



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 11 OF 2018

JULIET KWAMBOKA ONGWAE

T/A KAHAWA KULTURE.....APPELLANT/APPLICANT

VERSUS

MOCHA PLACE LIMITED.....RESPONDENT

R U L I N G

(Being an appeal from the Ruling of Hon. S. K. Onjoro, SRM issued in Kisii CMCC No. 389 of 2018 dated on 21st September 2018)

1. The appellant, Juliet Kwamboka Ongwae t/a Kahawa Kulture has filed an appeal to this court vide a Memorandum of Appeal dated 23rd September 2018 against the ruling of the Honourable S. K. Onjoro SRM delivered on 21st September 2018 in Kisii CMCC No. 389 of 2018 whereby the appellant's application for injunction was dismissed.

2. The appellant simultaneously with the Memorandum of Appeal filed a Notice of Motion expressed to be brought under Sections 3A, 75, 78, 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. The appellant seeks the following substantive orders:

(i) That a stay of execution in Kisii, CMCC No. 389 of 2018 be granted pending the hearing and determination of this application.

(ii) The court be pleased to grant a stay of execution on Kisii, CMCC No. 389 of 2018 pending hearing and determination of the appeal against the ruling made by the Hon. Mr. S. K. Onjoro on the 21st September 2018.

(iii) Costs of the application be provided for.

3. The appellant's application is supported on the grounds set out in the body of the application and the affidavit sworn in support by Juliet Kwamboka Ongwae dated 23rd September 2018. The appellant contends that her appeal has reasonable chances of success and that if the respondent carries out the threatened action of evicting her from the premises where she runs a hotel/restaurant business the appeal would be rendered nugatory and she stands to suffer irreparable damages.

4. The respondent filed a replying affidavit dated 26th September 2018 in opposition to the appellant's application and simultaneously also filed a Notice of Preliminary Objection to the application dated 26th September 2018 inter alia on the following grounds:-

1. The Honourable Court is devoid and/or divested of jurisdiction to entertain and/or adjudicate upon the subject proceedings, (read appeal) either as mounted or at all.

2. The subject dispute is and/or falls outside the purview of the provisions of Article 162 (2) of the Constitution, 2010. Consequently, the proceedings herein are a nullity.

3. The instant proceedings and in particular, the application for stay of execution pending appeal, amounts to and/or constitutes an abuse of the Due process of the Court.

4. In any event, the Notice of Motion application herein, is premature, misconceived and otherwise mounted in vacuum. Consequently, the entire proceedings are a nullity ab-initio.

5. On the other hand, the appellant/applicant herein is non-suited.

6. At any rate, the instant application does not disclose and/or capture any reasonable cause of action, either known to law or at all.

5. In the filed grounds in support of the preliminary objection the respondent contends this court has no jurisdiction to entertain the instant application by the appellant. The respondent avers the application for stay of execution pending appeal is an abuse of the process of the court, was premature and misconceived and that the appellant was non-suited.

6. The appellant on 8th October 2018 filed grounds on which she sought to oppose the preliminary objection. The appellant maintained the court had the jurisdiction to handle the matter which she stated related to a dispute arising from a lease agreement over a portion of **LR No. Kisii Municipality/Block III/195**. The appellant argued that Article 162 (2) (b) of the Constitution and Sections 12 and 13 of the Environment and Land Court Act conferred this court with jurisdiction to hear and determine matters such as the present one. The appellant averred that her application for stay was not premature as alleged by the respondent, since the respondent had set in motion activities which had clearly shown they were intent on evicting the appellant from the leased premises which the appellant argued would expose her to substantial loss if carried out.

7. In oral submission before me, Mr. Kebero advocate for the appellant submitted that the appellant in the suit before the Chief Magistrate's Court had pleaded breach of contract and had sought an injunction pending the determination of the suit but that the learned trial magistrate dismissed the interlocutory application for injunction on the basis that the appellant had not sought a permanent injunction in the final prayers. Counsel contended that this was a mere technicality and the court ought not to have resorted to technicality to determine the matter but should rather have considered the substance and merits of the application.

8. Mr. Ochwangi Advocate for the respondent submitted that the order made by the learned magistrate dismissing the application for injunction was incapable of being stayed as it was a negative order. He argued a dismissal order could not be stayed. In the present application no injunction is sought by the appellant. He contended the present application amounted to an abuse of the court process and sought for its dismissal.

