



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAIKHANDIA & SICHALE, JJ.A.)

CIVIL APPLICATION NO.16 OF 2014

BETWEEN

NEW OCEAN TRANSPORT LIMITED

LESK INVESTMENTS LIMITED APPLICANTS

AND

ANWAR MOHAMED BAYUSUF LIMITED RESPONDENT

(Being an application for a restorative injunction and reinstatement of the appellant into the suit premises, pending the lodging, hearing and determination of an application for stay and an intended appeal from the ruling of the high Court of Kenya at Mombasa (Mukunya, J.) dated 5th June, 2014

in

H.C.E.L.C.C. No.53 of 2014)

RULING OF THE COURT

New Ocean Transport Company Limited and Lesk Investments Limited “the applicants” entered the property known as Plot No.194/VI/MN, “the suit premises” then registered in the Erstwhile owner, M.A. Bayusuf Limited through a 5 year 3 months lease. When it expired M.A. Bayusuf Limited granted them an extension of the lease for a further two years from 1st February, 2003. The two years extension came to an end by effluxion of time on 1st February, 2005. However the applicants continued to hold over. On 9th May 2007, the suit premises were sold, transferred and registered in the name of Anwar Mohamed Bayusuf Limited, ‘the respondent’ by M.A. Bayusuf Limited. Subsequent thereto on 1st August 2007, the respondent issued to the applicants Notice of termination of tenancy pursuant to the provisions of the Landlord and Tenant (Shops, Hotels and catering Establishments) Act to take effect from 1st November, 2007. The applicants contested the notice and filed a reference as required with the Business Premises Rent Tribunal. Having heard the parties on the reference, the Business Premises Rent Tribunal ruled in the respondent’s favour, and declared the tenancy terminated. Aggrieved by this determination, the applicants moved to the High Court at Mombasa by way of an appeal. Contemporaneous with the filing

of the appeal, the applicants took out a Notice of motion, seeking stay of execution of the tribunal's determination aforesaid. The application upon *interpartes* hearing was on 8th April, 2009 granted on condition that the applicants deposit Kshs.500,000/- as security. This requirement was met and the applicants continued to remain and run their business in the suit premises. However, the applicants made no efforts at all to prosecute the appeal. Six years down the line and with no possibility of the appeal being heard, the respondent in exasperation filed a suit in the Environment and Land Court being **ELC No.53 of 2014** dated 11th March, 2014. The suit in the main sought that the court grants an order for eviction of the applicants from the premises. The main ground upon which the prayer was sought was that the respondent was the registered proprietor of the suit premises and was therefore entitled to possession thereof. Contemporaneous with the filing of the suit the respondent took a motion seeking an eviction order on the same grounds as in the plaint.

The applicants opposed the application and the main thrust of their defence was that when the lease was extended for a further period of 2 years they became protected tenants subject to the provisions of the Landlord and Tenant (Shops, Hotels and catering Establishments) Act. Though they had lost the argument in the Business Premises Rent Tribunal, they had nonetheless preferred an appeal to the High Court and obtained stay of execution of the tribunal's order. That the stay was still in force which prevented any action regarding the suit premises until the appeal was heard and determined. Mukunya, J. who heard the application *interpartes* was not at all taken in with the applicants' arguments. Accordingly, on 5th June, 2014, he ruled against them holding that:-

"I am well aware that the plaint asks for the same thing as this application. I am well alive to the fact that by allowing this application I will be determining the suit. However, this is necessary to prevent the blatant abuse of the court process by New Ocean Transport Ltd the 1st defendant.

There is no averment that a caveat or any inhibition was ever registered against the suit property or that the plaintiff purchaser was not bonafide when he purchased the suit property. The Business Premises Tribunal found in 2008 that there was no tenancy between New Ocean Transport Ltd the 1st defendant, and M.A. Bayusuf & Sons. This remains so until, the High Court overrules that decision. The High Court can do so if New Ocean Transport Ltd the 1st defendant were to have the appeal admitted and have it successfully determined in its favour. It has taken six years to do so and it does not appear that the second defendant herein has any intention to do so. It has refused to do so for the selfish reasons that I stated earlier. It is my finding that, should the appeal succeed damages shall be an adequate remedy, since it is alleged by the plaintiff in its statement that the appellant does not personally occupy the premises but only uses part of the same as a junk yard."

Unimpressed by the ruling and order by Mukunya, J. aforesaid, the applicants promptly filed Notice of appeal. In the meantime they moved the High Court for a stay of execution order which was granted to last for 14 days. The stay order granted as aforesaid expired on 20th June, 2014. At the expiry thereof on a Saturday the 21st June, 2014, the respondent executed the order and evicted the applicants. The applicants smelt a rat in the manner their eviction was effected. To them they should not have been evicted as their counsel had sent to the respondent's counsel a letter dated 17th June, 2014 informing them that they had filed an application in this Court seeking stay of execution of the order of the High Court which was scheduled for hearing on 23rd June, 2014 and pleaded with them to advise their clients to refrain from taking any precipitate action of evicting the applicants in the meantime. That the extracted order upon which the respondent acted in evicting the applicants was never sent to their counsel's offices for approval as per order 21 of the Civil Procedure Rules. In any event the said order and ensuing warrants for eviction were extracted on the same day, 19th June, 2014 whilst the order of stay of the High Court was in force. Accordingly they were irregular, unprocedural and invalid. They further contended that having been served with the application for stay pending appeal, it was incumbent on the respondent to defer any action on the order until the Court of Appeal had delivered its decision on the application. Steps for eviction taken by the respondent barely a day before the hearing of the application for stay by the Court of Appeal, during the weekend, showed an intention on the part of the respondent to ride roughshod over, and override the authority of the Court of Appeal. That the applicants ran legitimate

transport business on the suit premises and following their eviction, their business had come to a standstill and they were suffering a daily loss of about US dollars 5000 which they feared the respondent would be unable to compensate them in the event that they were successful in their appeal. It was on this basis that they now sought to be reinstated in the suit premises by way of restorative injunction pending the hearing and determination of the application for stay and also pending the hearing and determination of the appeal. They also prayed that this Court to order the return of their goods and trucks. As a parting shot, the applicants claimed that if the application was denied then the appeal would be of no use and if anything, it would be rendered nugatory.

As already stated, the above facts informed the decision by the applicants to lodge in this Court the Notice of motion dated 26th June, 2014. In essence, the applicants prayed:

“THAT this Honourable Court be pleased to grant a restorative injunction and reinstatement of the applicant/appellant (sic) into the suit premises, pending the hearing and determination of stay of execution of the order and ruling delivered by the Honourable Justice Mukunya on the 5th July, 2014, and an appeal against the said ruling ...”

There was also an ancillary prayer for the return of the applicants’ goods and trucks.

Opposing the application, **Nuru Ali Islam Jeizan**, a Director of the respondent deponed in the replying affidavit where pertinent that the eviction was carried out after the expiry of the 14 days order of stay of execution granted by the High Court. That the 14 days stay of execution was granted to the applicants to enable them make a formal application for stay in the High Court and not pending the filing of a similar application to this Court. That this Court lacked jurisdiction to entertain the application and grant the orders sought in the motion. It denied that the applicants were forcibly evicted from the suit premises. Indeed **Nuru Ali Islam Jeizan** was on site when the eviction was carried out and he did not contest or protest. If anything, he voluntarily vacated the suit premises and was directed to where the junk trucks had been deposited. As for the alleged unprocedural manner in which the order was extracted and enforced, the respondent countered that deposition by stating that the Court had power to approve a draft order, that infact the draft order the respondent used to extract the formal order was drafted by the applicants which they forwarded to the respondent for approval. Following the approval it was sent back to the applicants, that the warrants of execution that were issued by the Court were lawful and effective and lastly that the order issued by the Court was in conformity with the order drafted by the applicants and approved by the respondent with amendments. With regard to the alleged loss of business, the respondent deponed that the applicants did not run legitimate transport business in the suit premises. Instead the applicants only used the suit premises as a junk yard in which they stored junk lorry trucks and disused containers.

Submitting before us on 16th September, 2014 in support of the application, **Ms Moolraj**, learned counsel for the applicants stated that though the applicants stood evicted, their eviction was unprocedural. If the applicants were not reinstated in the suit premises their pending appeal would be rendered nugatory. Counsel further submitted that this Court had jurisdiction to grant a restorative injunction once a Notice of appeal had been lodged. She made reference to **section 3(2)** of the Appellate Jurisdiction Act in support of this proposition. She also called in aid the decisions of this Court in **Equity Bank Limited v West Link MBO Ltd (2013) eKLR** as well as **Dennis Mogambi Mang’are v Attorney General & Anor (2012) eKLR**. Counsel submitted further that in exercising this jurisdiction, the Court is vested with an original and independent jurisdiction; that the Court is bound to apply its mind to the case de novo and above all do justice to the parties. Counsel further submitted that the eviction was premature and unprocedural since the order had not been served on her firm for approval as required by the rules before the Deputy Registrar of the Court certified and issued it to the respondent. Nor did it encompass the crucial 14 days stay granted. She also disavowed the deposition that the suit premises had all along been used as a junk yard and reiterated that the suit premises were used for running a legitimate business by the applicants.

Responding, **Mr Asige**, learned counsel for the respondent submitted that restorative injunction is not among the injunctions contemplated in **rule 5(2)(b)** of this Court’s rules. The only injunction

contemplated by the rule is an injunction to preserve the subject matter of proceedings pending in an appeal. In any event such an injunction is granted pending appeal and not pending the hearing of another application in the same court. In the circumstances of this case, counsel thundered, the test whether the appeal would be rendered nugatory does not arise; that a remedy flows from proceedings conducted from the High Court and cannot emanate from proceedings of the Court of Appeal. When eviction was carried out on 21st June, 2014 there was nothing to prevent the respondent from so doing. Counsel further submitted that the applicants had stayed in the suit premises without paying rent for 6 years; yet there was no landlord/tenant relationship between them. The effect of a restorative injunction is the same as mandatory injunction. Such injunction is only granted in very sure circumstances. The circumstances of this case militated against the grant of such injunction. Counsel further submitted that in granting the order for eviction, the High Court had exercised discretion which should not be interfered with by this Court. The applicants having been evicted, there is no status quo that can be reclaimed. Finally, counsel submitted that the orders sought if issued will be in vain. Damages would be adequate if the warrants of eviction dated 19th June, 2014 are impugned on appeal.

Having taken into consideration the pleadings on record and the submissions by counsel, the issues for determination in this application are fairly simple and straightforward;

- *Does this Court have jurisdiction to grant restorative injunction?*
- *If the answer to the above is in the affirmative, does this application qualify for such issuance?*

Dealing with the first issue the jurisdiction of this Court to grant an injunction is anchored on **Rules 5(2) (b)** of this Court's rules. That rule provides *interalia*:-

“5(2) subject to subrule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may

- a.
- b. *In any civil proceedings where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or stay any further proceedings on such terms as court may think just.”*

See also the cases of **Equity Bank Ltd** and **Dennis Mogambi Mang'are** (supra) as well as section 3(2) of the Appellate Jurisdiction Act. On the basis of the foregoing provisions of the law as well as the authorities both counsel conceded to the fact that we had jurisdiction to grant injunction. However their point of departure is that; according to the respondent, the injunction contemplated by the rule is prohibitive as opposed to the mandatory injunction, and restorative injunction is part of the family of mandatory injunction. The applicant however takes a contrary view. The injunction contemplated by the rule is not restrictive. That this Court can grant any injunction known in law if circumstances of the case call for it in the exercise of its original and independent jurisdiction.

We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation affords an inadequate remedy to an injured party. See Halisburys Laws of England 3rd edition, vol.21 at pg. 343. Basically there are 2 types of injunctions; positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the *status quo ante* so that the damage does not continue. Then there is the mandatory injunction *per se* which compels a party to carry out some positive act to remedy a wrongful omission. As

for negative injunctions, these would include prohibitory, perpetual, interlocutory and *Quia Timet* injunctions. We are not in this application concerned with the latter species of injunctions. Rather we are concerned with the restorative injunction.

We do not agree with the submissions by counsel for the respondent that the only injunction available to an applicant under **rule 5(2)(b)** is the negative injunction, i.e. either prohibitory or interlocutory injunction. That is giving a very narrow and restrictive interpretation of the word “injunction” in the rule. A plain reading of the word does not convey the message that the injunctions contemplated in the rule are only the negative ones. The rule simply confers on this Court in suitable case to grant an injunction be it negative or positive. If it was intended by the drafters of the rule to limit the injunction grantable under the rule to negative injunctions nothing could have been easier than to specifically say so. It is instructive that counsel for the respondent did not cite any authority or scholarly work to back up his proposition that only a negative injunction is available to an applicant under **rule 5(2)(b)**. In any event both parties are in agreement that this Court under **rule 5(2)(b)** exercises independent and original jurisdiction. Is it not therefore a contradiction in terms for counsel for the respondent to purport to limit that jurisdiction by claiming that only a negative injunction can issue from this Court. Finally, under the overriding Objective principle this Court can grant any interlocutory order that may be necessary for the ends of justice. In the premises we hold that the respondent’s proposition aforesaid has no legal foundation and we reject it. In effect we are saying that this Court has jurisdiction to grant a restorative injunction in a suitable case.

