



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), SICHALE & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. E8 OF 2020

BETWEEN

HEDWIG- HIRT MITTERLERLEHNER ULRICH.....APPLICANT

AND

HENDRICK SPIN.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of the intended appeal against the judgment of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) delivered on 30th September, 2020

in

ELC Case No. 293 of 2019)

RULING OF THE COURT

The dispute herein involved a parcel of land known as CR. NO. 15140/1/425/Section III/ Mainland North which was leased to the applicant by the respondent by a lease dated 10th February, 2003 for a period of 10 years at an annual rent of 1500 euros. According to the applicant, one of the significant terms therein was that upon expiry of the lease period, the respondent would give her first priority to purchase the suit premises should he wish to sell the same; that in the alternative, the respondent would compensate her for all the developments undertaken thereon; that the respondent however, reneged on that term causing her to file the above mentioned suit in which she sought *inter alia*, a mandatory injunction to compel the respondent to sell the suit premises to her; and a permanent injunction to restrain the respondent from evicting her and/or in any other way interfering with her tenancy.

In his defence, the respondent insisted that the applicant was in rent arrears summing up to 11,460 euros; that at no time was there an agreement that the applicant would have first priority to purchase the suit premises because he did not intend to sell the property; and that the developments on the property were undertaken by the respondent in contravention of the terms of the head lease and without his consent. In addition, and based on the expiration of the lease, the respondent also counter-claimed for vacant possession and *mesne* profits.

Munyao Sila, J., on 30th September, 2020 entered judgment in favour of the respondent and dismissed the applicant's suit. The learned Judge found that the suit was incompetent for the reason that the verifying affidavit in support of the plaintiff, which commenced the suit, had not been executed by the applicant; that nonetheless, by virtue of **Section 3 (3)** of the Law of Contract Act, the lease in issue could not be enforced as it had equally not been executed by the applicant; that the applicant was in rent arrears; and that she had continued in possession of the suit premises after the effluxion of the lease entitling the respondent to *mesne* profits.

As such, the applicant was ordered to give vacant possession within 14 days and in default, the respondent was at liberty to evict her.

Aggrieved by that decision and having evinced her intention to challenge the same in this Court, the applicant has brought a motion under **Rule 5(2)(b)** of this Court's Rules praying for stay of execution of the impugned judgment. The basis of her motion is that the intended appeal raises arguable issues, as set out in the draft memorandum of appeal annexed to the motion; that the learned Judge failed to appreciate that the irregularity identified in the verifying affidavit was cured by a subsequent one which was filed with the amended plaint; that **Article 159(3)** of the Constitution called for the administration of justice without undue regard to technicalities; and that her eviction would render the intended appeal academic.

On his part, the respondent is adamant that the intended appeal does not raise any viable ground; and that an order of stay, if granted would

allow the applicant to continue in occupation of the suit premises for free to his detriment.

The applicant is required to satisfy this Court that the intended appeal is not frivolous; and that if the stay sought is not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See **Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd.** [2002] 1 EA 227.

Being mindful not to make any determinations on the merits of the intended appeal, we do not think that the same is arguable. Firstly, apart from the procedural lapses, the learned Judge also made findings on the substantive issues; and secondly,

it is common ground that the lease which was the basis of the applicant's occupation of the suit premises expired in the year 2013.

Besides, the respondent argued that the applicant has continued occupying the suit premises without making any rent payment, a fact which she has not disputed. All these are factors that we take into account and they confirm that an order of stay will be prejudicial to the respondent. Therefore, having come before this Court with unclean hands, the applicant is not deserving of the discretionary orders sought. See **Patrick Mukiri Kabundu vs. Miliki Limited** [2016] eKLR.

Accordingly, this motion lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR