



**Dewdrop Enterprises Limited v Etindi & another (Civil Application
148 of 2019) [2022] KECA 73 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 73 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 148 OF 2019
RN NAMBUYE, J MOHAMMED & S OLE KANTAI, JJA
FEBRUARY 4, 2022**

BETWEEN

DEWDROP ENTERPRISES LIMITED APPLICANT

AND

MARTIN BRIGHT ETINDI 1ST RESPONDENT

**THE CHIEF MAGISTRATE'S COURT MILIMANI COMMERCIAL
COURT 2ND RESPONDENT**

*(Being an application for injunction pending the determination of an
intended appeal from the judgment of the High Court at Kajiado (R.
Nyakundi, J.) dated 17th February, 2019 in Petition No. 13 of 2018)*

RULING

1. Background

Before us is a notice of motion dated 13th May, 2019, in which Dewdrop Enterprises Limited (the applicant) seeks orders in the main: -

- a. That this Court be pleased to issue an injunction compelling Martin Bright Etindi (the 1st respondent) to provide the applicant with a copy of his replying affidavit that was filed on 7th December, 2018 at the High Court in Kajiado, Petition No.13 of 2018 (the Petition).
- b. That this Court be pleased to issue a temporary injunction restraining the 1st respondent from committing and/or continuing breach of the tenancy agreement dated 15th November, 2016 pending the hearing and determination of the intended appeal; and
- c. That the costs of the application abide the outcome of the intended appeal.



2. The application is brought under Articles 20(4), 35(1), 35(2), 40(1), 47, 50, 159(2) & 259(1) of the *Constitution* and Rules 5 (2) (b) and 45(1) of the *Court of Appeal Rules* (this Court's Rules). The Chief Magistrate's Court at Milimani Commercial Court is the 2nd respondent herein.
3. A brief background to the application is that the applicant and the 1st respondent duly entered and executed a tenancy agreement. The applicant is the registered proprietor of House No. OP23 Ongata Rongai on L.R No. NGONG/NGONG/8233, (the suit property) while the 1st respondent is a tenant therein. A dispute arose between the applicant and the 1st respondent regarding payment of rent. The applicant filed a Petition in the High Court alleging inter alia that the 1st respondent breached the tenancy agreement by failing to pay rent as per the agreement. The 1st respondent opposed the Petition by way of a replying affidavit and submissions. The tenancy agreement stipulated inter alia that the 1st respondent would pay a basic monthly rent of Kshs 20,000.00 per month.
4. The grounds upon which the notice of motion is based are inter alia: that the 1st respondent filed a replying affidavit in the Petition; that the replying affidavit has not been served upon the applicant and as such it was denied a fair hearing in the Petition; that the 1st respondent continues to illegally deprive the applicant of the use and enjoyment (ownership) of rental income from the suit property; that the applicant has an arguable appeal; that the application has been made without unreasonable delay; that the applicant stands to suffer substantial and irreparable loss unless this application is allowed; and that this application and the intended appeal shall be rendered nugatory in the event that interlocutory orders are not issued in the first instance.
5. On 17th February, 2019, the High Court (R. Nyakundi, J.) dismissed the Petition with no order as to costs. Aggrieved, the applicant lodged a notice of appeal and the instant application supported by the affidavit of its Managing Director, Mr. Edward Thiong'o Wachira in which he reiterated the grounds on the face of the application
6. The respondents did not file any response to the application or written submissions despite service.

Submissions by Counsel

7. The application was heard by way of written submissions. The applicant filed its written submissions and submitted that it is entitled to be supplied with the respondent's replying affidavit by dint of Articles 35(1)(b) & 35(2) of the Constitution; that the uncontroverted evidence before this Court shows that the 1st respondent is in breach of the tenancy agreement dated 15th November, 2016 and has used fraudulent means to deprive the applicant of rental income; that it has an arguable appeal as spelt out in its draft memorandum of appeal on grounds inter alia that the learned Judge erred: in failing to ensure that the applicant was duly served with the 1st respondent's replying affidavit before setting a ruling date; in denying the applicant an opportunity to be heard and to cross-examine the 1st respondent; in failing to find that the 2nd respondent did not give the applicant an opportunity to be heard; and in failing to find that the 1st respondent being in possession of the suit property and not paying rent since December, 2017 contravened the applicant's right to own property in the form of rent and to use and enjoy the suit property.

Determination

8. We have considered the application, the grounds thereof, the supporting affidavits, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
9. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in *Trust Bank Limited and Another*



v. Investech Bank Limited and 3 Others [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

10. The applicant’s motion is brought inter alia under Rule 5(2)(b) of this Court’s Rules. Rule 5(2)(b) of this Court’s Rules which guides this Court in applications of this nature provides as follows;

“5(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

(a)...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

11. In the impugned ruling, the learned Judge dismissed the Petition in the following terms:

“The two orders on injunction and award of general damages sought by the petitioner are distinct in form and cannot be given or be subject to judicial review jurisdiction. It follows therefore that this court will not make any declaration in respect of these two reliefs. Therefore the petition must fall flat on its face with no order as to costs.”

12. In the instant application, the applicant seeks an injunction to compel the 1st respondent to provide a copy of the replying affidavit filed in the High Court. The applicant also seeks a temporary injunction restraining the 1st respondent from committing and/or continuing breach of the tenancy agreement.

13. In Equity Bank Limited vs. Mbo Limited [2013] eKLR, Githinji, J.A stated as follows:

“It is evident that it is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”.

The learned Judge further remarked as follows (paragraph 56):

“I do not think that it was the intention of the drafters of the Constitution to fling open the doors of this Court to all manner of decisions from the High Court. That would unnecessarily clog the Court system”. A filtering mechanism to control matters that go to an appellate Court is necessary” [emphasis supplied].

14. In Devani and 4 Others vs. Joseph Ngindari & 3 Others, Civil Application No. Nai. 136 of 2004, (unreported), this Court stated as follows:

“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application. This court



cannot undo at this stage what the superior court has done. It can only do so after hearing the appeal.”

15. In the instant application, the impugned judgment and order of 17th February, 2019 dismissed the Petition with no order as to costs. The order did not therefore grant the respondents any relief.
16. In the circumstances, there is no judgment in favour of the respondents which is capable of enforcement by way of injunction as sought. The applicant has therefore failed to establish the twin principles for consideration in an application under Rule 5(2)(b) of this Court’s Rules to grant an order of injunction.
17. The upshot is that the application dated 13th May, 2019 is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