9. The appellant under prayer 4 of the Notice of Motion seeks an order thus:-

4. The court be pleased to grant a stay of execution on Kisii, CMCC No. 389 of 2018 pending hearing and determination of the appeal against the ruling made by the Hon. Mr. S. K. Onjoro on 21st September 2018.

It is noteworthy that the appellant seeks an order staying execution in Kisii CMCC No. 389 of 2018 yet the learned magistrate in his ruling did not grant any orders capable of being executed. The learned magistrate made an order dismissing the appellant's application for injunction. A dismissal order is not capable of being stayed since it takes effect once it is pronounced. In the affidavit sworn in support of the application by the appellant paragraph 2 is worded as follows:-

2. That civil suit No. Kisii CMCC No. 389 of 2018 was concluded at the Kisii Magistrate's Court on the 21st day of September 2018 with the Honourable Mr. Onjoro reading the ruling of the court. Annexed hereto and marked "SSP1" is a true copy of the proceedings.

10. Neither the pleadings, proceedings nor ruling in CMCC No. 389 of 2018 was annexed to the affidavit and the court has no benefit of reviewing the said documents. The affidavit is without any annexure and to that extent is incomplete. Indeed without a copy of the ruling delivered by the trial magistrate this court is not in a position to evaluate the basis of the learned magistrate's decision. The further affidavit in support also did not annex the proceedings or ruling though it is indicated under paragraph (2) that the proceedings were annexed as "SSP1". Instead only a copy of the extracted order in Misc. Civil Application No. 110 of 2018 is annexed as "APK1". From the affidavit sworn by Josephat Mwangi Moracha in opposition to the appellant's instant application, it is evident that what was in contention in Kisii CMCC No. 389 of 2018 was whether the appellant had breached the terms of the lease agreement she had entered into with the respondent so that the respondent was entitled the right of re-entry provided under Clause 5(b) of the Lease Agreement. Unfortunately no copy of the lease referred to was annexed to this application to enable the court to peruse the terms thereof.

11. The appellant in the instant application did not pray for an order of injunction but merely prayed for grant of stay of execution on Kisii CMCC No. 389 of 2018 pending hearing and determination of the appeal against the ruling made by the learned magistrate. I have observed earlier in this ruling that the learned magistrate made an order dismissing the application for injunction. The dismissal order cannot be stayed as it took effect on pronouncement. Order 42 Rule 6(6) empowers an appellate court to grant an order of temporary injunction in appropriate case. Rule 6(6) provides:-

"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

12. Ordinarily parties are bound by their own pleadings. In the instant case the appellant sought an order for stay of execution. The considerations in an application for stay of execution are different from those in respect of an application for injunction. In an application for stay the court has to be satisfied that substantial loss may result to the applicant and the application is made without unreasonable delay. The court also is required to consider whether provision of security by the applicant is necessary to ensure the due performance of the decree or order if ultimately it is found to bind the applicant. In an application for temporary injunction the age old conditions as established in the case of **Giella -vs- Cassman Brown Co. Ltd [1973] E. A 358** must be satisfied before an injunction is granted. The applicant must demonstrate a prima facie case with a probability of success; that damages would not be an adequate remedy; and/or that the balance of convenience tilts in favour of granting the injunction having regard to all the circumstances.

13. I have held that an order of stay would be inapplicable in the present case as there is nothing to stay. As regards the grant of an order of

temporary injunction, I have stated that the same was not prayed for and the court will ordinarily not grant a party an order that was never sought. The response that the respondent made was in regard to an application for stay of execution and not for an injunction. It would be prejudicial to the respondent if the court was to, on its own motion, amend the applicant's application to include a prayer for injunction.

14. Nonetheless, even if a prayer for injunction had been made by the applicant, the court would not have been in a position to grant the same as there was omission of crucial relevant materials that the court would have needed to evaluate. The ruling sought to be appealed from was not annexed; the pleadings in the lower court were not equally annexed; and neither was the lease agreement between the parties which was the genesis of the dispute between the appellant and the respondent. The application for injunction was therefore bound to fail on account of material non-disclosure.

15. For all the above reasons, it is my view that the appellant's application dated 23rd September 2018 lacks any merit and the same is for dismissal. I order the same dismissed with costs to the respondent.

16. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 16TH DAY of NOVEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Kebero for the applicant/appellant

Mr. Ochwangi for the respondent

Ruth Court assistant

J. M. MUTUNGI

JUDGE