



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CIVIL APPLICATION NO. 9 OF 2015 (UR 6/15)**

**BETWEEN**

**JAMES TITUS KISIA.....APPLICANT**

**AND**

**SAID MAJID SAID.....RESPONDENT**

***(An application for stay of execution of the ruling and order of the High Court of Kenya at Mombasa, (Kasango, J.) dated 5<sup>th</sup> March 2015***

***in***

***HCCC No. 149 of 2014)***

**\*\*\*\*\***

**RULING OF THE COURT**

Before us is a Motion on Notice taken out principally under **Rule 5(2) (b)** of the **Court of Appeal Rules**, by the applicant, **James Titus Kisia**, who is seeking to stay execution of the order of the High Court (**Kasango, J.**) dated **5<sup>th</sup> March 2015**. By that order, the learned judge issued among other orders, a mandatory injunction directing the applicant to forthwith and unconditionally reinstate the respondent, **Said Majid Said**, into possession of two shops on **Plot No. Mombasa/Block XVII/450** along **Jomo Kenyatta Street, Mombasa** (“**the suit property**”), pending the hearing and determination of **High Court Civil Suit No. 149 of 2014**.

The background to the application is as follows. At all material times the respondent was a tenant of the applicant on the ground floor of the suit property. He held leases for two shops for a period of 6 years each, one commencing in 2010, at a monthly rent of Kshs 30,000/-, and the other in 2013 at a monthly rent of Kshs 110,000/-. The respondent was using the premises as booking offices and storage facility for passenger luggage and parcels on transit. As the leases were not registered, the respondent contended that he was a protected tenant within the meaning of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 302**.

In October 2013 and during the currency of the leases, the applicant undertook illegal and unapproved alterations of the suit property. The unapproved development entailed erection of two additional floors. This resulted in the Town Planning authorities of the County Government of Mombasa condemning the

suit property as unsafe and unfit for occupation, whereupon the respondent and other tenants were denied access thereto and barred from using the same.

The respondent was subsequently charged under the **Physical Planning Act** and the **Public Health Act** for failure to comply with enforcement notices requiring him to vacate the suit property. While the applicant alleges that the respondent was prosecuted for undertaking the illegal alterations of the suit property himself, the respondent contends that it was the applicant who initiated the illegal alterations for the purposes of forcing him out and letting the suit property to new tenants at a higher rent.

As soon as the suit property was rendered habitable, the applicant purported to evict the respondent and to let it to third parties. On 28<sup>th</sup> November 2014 the respondent filed HCCC No 149 of 2014 in which he sought declarations that he was a protected tenant and that under the leases, he was not obliged to pay the rent for the period that the applicant had rendered the suit property inhabitable; a mandatory injunction to compel the applicant to put him back into possession and a prohibitory injunction to restrain the applicant from letting the suit property to third parties.

Contemporaneously with the suit, the respondent filed a Motion seeking the injunctions aforesaid as an interim measure, pending the hearing and determination of the suit. In his replying affidavit sworn on 1<sup>st</sup> December 2014 in opposition to the Motion, the applicant admitted the existence of the two leases and the fact that they were not registered. He however contended that it was the respondent who was responsible for the illegal alterations of the suit property after which he, the applicant, was directed by the County Government to fence them off. As a result of those illegal alterations by the respondent, he claimed to have filed **HCCC No 98 of 2013** which is still pending. As far as the applicant was concerned, the respondent had voluntarily relinquished possession of the suit property after which the same was let to other parties.

Upon hearing the application, Kasango J. found for the respondent and issued the mandatory and prohibitory injunctions. The learned judge found that *prima facie*, it was the applicant who had rendered the suit property inhabitable by adding unauthorized floors to the building. In arriving at that conclusion, the learned judge took into account photographs that were adduced in evidence, and which were never disputed, showing the additional floors. It was the view of the learned judge that the respondent, who was a tenant on the ground floor of the suit property, could not possibly have been responsible for the extensive alterations in question.

Accordingly the learned judge found that the applicant had illegally and unlawfully purported to evict the respondent and issued the mandatory injunction to restore him back and the prohibitory injunction to protect his possession of the suit property.

The applicant was aggrieved by the said orders and lodged a notice of appeal on 10<sup>th</sup> March 2015. Immediately thereafter he filed the Motion now before us. The Motion is supported by the applicant's affidavit sworn on 17<sup>th</sup> March 2015.

In a bid to establish that the applicant's intended appeal was arguable, as he was obliged to do, **Mr. Joseph Munyithia**, learned counsel, submitted that the High Court had erred by placing upon the applicant the burden of evicting from the suit property persons who were not parties to the suit; that those new tenants had a constitutional right to be heard; that compliance with the court order would entail eviction of the new tenants; that the order was oppressive to the applicant and would occasion him substantial loss and damage; and that the order exposed the applicant to the risk of committal for contempt of court.

Learned counsel further contended that there was no evidence before the court that the respondent was running any business in the premises; that the respondent was therefore not likely to suffer any irreparable loss and damage; that accordingly he was not entitled to any injunction; that there was similarly no evidence that the respondent was a protected tenant; and that the learned judge had erred by issuing a mandatory injunction at the interlocutory stage without any special circumstances. We were accordingly invited to find that the applicant's intended appeal was arguable and that he had satisfied the first

consideration for grant of stay of execution before this Court. (See **GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (NO. 2) [1988] KLR 838**).

On the second consideration, namely whether the intended appeal, if successful, would be rendered nugatory, learned counsel submitted that were the applicant to comply with the order of the High Court and put the respondent back in possession of the suit property, his intended appeal would be rendered nugatory as the new tenants will have been evicted.

The respondent opposed the application through a replying affidavit sworn on 21<sup>st</sup> April 2015. His learned counsel, **Mr. Nyongesa Wafula**, submitted that the applicant had completely failed to demonstrate that his intended appeal was arguable and that in any event the learned judge had not erred in any way by making the orders she had; that the mandatory injunction was justified because the respondent had acted summarily, illegally and unlawfully in dispossessing the respondent who was a protected tenant without resort to any law; and that by putting new tenants in possession of the suit property after unlawfully dispossessing the respondent, the applicant had acted in bad faith and stolen a march on the respondent.

As regards whether, absent an order of stay of execution the intended appeal would be rendered nugatory if it was ultimately successful, the respondent submitted that it would not. It was his contention that after the alterations to the suit property, the applicant had created five shops from the respondent's two shops and that three of those shops were still vacant; that as a sign of good faith the applicant should have given the respondent possession of the vacant shops; that the applicant was the author of his own purported hardship and should therefore not be allowed to benefit from his own illegal actions.

Having carefully considered the application before us, we reiterate what this Court has said time without number, namely that an arguable appeal is not necessarily one which must ultimately succeed but rather is an appeal that raises a *bona fide* issue that is deserving of consideration by the Court. (See **KENYA RAILWAYS CORPORATION V. EDERMANN PROPERTIES LTD, CA NO. NAI. 176 OF 2012**). To establish such an appeal, the applicant is not obliged to put before us a multiplicity of issues. Even one *bona fide* arguable issue will satisfy the requirement. (See **KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, CA NO. NAI 72 OF 2001**).

On account of the issues that we have set out above, which the applicant intends to argue before this court, we are not able to say that his intended appeal is entirely frivolous or hopeless. At the heart of those issues is the question whether discretion was properly exercised in granting the injunctions in favour of the respondent. While ordinarily an appellate court will not interfere with the exercise of discretion by the court below (see, **UNITED INDIA INSURANCE CO. LTD. V. EAST AFRICAN UNDERWRITERS (KENYA) LTD. [1985] E.A 898**), the applicant is at liberty to demonstrate whether or why the discretion was wrongly exercised so as to justify intervention by this Court. We shall not say more in that regards, for at this stage, we will refrain from expressing any concluded views to avoid embarrassing the bench that ultimately hears the appeal on its merits.

The real question in this appeal is whether the intended appeal will be rendered nugatory if it succeeds, in the absence of an order for stay of execution. In **STANLEY KANGETHE KINYANJUI V. TONY KETTER & 5 OTHERS, CA NO. 31 OF 2012** this Court stated as follows regarding what may render an appeal nugatory

***“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”***

We do not see how the intended appeal can possibly be rendered nugatory through compliance with the order of the High Court. Any damage suffered by the applicant is easily quantifiable in monetary terms and the applicant can adequately be compensated by award of damages. The applicant has not suggested at all that the respondent is incapable of paying any damages that may be found payable to him.

There is also the other relevant question whether a party who is found *prima facie* to have engineered a *status quo* that is illegal can seek an equitable remedy to maintain and sustain that status quo. (See KAMAU MUCHUHA V. THE RIPPLES LTD, CA NO. NAI. 186 OF 1992; GUSII MWALIMU INVESTMENT CO. LTD & 2 OTHERS V. MWALIMU HOTEL KISII LTD., CA NO. 160 OF 1995 (KISUMU) and PAUL TIRIMBA MACHOGU V. RACHEL MORAA MOCHAMA, CA NO. 31 of 2014 (KISUMU)). The uncontroverted evidence remains that the there are three shops at the disposal of the applicant that are still unoccupied.

The applicant is obliged to satisfy both conditions for grant of an order of stay of execution. Satisfying only one of the considerations is not good enough; both of them must be satisfied. (See PETER MBURU NDURURI V. JAMES MACHARIA NJORE, CA NO. 29 OF 2009 (UR 14/2009)). In the circumstances we are not persuaded that the application for stay of execution is merited. The same is hereby dismissed with costs to the respondent. It is so ordered.

**Dated and delivered at Malindi this 29<sup>th</sup> day of May, 2015**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR.**