IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO, M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 35 OF 2016 (UR 26/2016)

BETWEEN

PATRICK MUKIRI KABUNDU…….…… APPLICANT

AND

MILIKI LIMITED……..……..…… RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Mombasa (Otieno, J.)

in Civil Suit No. 126 of 2014 consolidated with Misc. Civil Appl. No. 149 & 151.)

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RULING OF THE COURT

Sometime in 2012, the applicant, **Patrick Mukiri Kabundu**, took over, as a going concern, a bar and restaurant business from a firm known as Seafront Entertainment Limited. The business was and still is located on **subdivision No. 1432 of section 1 Mainland North** ("*the suit premises*") and was demised to Seafront Entertainment Ltd by **Miliki Limited**, the respondent. The lease period was for five (5) years and three (3) months with agreed monthly rent of Kshs.100,000/-. It appears the relationship between the landlord and the applicant was cordial up until the lapse of the first term of the lease in December 2012. Immediately thereafter, the applicant defaulted in payment of rent and in April, 2013, the respondent issued him with eviction notice and that is when their hitherto cordial relationship hit rough and turbulent waters.

The applicant however, being a protected tenant in terms of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** ("*the Act*") sought refuge in the Business Premises Rent Tribunal ("the *Tribunal*") where he obtained orders restraining the applicant from increasing rent, levying distress and or evicting him from the suit premises. The applicant however continued to default in the payment of rent and when the rent arrears hit Kshs.2,600,000/-, the respondent took matters into its hands and forcefully evicted the applicant from the suit premises. However, on 5th August, 2014, the applicant successfully petitioned the tribunal and was allowed into the suit premises but on condition that he pays the outstanding rent. The applicant did not honour the said conditional order. This forced the respondent to seek the intervention of the High Court at Mombasa vide a plaint dated 14th October, 2014 in which it sought to regain possession of the suit premises. From this point on, the dispute assumed a long and chequered history with numerous applications and counter applications being filed by both parties,

shuffling between the tribunal and the High Court and at times contradictory orders being issued.

To stem this confusion the High Court on 25th June 2015 issued orders to the effect that the High Court suit be stayed pending the hearing and determination of the tribunal case or until further orders of the court. Tired of the applicant's antics, on 3rd July 2015, the respondent served the applicant with a formal notice dated 1st July 2015 under section 4 (2) of the Act seeking to terminate the tenancy on account of non-payment of rent. The notice period lapsed without any intimation from the applicant as required, whether he intended to comply or contest the notice by filing a reference in the tribunal. In the premises and according to the respondent, the notice took effect and the tenancy was thereby terminated.

The applicant belatedly filed in the tribunal a reference in response to the Notice of Termination of Tenancy being **Case No. 133 of 2015** on 15th September 2015. This was long after the notice had taken effect. The respondent had by then moved the High Court by an application dated 18th October, 2015 seeking orders to compel the applicant to hand over vacant possession of the suit premises. After a plenary hearing, **Otieno, J**. rendered his ruling on the said application on 6th June 2016 and ordered as follows;

> "**16. The defendant/respondent shall yield and hand over vacant possession to the plaintiff on or before the 30/6/2016 and on default the plaintiff shall be at liberty to forcefully have him evicted for which reasons the OCS Nyali police station is directed to supervise the peaceful and orderly execution of this order by the court bailiff**. "

The ruling and order is now impugned by the applicant and is the subject of the application being considered in this ruling.

The applicant seeks in the main, an injunction and a stay of execution of the aforesaid ruling and order pending the filing, hearing and determination of an intended appeal. The application is expressed to be brought pursuant to **Articles 20 (3)** and **23 (3)** of the Constitution, **Sections 3 (2)** and **3A** of the Appellate Jurisdiction Act, and **Rules 5 (2) (b)** and **101** of the Court of Appeal Rules.

The application is premised on the grounds on its face and is further supported by an affidavit sworn by the applicant. The applicant contends that there are two conflicting orders in regard to the dispute by the High Court. First are the orders of 25th June 2015 issued by **Kasango, J.** staying any further proceedings in the suit pending the determination of the tribunal case and the now impugned orders of 6th June 2016 granting the respondents vacant possession of the suit premises. Further, that there are two references before the Tribunal pending determination, being, **Tribunal Case Nos. 33 of 2013** and **133 of 2015** respectively which would in effect be rendered redundant if the stay orders now being sought are denied. The applicant has also stated that there was no express prayer for vacant possession in HCCC No. 126 of 2014 and so the order granting vacant possession of the suit premises to the respondent was issued in a vacuum and could not stand. That in any event the said orders had the effect of disposing the dispute un-procedurally. The applicant has also pleaded that he has an arguable appeal and the same would be rendered nugatory if the orders he seeks are not granted. That the impugned orders have pre-empted his right of appeal. According to the applicant, the High Court in dealing with the matter was exercising both original and appellate jurisdiction in the same cause and in the process usurped the jurisdiction of the Tribunal. The applicant also alleges that the respondent's application seeking vacant possession of the suit premises was mischievously meant to circumvent the applications before the Tribunal. Finally, he contends that he has invested a lot in the suit premises and stood to suffer substantial loss if the stay orders were not granted.

The application is opposed through an affidavit sworn by one **Josef Bruhneler**, the respondent's Managing Director. The respondent in going to the crux of the matter depones that an injunction is an equitable remedy and can only be granted to an applicant who has approached the court with clean hands. That the applicant is in rent arrears of Kshs.4, 900,000/- and therefore underserving of the remedy. He further depones that on 23rd September 2014, the Tribunal ordered the applicant to deposit with it Kshs.2,600,000/- pending the hearing and determination of the application. That amount was the rent

owing to the respondent as at that date. However the applicant failed to comply with the order and in effect the rent owing has escalated to the current figure. That the figure continues to escalate as the applicant is still in possession of the suit premises but is not paying rent. The respondent accused the applicant of using the judicial process to evade meeting his tenancy obligations. He also contends that the intended appeal has no chances of success in that the applicant failed to comply with the provisions of **Section 4 (2)** of the Act with regard to whether he intended to comply with the termination notice before the lapse of the prescribed period or file a reference. Having failed to do so, he depones that the tenancy stood terminated and invariably terminated the two cases pending before the Tribunal. This is because the substratum of the cases before the Tribunal was no longer in existence, as it had been extinguished rendering the Tribunal without jurisdiction. In the same vein and seeking to dispel the applicant's argument that the High Court was usurping the Tribunal's power, the respondent argues that the notice having taken effect there was no landlord/tenant relationship to clothe the Tribunal with jurisdiction.

During the oral hearing of the application, the applicant reiterated the grounds in support of the application as well as what he had deponed to. Suffice to add that the applicant feels that his right to a fair hearing as enshrined in **Article 50** of the Constitution would have been infringed if his appeal was not heard. He submitted that the intended appeal would be rendered nugatory if stay was not granted as he would be evicted from the suit premises.

In opposing the application, **Mr. Bwire,** teaming up with **Mr. Wamaya** learned counsel for the respondent, similarly reiterated what the respondent had deponed in its replying affidavit. However they emphasized that there was no arguable appeal as there was no longer landlord/tenant relationship between the applicant and respondent. That the issue of jurisdiction had been raised by the applicant before Lady Justice Kasango and the learned Judge dealt with it in her orders dated 26th February 2015. Counsel submitted that the applicant did not challenge those orders in any way and they were still in force. In any case, counsel argued the said orders were issued till the conclusion of the Tribunal case or until further orders of the High Court. Counsel contended that the applicant was now a trespasser in the suit premises after lapse of the tenancy termination notice and could not claim that he stood to suffer substantial loss.

