IN THE COURT OF APPEAL

AT MOMBASA

(CORAM, VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPLICATION NO. 49 OF 2018

BETWEEN

TECHNO HOLDINGS LIMITED.....1ST APPLICANT

MAHBOOB ABDUL AZIZ

T/A SEKAI CAR SALES LIMITED.....2ND APPLICANT

LE MISBAH CAFÉ..... 3RD APPLICANT

BAIG & SONS TRADING COMPANY LIMITED.....4TH APPLICANT

DAKANE SHEIKH MOHAMMED.....5TH APPLICANT

AND

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES.....RESPONDENT

(An application for an injunction pending the lodging, hearing and determination of an intended appeal from the ruling of the Environment and Land Court at Mombasa (Komingoi, J.) dated 10th April, 2018

in

***E.L.C No. 377 of 2017.*)**

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RULING OF THE COURT

1. Before us is an application anchored under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules*** (the Rules) wherein the applicants seek:

> ***An injunction restraining the respondent whether by itself, its servants, its agents and/or any person claiming under it from levying distress against the applicants or interfering with the applicants quiet and peaceful possession of L.R No. Mombasa/ Block XX/328/329 pending the lodging hearing and determination of an intended appeal against the ruling dated 10th April, 2018 in E.L.C No. 377 of 2017.***

2. The salient facts which gave rise to the said application are that by a lease dated 1st August, 2010, the respondent leased out the suit premises also known as **Hazina Plaza** to the 1st applicant. The amount and mode of payment of rent was set out in the said lease. It was also a term of the said lease that the 1st applicant was granted a grace period of two years not to pay rent while undertaking renovation of the suit premises. Nevertheless, this was not possible since the suit premises was not vacant thus, the grace period was extended. By mutual consent, the two agreed that the 1st applicant would commence paying rent from January, 2017. It is instructive to note that the 1st applicant sub-let the suit premises to the 2nd, 3rd, 4th and 5th applicants (sub-leasees).

3. Thereafter, the respondent served the 1st applicant with an invoice dated 27th February, 2017 demanding Kshs.7,830,000 as rent for the first quarter. The 1st applicant disputed the amount and communicated as much to the respondent. The 1st applicant sought to engage the respondent on the said demand without any success. Vide a letter dated 29th June, 2017 the respondent made a further demand for rent in respect of the second quarter. Subsequently, the respondent instructed Dimekwa Auctioneers to levy distress on account of the alleged rent arrears. In carrying out the respondent's instructions, the said auctioneers proclaimed goods belonging to the sub-leasees.

4. That state of affairs prompted the applicants to file suit at the Environment and Land Court (ELC) being E.L.C No. 377 of 2017 praying for several orders. Contemporaneously, the applicants also filed an application seeking similar interim reliefs as in the current application. However, the interlocutory application was dismissed by the ELC (**Komingoi, J.)** on 10th April, 2018. It is in regard to this decision that the applicants filed a notice of appeal signifying their intention to appeal against the same.

5. Turning back to the application at hand, it is premised on grounds that firstly, the intended appeal is arguable. In that, as per the lease agreement any dispute between the 1st applicant and respondent was to be resolved through arbitration. Therefore, the respondent in instructing the auctioneer to levy distress breached the lease agreement. The goods proclaimed belong to the sub-leasees and the 1st applicant has no legal or beneficiary interest over the same. As a result, the purported distress was irregular and illegal. Secondly, that in the event the injunction is not granted, the substratum of the intended appeal will be lost because it highly likely that the proclaimed goods will be sold. Thirdly, it was in the interest of justice for the order sought to be granted.

6. In opposing the application, the respondent's Acting General Manager, Austin Ouko, deposed that the claims based on the sub-leases lacked merit since they were not privy to the lease agreement between the respondent and the 1st applicant. Any claim the sub-leasees had could only be maintained as against the 1st applicant. Besides, the lease explicitly prohibited sub-leasing of the suit premises without the respondent's consent. No such consent was obtained from the respondent. The 1st applicant as a tenant is under an obligation to pay rent when and as it accrued. The 1st applicant has never made any payment towards rent which stood at Kshs.46,980,000 inclusive of Value Added Tax as at June, 2018. Consequently, the respondent was within its rights to levy distress for rent owing. Furthermore, that the balance of convenience titled in the respondent's favour.

7. In her address to us, Ms. Ali, learned counsel for the applicants, reiterated the grounds in support of the application. She contended that the learned Judge had made final determinations in the impugned ruling. She also refuted the claim that the respondent was not aware of the sub-leasees and that the 1st applicant had not made any payment towards rent.

8. On his part, Mr. Wafula, learned counsel for the respondent, argued that the applicants were not entitled to the injunction sought for the reason that the 1st applicant had not paid any rent. He went on to add that rent must be paid by a tenant; if the 1st applicant paid the outstanding rent, the respondent would have no basis of levying distress.

9. We have considered the application, submissions by counsel and the law. whenever we are faced with an application under ***Rule 5(2)(b)***, such as in this case, we have to satisfy ourselves that the applicants have demonstrated that they have an arguable appeal or an appeal that is not frivolous, and also that if the orders sought are 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***.The applicants are obliged to satisfy both of those principles; it is not enough to satisfy only one of them. See ***Peter Paul Mburu Ndururi vs. James Macharia Njore [2009] eKLR.***

10. Applying the foregoing principles to the circumstances of this case, we find that the applicants have not demonstrated that the intended appeal is arguable. This is because it is not in dispute that the 1st applicant has not even paid the amount it admits as owing as rent. The applicants' counsel admitted as much. Therefore, the respondent as the landlord was entitled to levy distress to recover the outstanding rent. Having failed to satisfy the first principle, we find that there is no need to delve into the second principle since both principles have to be established for an order under ***Rule 5(2)(b)*** to issue.

11. The upshot of the foregoing is that this application lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 12th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR