



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 400 OF 2017

IDEAL LOCATIONS LIMITED.....PLAINTIFF/RESPONDENT

-VS-

NAKUMATT HOLDINGS LIMITED.....1ST DEFENDANT/APPLICANT

ATUL SHAH.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of the Notice of Motion dated 7th March 2018 filed by the Defendants. It is brought under Sections 1A, 1B, 63(e), 75 and 78 of the Civil Procedure Act, Order 9 Rule 9, Order 42 Rule 6, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules. The Defendants are seeking the following orders:

- 1. THAT this matter be certified urgent and service thereof be dispensed with in the first instance.**
- 2. THAT leave be granted to the firm of Ms. Ngonze and Ngonze Advocates Mombasa to come on record for the firm of Ms. Taibjee & Bhalla Advocates, Nairobi for purpose of this application.**
- 3. THAT pending inter parties hearing of this Application.**
 - a. There be a stay of Execution of the ruling delivered herein on 5/3/18 as well as the resultant decree and all/any consequential orders/process subject thereof;**
 - b. An order do issue directing the reinstatement of the 1st Defendant into the Suit property, situated in the building known as "city mall" erected on land reference No.14407 and 16088, Section 1, Mainland North, Mombasa Municipality (CR 42055 and CR 46440);**
 - c. An order of injunction do issue restraining the Plaintiff, whether by herself, her agents, servants, employees, assigns or anyone howsoever claiming through her from evicting, alienating, interfering with and/or otherwise howsoever dealing with the 1st Defendants's peaceful and derivative use and occupation of the Suit Premises aforesaid;**
- 4. THAT the OCS, Bamburi Police Station, Mombasa do supervise the execution of this order, provide security, and ensure no public disturbance ensues, and maintain law and order throughout and after the execution of this order;**
- 5. THAT the interim orders subject of prayers/orders Nos. 3 and 4 hereinabove do persist until the hearing and determination of the Appeal subject hereof.**
- 6. THAT costs of this Application be provided for**

2. The Application is based on the grounds on the face of the motion and supported by the Affidavit of Peter Obondo Kahi and the affidavit of Atul Shah both sworn on 7th March 2018. The main grounds as claimed by the Applicants are that the Defendants being aggrieved by the decision of this Court made on 5th March 2018 have lodged a Notice of Appeal in respect of the entire decision and that they have a substantially credible appeal which ought to be ventilated prior to ejection of the parties from the Suit Premises; that the Application has been lodged without undue delay and that unless the Court grants the orders sought, the Defendants shall suffer irreparable substantial loss. The Defendants aver that they are prepared to abide by any conditions the Court may impose on grant of the orders sought herein and that no prejudice shall befall any of the parties herein should the orders sought be granted.

3. The Defendants further state that can unbeknown to them, the Plaintiff proceeded to unilaterally extract the decree subject of the ruling herein contrary to the express provisions of the law and on the morning of 7/3/17, accompanied by about 100 rowdy youths, the Plaintiffs representatives stormed into the Suit Premises and forcefully evicted the 1st Defendant in contravention of the express provisions of the Insolvency Act 2107.

4. The Application has been opposed by the Plaintiff/Respondent vide Grounds of Opposition dated 16th March 2018 and a Replying Affidavit by Mohamed Talsam Mohamed Salim sworn on 20th March 2018. It is the Plaintiff's contention that the Application has been overtaken by events as the 1st Defendant is no longer in occupation of the Suit Premises and that the same have been leased out to a new tenant and therefore the same are not available for the 1st Defendant's reinstatement. That granting the orders sought would be tantamount to setting aside the decree and order given by the Court on 5th March 2018 and effectively allowing the intended appeal through the back door.

5. By the time matter came up for inter parties hearing, the parties had filed a consent for the firm of Ms Ngonze & Ngonze Advocates to come on record for the Defendants, hence prayers (1) and (2) of the Application are already spent.