The issue for determination in this application is not as complex as the applicant would have this Court believe from his many arguments. For the applicant to succeed in the present application the onus is on him to satisfy two conditions; that he has an arguable appeal and that if the stay orders sought were not granted, the intended appeal would be rendered nugatory. This Court in the case of **Star Transport Co. Ltd v Ali Mwinyi Mvita [2016] eKLR** explained the application of the two conditions as follows:-

> "**To obtain the order of stay of execution, the applicant is obliged to satisfy us that the intended appeal is arguable and that unless we order stay of execution, that appeal will be rendered nugatory. (See** Ishmael Kagunyi Thande v. Housing Finance Co. of Kenya Ltd (Civil Application No. Nai. 157 of 2006). **The applicant is obliged to satisfy both of those conditions; satisfying only one will not suffice. (See** Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA No. 314 of 2007).
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> **In an application under rule 5(2)(b), we must refrain from making any definitive findings on the issues in dispute, for that is the province of the Court when hearing the substantive appeal (See** Njuguna S. Ndungu v. EACC & 3 Others, CA. No. Nai. 304 of 2014**)…… We remind ourselves that indeed an arguable appeal is not one, which must necessarily succeed. It is simply an appeal, which raises even a single *bona fide* issue that deserves to be fully considered by this Court** (See **Kenya Railways Corporation v. Edermann Properties Ltd, CA. No. Nai. 176 of 2012*).***
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> **The crux of the application is whether if the intended appeal succeeds, it will be rendered nugatory. Whether or not a successful appeal will be rendered nugatory depends on the circumstances of each case. The primary consideration is whether, if what is sought to be stayed were to happen, it is reversible and if not whether the applicant can be adequately compensated by damages. (See** Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others, CA. No.

31 0f 2012**)."**

In his bid to satisfy the Court that he has an arguable appeal, the applicant has attached to his application the draft Memorandum of Appeal. In that draft, it is evident that the salient features on which he intends to base his appeal are in summary:-

1. Jurisdiction of the High Court over this matter

2. Conflicting High Court orders

3. The two pending cases before the Tribunal

4. Breach of the applicant's right to fair trial

5. Lack of prayer by the respondent for vacant possession in the main suit

To our mind, these are not *mundane* or frivolous grounds. We therefore have no hesitation whatsoever in holding that the intended appeal will be arguable.

Will the intended appeal however be rendered nugatory if the stay orders now sought are denied? The applicant's contention is that if the stay orders are not granted, he stands to suffer substantial loss of over Kshs.3,000,000/- as he would be evicted. He did not however allege or demonstrate that the respondent would be unable to compensate him for his investments on the suit premises or would be unable to adequately pay him any damages as may be ordered. In any event the applicant owes the respondent Kshs.4,900,000/- which is not disputed. So what is Kshs.3,000,000/- compared to Kshs.4,900,000/-?. In our view, if the stay orders are not granted, the appeal will not necessarily be rendered nugatory. The applicant can seek to be reinstated back into the suit premises. It has not been argued in the course of this application that the respondent intends to alienate the suit premises beyond the reach of the applicant in one way or another.

This Court must also be alive to the nature of the orders sought by the applicant. Stay of execution and or injunctive orders are by their very nature discretionary and equitable. For this Court to grant the applicant those reliefs, it must be satisfied that the applicant has come to equity with clean hands in line with the maxim that '*he who comes to equity must come with clean hands'*. The applicant has conceded that he is in rent arrears. The respondent maintains that the applicant has not paid rent from January 2013 and currently owes it Kshs.4,900,000/- in rent arrears. These assertions have not been dispelled by the applicant. Indeed in his reply to the respondent's submissions, the applicant readily concedes to that fact. No evidence is discernable from the record nor did he offer in his submissions clear indication whether he intends to pay the arrears. Even when on 23rd September 2014, the Tribunal ordered the applicant to deposit Kshs.2,600,000/- then owed to the respondent with it pending the determination of the case before it, the applicant failed to comply.

Can equity, which is based on fairness, come to the aid of the applicant? In our view, by not meeting his rent obligations for more than 43 months now it is unfair to the respondent who has obviously been denied the property rights it is entitled to under the Constitution and as the landlord. The applicant's conduct is prejudicial to the respondent and renders him undeserving of the orders he seeks. In **John Musyoka Musembi (Suing as the legal representative of the estate of Nashon Musembi Musomba (Deceased) v Henry Muli Kisenga [2015] eKLR**), it was held:

> **"….the appellant does not have clean hands, and therefore is not entitled to the equitable remedy he seeks. Discretionary remedies such as injunctions cannot be used to perpetuate deceit and injustice."**

This application fails and is accordingly dismissed with costs to the respondent.

Made and dated at Malindi this 30th day of September, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL