REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPLICATION NO. 236 OF 2016 (UR 188/2016)

BETWEEN

BESTLADY COSMETICS SHOP LIMITED ……...….1ST APPELLANT

DANIEL MUNYAKA……...2ND APPELLANT

DAVID KIRIMI t/a KINYANJUI KIRIMI & CO. ADVOCATES…..3RD APPELLANT

AND

LEAH WANGECHI GIOCHE …….....…RESPONDENT

*(An application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (**Sergon, J**) delivered and made on 29th September, 2016*

in

HC Misc. Application No. 238 of 2015)

****

RULING OF THE COURT

There are three applicants – a limited liability company called **Bestlady Cosmetics Shop Limited** *("1st applicant");* its director or manager **Daniel Munyaka** *("2nd applicant")* and an advocate of the High Court of Kenya **David Kirimi** trading as Kinyanjui Kirimi and company advocates *("3rd applicant").* The proceedings in the High Court of Kenya and other proceedings at the Business Premises Rent Tribunal show, amongst other things, that the 3rd applicant acted at first as advocate for the 1st and 2nd applicants but was in the course of the proceedings roped in and became a party to the proceedings – he continued to act for those parties as their advocate but also acted in person for himself when he became a party to the proceedings.

The record shows a multiplicity of applications filed both in the High Court and at the said Tribunal. It will not be necessary for us to visit or review all of them because our duty at this stage where we are asked to stay proceedings in the High Court is to consider and find whether the applicants have an

arguable appeal, and if so, whether the same would be rendered nugatory absent stay.

A brief rendition of facts shows that the 1st applicant, being the owner of premises erected on Plot No. 209/785/30 at Ronald Ngala Street, Nairobi, issued a ***"Landlord's Notice To Terminate Or Alter Terms of a Tenancy"*** against the respondent, Leah Wangechi Gioche, dated 18th June, 2014 issued under the provisions of The **Landlord and Tenant** (**Shops, Hotels and Catering Establishments**) **Act** *("the Shops Act").* The grounds set out in the Notice were *inter alia* that the 1st applicant intended to carry out extensive renovations to the premises and to utilize the same for its own ventures which could not be undertaken with the respondent in occupation. The respondent was therefore required, in terms of the **Shops Act**, within one month of receipt of the notice, to notify the 1st applicant in writing whether she would comply with the notice. The respondent, on receipt of the notice, wrote back to the 1st applicant objecting to the notice. That objection led to two cases at the Business Premises Rent Tribunal – BPRT Case No. 517 and 554 both of 2014.

On 21st October, 2014 BPRT Case No. 554 of 2014 was before the Chairman of that Tribunal and the following order was made:

> ***"1. The tenant to continue to enjoy quiet and peaceful enjoyment of the suit premises until BPRT 517/2014 is heard and determined.***
>
> ***2. The tenant shall pay the October rent to the landlord and continue to pay her monthly rents until when BPRT 517/2014 is heard and determined.***
>
> ***3. The issue as to whether the tenant has vacated and sublet the premises to be dealt with in BPRT 517/2014.***
>
> ***4. The costs of this complaint to abide the outcome of BPRT 517/2014.***
>
> ***5. Mention for taking hearing date in BPRT 517/2014 on 31st October, 2014."***

That is to say that the respondent was granted an order to enjoy quiet possession of the premises she occupied; to continue paying rent and that status was to remain until BPRT Case No. 517 of 2014 was heard and determined.

The 1st applicant changed tack. On 10th November, 2014, that is about 20 days after the said orders had been issued by the Tribunal, an *ex-parte* application was filed at the Chief Magistrate's Court, Milimani, Nairobi under Certificate of Urgency (CM Misc. Application No. 1065 of 2014) where it was prayed in the main that the 1st applicant be granted a break-in order to remove the respondent from the said premises. It was also prayed that the order, when issued, be executed under supervision of the Officer Commanding Station, Kamukunji Police Station, and break in be undertaken by Moran Auctioneers. That application was heard *ex-parte* by T. S. Nchoe (Mr.), Acting Senior Resident Magistrate, who granted all the orders sought.

By Notice of Motion filed on 5th December, 2014 the respondent moved the court for setting aside, vacation or discharge of those *ex-parte* orders but that was water under the bridge as the 1st applicant, armed with the said *ex-parte* order, and with the aid of police and the auctioneer had evicted the respondent from the premises.

The ongoing drama now moved to the High Court. The respondent, by Notice of Motion in High Court Miscellaneous Application No. 238 of 2015 prayed that the applicants be committed to civil jail for contempt of the orders of the Tribunal set out in this ruling. This Motion was strenuously opposed and going by the language in some of the affidavits the advocate for the respondent and the 3rd applicant had allowed their emotions to take over from the better judgment that should always remain the professional duty of an advocate to maintain. But let us not digress; let us focus on what is before us.