Is this however one of those suitable cases? Let us see! One of the arguments put forward by the respondent was that even if we had jurisdiction to grant the restorative injunction sought, we cannot do so since it is prayed in the application that the same remain in force pending the hearing of yet another application filed by the applicants for stay of execution. To the applicants this is unheard of in this Court. That an injunction cannot be granted pending the hearing of an application for stay of execution. That an injunction can only be granted pending the hearing of an appeal. As we understand it, the applicants had filed an application for stay pending appeal which was certified urgent and served on the respondent’s counsel on 16th June, 2014. Despite notice of the pending application, the respondent went ahead and carried out the eviction of the applicants on Saturday the 21st June, 2014. It is this action that compelled the applicants to file the application now before us for restorative injunction. Before this Court therefore are two applications; one for restorative injunction and the other for stay of execution. In the application before us all that the applicants are seeking is for a restorative injunction pending the hearing of the application for stay. The applicants are merely saying: “*let us back into the suit premises as we await the hearing and determination of our application for stay of execution.*” This is where our problem begins. Ordinarily an injunction is always issued pending the doing of something or to compel the doing of something. However under **rule 5(2)(b)**, such an application must be anchored on an appeal or intended appeal and nothing else. That is why the principles of granting such an injunction are that the appeal must be arguable and that it must not be rendered nugatory. Those principles cannot apply in a situation such as the applicants find themselves. What they are seeking is a restorative injunction pending the hearing of their application for stay of execution. We therefore agree with submissions by the respondent that an injunction under **rule 5(2)(b)** cannot be granted pending the hearing of an application for stay in this Court.

The applicants were evicted pursuant to a court order and through a legal process. By the time of such eviction, the temporary stay of 14 days issued by the High Court to the applicants had elapsed. There was therefore nothing in law stopping the respondent from enforcing the terms of the court order. Yes the respondent had been served with a letter from the applicants’ counsel suggesting that they had filed an application in this Court for stay of execution of the order. However, that *per se*, did not and could not have amounted to a stay order known in law nor was the letter binding on the respondent. Out of courtesy perhaps the respondent could have opted to suspend the execution of the order. However the respondent cannot be faulted for not being courteous to the applicants, nor can this Court grant a restorative injunction merely because the respondent ignored the applicants’ plea in their letter dated 17th June, 2014.

The applicants have read mischief in the manner in which the order was extracted and warrants of

eviction issued. They contend that the draft order was never forwarded to them for approval as required under the rules and that both were extracted and signed on the same day, that is, 19th June 2014 whilst the temporary order of stay was still in force. To this the respondent's answer is that the extracted order was in accordance with the draft order as prepared by the applicants. Indeed there is evidence of the draft order having first been prepared by the applicants courtesy of the letter dated 18th June, 2014 addressed to applicants' advocates by the respondent's advocates returning the draft order approved as amended. It is instructive that the letter was copied to the Deputy Registrar of the High Court. That evidence has not been disputed by the applicants. If that be the case, how can the applicants turn around and claim that the order was extracted by the respondent without their knowledge or input? The Deputy registrar became aware of the draft order by virtue of the letter by the respondent aforesaid. So that when the respondent filed the draft order as drawn by the applicants with amendments he had proposed the Deputy Registrar had jurisdiction to process and approve the same as long as it was in tandem with the Court's ruling. Thus the Deputy registrar had power to approve the draft order. There is no evidence that the order issued by Court was not in conformity with the order drafted by the applicants and approved by the respondent, nor was it contrary to the court ruling.

It is true that the order and warrants of eviction were extracted on 19th June, 2014 when the order of temporary stay was still in force. We do not see anything irregular nor do we read any impropriety in the actions by the respondent. The story would perhaps have been different had the eviction been carried on the said date. However upon obtaining the order and warrants of eviction, the respondent bid its time until the order of stay lapsed by effluxion of time before it moved to execute the order. The respondent cannot be blamed for being vigilant and diligent.

The applicants having been evicted lawfully no basis for a restorative injunction has been laid out. Accordingly we dismiss the application dated 26th June, 2014 with costs to the respondent.

Dated and delivered at Mombasa this 16th day of October 2014.

H. M. OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

/saa