6. In his submissions, Mr. Mutiso, learned Counsel for the Defendants reiterated the grounds in support of the Application as well as the facts as deponed in the affidavits in support of the Application. He added that the Application seeks to preserve the substratum of the Appeal pending the hearing and determination of the Appeal. It was the Defendants' submission that there was no proof that the Premises have been leased out as stated by the Plaintiff. They submitted that if the appeal is successful and the Suit Premises have been leased out, then the appeal will be rendered nugatory. The Defendants urged the Court to grant the orders sought in order to have the status quo maintained pending the conclusion of the Appeal.

7. On his part, Mr. Oluga, learned Counsel for the Plaintiff submitted that the orders sought cannot issue as the 1st Defendant is no longer in occupation of the Suit Premises and that the Defendants will not suffer any substantial loss. The Plaintiff further submitted that granting the order for reinstatement would be tantamount to setting aside the decrees of the Court which ordered the Defendant to vacate from the Suit Premises.

8. I have considered the Application, Affidavits, annexures and the submissions and authorities which have been very useful. The issue which I find falling for determination is whether the Defendants have met the prerequisites for grant of the orders sought. The relief of Stay of Execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

6 1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order Stay of Execution of such decree or order and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such Appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court appealed from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless-

(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without undue delay; and

b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

9. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Therefore stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court would be guided by the three principles provided under order 42 Rule 6 above. Firstly, the application must be brought without undue delay; Secondly, the Court will satisfy itself that substantial loss may result to the Applicant unless Stay of Execution is granted; and thirdly, such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

10. In this particular case, the order appealed against was made on 5th March 2018 and the Application herein was filed on 7th March 2018. The Application was therefore made timeously.

11. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicants, I wish to refer to the case of **Kenya Shell Limited –V- Benjamin Karuga Kigubu & Another (1982-1988)KAR 1018** where the Court of Appeal stated:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone for granting stay.”

12. Also in the case of **Absalom Dora –v- Turbo Transporters (2013)eKLR**, it was stated that:

“The discretionary relief of Stay of Execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be

rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

13. The cornerstone of the jurisdiction of the Court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the Applicant unless a Stay of Execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J, in the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012)eKLR** where it was held *inter alia* that:

*“No doubt in law, the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein –v- Chesoni (2002)1 KLR 867**.....the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.*

14. In this particular case, how does the Court balance the rights of the parties, considering that it is not disputed that the Applicants owe the respondent substantial amount of outstanding rent arrears which was Kshs. 27,812,108.52 as at 1st November 2017. The Applicants have sought an order for reinstatement of the 1st Defendant into the Suit Premises as well as an order of injunction restraining the Respondent from evicting, alienating, interfering with a or otherwise dealing with the 1st defenant’s peaceful and derivative use and occupation of the Suit Premises. However, the parties are in agreement that the 1st Defendant has been evicted from the Suit Premises. Although the Plaintiff avers that the Suit Premises have been leased out to a new tenant, it is apparent that the same are still vacant. Indeed on 21st March 2018, the Court ordered that pending the delivery of this ruling, the status quo prevailing at the time should be maintained, subject to the Defendants paying the mesne profit equivalent to the rent payable for this period.

15. The Applicants stated that they are prepared to abide by any conditions the Court may impose on grant of the orders sought herein. I reckon that the Applicants are alive to the fact that even where stay is granted it must be on terms in the form of security for the due performance of the decree. The Applicants are submitting that they will suffer substantial loss and the appeal will be rendered nugatory if the orders sought are not granted. However, the rights of the Plaintiff to earn income from the Suit Premises must also be considered. Similarly, this Court takes cognizance of the fact that a Stay of Execution helps preserve the subject matter so that the appeal is not rendered nugatory if it succeeds.

16. For the foregoing reason, I have balanced the rights of both the Applicant and of the Respondent and allow the Application dated 7th March 2017 conditionally in the following terms:

- a. The Applicants shall pay to the respondent the outstanding rent arrears within the next thirty (30) days from the date of delivery of this ruling.**
- b. Upon compliance with order (a) above, the 1st Applicant to be reinstated into the Suit Premises and thereafter to pay the rent whenever it falls due.**
- c. Failure by the Applicants to comply with order (a) above, the Respondent be at liberty to allow the new tenant take up occupation of the Suit Premises.**
- d. Costs of this Application shall be in the cause.**

Delivered, signed and dated at Mombasa this 17th May, 2018.

C. YANO

JUDGE