J. K. Sergon, J was persuaded that the respondent had shown a *prima facie* case for contempt of court

proceedings to be commenced and he issued appropriate leave by a ruling delivered on 4th November, 2015. The said judge heard the application for contempt of court and found that orders of the Tribunal were issued in the presence of the 3rd applicant and for those and other reasons he found all the 3 applicants guilty of contempt of court orders and ordered the applicants to offer mitigation to allow the learned judge to pronounce appropriate sentence.

That, we hope, is a fair history of the matter before those courts and that is what has led the applicants to come to us under **sections 3A** and **3B** of the **Appellate Jurisdiction Act, Rules 5(2) (b), 42** and **47** of the **Court of Appeal Rules, 2010** where we are asked in the main, to order a stay of any further proceedings and especially the orders issued on 29th September, 2016 and any other proceedings in HC Misc. Appln. No. 238 of 2015 pending hearing of an intended appeal. It is argued in the grounds in support of the Motion, and in the affidavit of the 3rd applicant, that the applicants stand to suffer extreme prejudice, loss and damage if the High Court proceeds to sentence them as convicted.

Mr. Makokha, learned counsel for the applicants in submissions before us on 29th November, 2016 faulted the learned judge for convicting the applicants who, according to counsel, were not parties to the proceedings before the Tribunal and that those orders were not directed at the 2nd and 3rd applicants. Learned counsel also questions why the 2nd applicant is convicted when it is not shown that he is the only director who made a decision on behalf of the 1st applicant to evict the respondent and learned counsel also questions conviction of the 3rd applicant. Learned counsel feared that if stay was not granted the applicants could be jailed and that would render the intended appeal nugatory.

Miss P. Wangechi Waitere, learned counsel for the respondent, did not agree. According to learned counsel the motion before us was speculative in that the applicants had been convicted but no sentence had been meted out and thus applicants should await sentence and thereafter approach the court if dissatisfied with the sentence. In further submissions Miss Waitere pointed out that the 2nd respondent was a proper party in the contempt proceedings because he had sworn all affidavits on behalf of the 1st applicant where he had declared that he had authority to act and swear affidavits on behalf of the 1st applicant. Of the 3rd applicant, learned counsel submitted that the 3rd applicant was present in court in person when the Tribunal issued the orders and that it was he (the 3rd applicant) who thereafter filed ex-parte proceedings before the Chief Magistrate's court and obtained orders that led to eviction of the respondent from the demised premises. Further, that after being made a party to the proceedings at the High Court the 3rd applicant chose to act for himself as a party and also wore the hat of advocate for the 1st and 2nd applicants, a position learned counsel for the respondents thought was untenable.

Have considered the Motion, the affidavits in support and opposition thereof, the rival submissions, the draft memorandum of appeal and the relevant law and take the following view of the matter.

As already stated, and it is now trite law in this country, an applicant, to succeed in an application for stay of execution pending appeal has to satisfy us, firstly, that the appeal, or intended appeal, as the case may be, is arguable, which is also to say that it is not frivolous. Such an applicant, if they overcome that hurdle, has the added duty of showing that the appeal, or intended appeal, would be rendered nugatory absent stay.

Have the applicants made out a case to show that the intended appeal is arguable?

As we have shown in this ruling the order granted by the Tribunal on 21st October, 2014 was granted after advocates for the 1st applicant and the respondent had been heard and were present in court. That order preserved a status quo where the respondent was to remain in possession of disputed premises ***"--- until BPRT 517/2014 is heard and determined."*** The advocate for the 1st applicant, or the other applicants, did not go back to that Tribunal to challenge that order but instead sneaked to the Chief Magistrate's court and apparently without disclosing all material facts including the fact of preservation of status quo by that Tribunal pending hearing and determination of a reference, obtained ex-parte orders which, in effect, led to eviction of the respondent contrary to existing orders of the Tribunal. The 2nd applicant swore all the affidavits in support of all applications made on behalf of the 1st applicant including that in support of the ex-parte application that resulted in the eviction of the respondent while it

was the 3rd applicant who moved the Chief Magistrate's court well knowing that the Tribunal had issued orders, orders which were issued in his presence. We do not, on all these material, find any arguable point in the intended appeal by the applicants. It would appear that the applicants acted in flagrant abuse of court process and misled the magistrate to issue orders which in effect overturned the status quo granted and maintained by the Tribunal. Those matters will finally be determined by the bench that will hear the intended appeal so let us not make further comment. Having found that there is no arguable appeal it will not be necessary for us to consider the 2nd limb – whether the intended appeal would be rendered nugatory.

The Motion fails and is dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 24th day of February, 2017.

W. KARANJA

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JUDGE OF APPEAL

F. AZANGALALA

……..……

JUDGE OF APPEAL

S. ole KANTAI

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR