



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. NAL. 332 of 2018 (UR 269 of 2018)

BETWEEN

EQUIP AGENCIES LIMITED.....1st APPLICANT

INTERTRACTOR COMPANY.....3rd APPLICANT

COFTEA MACHINERY SERVICES LIMITED.....4th APPLICANT

INTERMART MANUFACTURERS LIMITED.....5th APPLICANT

KIPKELION CORNER LIMITED.....6th APPLICANT

UNICORN LIMITED.....7th APPLICANT

AND

PHOENIX PROPERTIES LIMITED.....RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment and Land Court at Milimani (K. Bor J.) dated 30th August 2018 in ELC Suit No. 287 of 2005)

RULING OF THE COURT

1. The respondent, **Phoenix Properties Limited**, is the registered proprietor of **Nairobi LR No. 209/9722** (hereinafter referred to as the suit property). The respondent leased the suit property to the applicants for a term of six years from 1st November 1998; the applicants took possession and the tenancy was to expire on 31st October 2004.
2. In 2005, the respondent filed a suit seeking vacant possession of the demised property and eviction on the ground that the applicants had failed to pay rent arrears then outstanding at Ksh. 23,699,000/= plus interest thereon together with mesne profits of Ksh. 900, 000/= per month.
3. Upon hearing the parties, the trial court in a judgment dated 30th August 2018 granted an order for vacant possession and eviction of the applicants. An order was also issued for the applicants to pay Ksh, 23,699,000/= plus interest thereon at court rates and mesne profits of Ksh. 900,000/= per month from 1st November 2004 until vacant possession is handed over to the respondent.
4. By Notice of Motion dated 15th November 2018, the applicant has moved to this Court seeking stay of the judgment and decree pending hearing and determination of an intended appeal. The application for stay is supported by an affidavit dated 15th November 2018 deposed by **Mr. Divyesh Kumar Indubhai Patel**. The grounds urged in support thereof are that the intended appeal is arguable and will be rendered nugatory if stay is not granted; that the judge erred in hearing the suit in its entirety in disregard of a pending Chamber Summons Application dated 15th November 2005; the said Chamber application sought leave to amend the defence and introduce a counterclaim; the judge ignored the Chamber application despite efforts to have the application listed for hearing; the applicants stand imminent risk of eviction and being thrown out of the suit property and that the monetary aspects of the judgment and decree is colossal whose payment will practically drive the applicants out of business.

5. In opposing the application, the respondent filed a replying affidavit dated 18th December 2018 deposed by **Mr. Kamaljeet Singh Matharu**. It was urged that the intended appeal shall not be rendered nugatory if stay is not granted; that there is no defence to the claim for rent arrears; the alleged pending Chamber Summons application was compromised by the full hearing of the dispute between the parties which was heard and determined; there was no claim or suit for counterclaim pending before the trial court and that the applicants have been in rent arrear since 2002.

6. At the hearing of the instant application, learned counsel, **Mr. Odera Obar**, appeared for the applicants while learned counsel, **Mr. Ochieng Oduol**, appeared for the respondent. Both parties filed list of authorities.

7. Counsel for the applicants repeated the grounds in support of the application as stated on the face thereof and deposed in the supporting affidavit. It was urged that the intended appeal is arguable to the extent that the trial court ignored a Chamber Summons application that was pending before the court; that in the pending application, the applicants were seeking leave to amend their statement of defence and include a counterclaim against the respondent; that by ignoring the pending application, the applicant's prospects of lodging a counterclaim was defeated and this is a miscarriage of justice; that the applicants' counterclaim is founded on an illegal attachment and sale of the applicants' properties by the respondent; that the applicants have a genuine counterclaim and right of set off against any claim for rent arrears by the respondent, and that the trial court erred in concluding the hearing and ignoring the pending application to amend the defence and include a counterclaim. The applicants submitted that if stay is not granted; they will be evicted from the suit property and the intended appeal shall be rendered nugatory.

8. The respondent in opposing the instant application submitted that the applicants have never paid rent since 2002; the applicants are under a contractual duty to pay rent on the demised premises and yield vacant possession to the respondent; that presently, the intended appeal shall not be rendered nugatory as there is no risk of execution against the applicants as costs of the suit are yet to be taxed and the decree is yet to be settled, signed and sealed; that the applicants have stayed on the suit premises for more than 15 years since May 2002 without paying a single cent as rent; the respondent has been kept away from its property with no rent, mesne profits and no step has been taken by the applicants to pay the outstanding rent; the applicants are abusing the court process by making an application for stay to deny the respondent the fruits of its judgment; the applicants have behaved inequitably and are not entitled to an order for stay and that in the event this Court is inclined to grant stay, the applicant should be ordered to provide a Bank Guarantee for the total sum of Ksh. 223,402,288/= (comprising the decretal sum of Ksh. 23,699,000/= plus interest thereof of Ksh. 46,703,288/=; and mesne profits from 1st November 2004 to 31st December 2018).

9. We have considered the Notice of Motion dated 15th November 2018, the grounds in support and opposition thereof, submissions by both counsel and the authorities cited. In **Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others**, Civil Application No. NAI 31/2012; this Court remarked:

“[I]n dealing with Rule (5) (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge's discretion to this Court”

10. In **Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others** [2013] eKLR it was stated:

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

11. In an application under **Rule 5 (2) (b)**, we must be satisfied of the twin guiding principles that the intended appeal is arguable; is not frivolous and unless stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – [2002] 1 EA 227**.

12. In this matter, the applicants contend that the trial court ignored a pending Chamber Summons application and proceeded with full hearing of the suit; that the pending application was for leave to amend the Statement of Defence and introduce a counterclaim and that by ignoring the Chamber Summons, the applicants' prospect of lodging a counterclaim was defeated thereby occasioning an injustice. The respondent on its part contends that the pending Chamber Summons application was compromised and dispensed with when full hearing was conducted; that in any event, the applicant has never paid rent since 2002.

13. No orders were sought and urged against the trial judge proceeding with the hearing of the matter. Again, we have not been informed what steps the applicants took to remedy its cause of action. We are not aware as we have not been informed of any law or procedure that stops a trial court from proceeding with the hearing and conclusion of the dispute, whilst a pending application exists on the file. We have been told why the application was not prosecuted.

14. On nugatory aspects, we observe that the intended counter-claim is a separate suit by itself. It is not in dispute that in this matter there was no counterclaim on record either before the trial court or this Court; a counterclaim is an independent cause of action and subject to the law on limitation of actions, therefore our pre-emptory view is that the intended counter-claim is not an arguable point.

15. The applicants contend that the intended appeal shall be rendered nugatory if they are evicted from the suit premises; that the judgment sum is colossal and payment thereof will drive the applicant out of business. The applicants conceded that they have not been paying rent for the suit property since 2005; conversely, the respondent assert that rent has not been paid since 2002. Whatever the year, it is not in dispute

that the applicants have not been paying rent for a period in excess of 10 years. We have agonized whether the intended appeal shall be rendered nugatory if stay order is granted to the applicant to continue being in possession of the suit property without paying any rent. The applicants, having conceded they have not been paying rent, we are neither satisfied nor convinced that the intended appeal shall be rendered nugatory on the basis that a counterclaim had not been lodged or that the judgment sum is colossal. For the reason that the applicant has not been paying rent for the demised premises, we are satisfied that this is one of those cases where a party should not be denied the fruits of its judgment.

16. For the foregoing reasons, we come to the conclusion that the Notice of Motion dated 15th November 2018 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of January, 2019

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR