that since a wrong party had been sued, and there had been an amendment the orders of injunction which the respondent had obtained were of no consequence. The auctioneers went ahead with the attachment and this is what prompted the respondent to file an application for contempt. The applicants were found guilty contempt of court. The applicant's then preferred an appeal to the High Court which appeal was later transferred to the Environment and Land Court.

3. The parties to the appeal filed written submissions in respect of the appeal as per the directions of lady Justice Gitumbi, Justice Gitumbi then fixed a mention date for 25/1/2018 for purposes of fixing a judgement date. Come 25/1/2018 I gave a date for judgement which was to be on 12/4/2018. As I was preparing the judgement, I noticed that there was no record of appeal, and the lower court file. I directed that the missing documents be availed. As we were waiting for the missing documents to be availed, the applicants filed a notice of motion dated 25/7/2018 in which they sought orders that the respondent deposits rent arrears amounting to Kshs.2,312,700/= in court and that all future rents be paid promptly to court and that in default, the respondent be evicted from the premises.

4. The appellants contend that their lawyers and the respondent's lawyers filed a consent in the lower court on the manner the rent arrears were to be cleared. Instead of paying the rent arrears as agreed, the respondent filed a suit against a non-existent entity. Thereafter there was amendment of pleadings which meant that the orders which had been granted were vacated. The applicants argue that they are paying utility bills and that it is fair that the respondent be ordered to deposit rent arrears in court.

5. The applicant's application was opposed by the respondent through a replying affidavit filed on 23/8/2018. The respondent contends that the application is an abuse of the process of the court; that the application ought to have been brought before the lower court and not before this court where there is a pending appeal; that what the applicants are seeking is not part of what is contained in the memorandum of appeal and that recovery proceedings cannot be initiated at appeal stage.

6. I have considered the applicant's application as well as the opposition to the same by the respondent. There is an appeal which is pending judgement. The applicants cannot start seeking orders which are not related to the appeal before the court. This court has no original jurisdiction. It can only exercise appellate jurisdiction. If the applicants wanted to file application for vacant possession and rent arrears, they

should have done so in the lower court. I find that this application is an abuse of the process of the court. I proceed to dismiss the same with costs to the respondent.

Dated, Signed and delivered at Nairobi on this 31st day of October, 2019.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Waweru for applicants and Mr Awino for Respondent

Court Clerk : Hilda

E.O.OBAGA

JUDGE