



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, M'INOTI & J. MOHAMMED)

CIVIL APPLICATION NO. NAI 47 OF 2011

BETWEEN

PETER O. NGOGE T/A O. P. NGOGE & ASSOCIATES ADVOCATES.....APPLICANT

AND

COFFEE BOARD OF KENYA1ST RESPONDENT

CRYSTAL VALUERS LTD.2ND RESPONDENT

(An Application for Stay of proceedings and Stay of Execution and or a mandatory and temporary injunction arising from the Ruling and Orders of the High Court of Kenya Central Law Courts Nairobi being the Decision of (Mwera, J) given on 24th February, 2011

in

HIGH COURT CIVIL SUIT NO. 599 OF 2010)

RULING OF THE COURT

1. On 24th February 2011, the High Court (Mwera J, as he then was) dismissed with costs the applicant's application presented to that court on 7th December 2010. In that application, the applicant sought a temporary injunction to restrain the respondents from interfering with his quiet possession and peaceful occupation of premises situated on 4th floor of the building erected on LR No. 209/6545 Nairobi ("the premises") or from levying distress on the premises pending the hearing and determination of his suit.
2. Aggrieved by the decision of the High Court the applicant lodged a Notice of Appeal. Pending the hearing and determination of the intended appeal the applicant presented a Notice of Motion dated 2nd March 2011 to this Court under Rules 1 and 5(2)(b) of the Rules of the Court seeking orders: to stay execution of the Ruling and orders given by the High Court on 24th February 2011; to stay further proceedings in the High Court; to restrain the respondents and their auctioneers from interfering with the applicant's occupation of the premises; and an injunction directing the respondents and their auctioneers to revert and maintain the status quo on the premises prior to the 24th February 2011.

Background

3. By a letter of offer dated 11th March 2005 Bageine Karanja Mbuu Limited, Estate Agents on behalf of the first respondent offered to lease the premises, subject to a formal lease, to the applicant jointly with one George Ouma Nyakan (hereafter together referred to as “the tenant”) for a term of six years commencing on 1st April 2005 on the terms set out therein. It would appear that a formal lease was never executed. That notwithstanding the tenant took possession of the premises.
4. According to the first respondent the tenant defaulted in the payment of rent and persisted in the default. As a result, the first respondent instructed auctioneers to levy distress.
5. The distress for rent levied by the first respondent precipitated the suit filed by the applicant in the High Court on 7th December 2010. In that suit, the applicant complained that he was “forced by the defendant [the first respondent] to share” the office space with one George Ouma Nyakan with the motive of making it possible for the first respondent “to send auctioneers to attach the plaintiff’s tools of trade...” and that “each of the two tenants were logically supposed to remit to the defendant[the first respondent] half of the agreed rent...” and that George Ouma Nyakan defaulted in making any payments to the first respondent thereby subjecting the applicant to bear the burden of paying all the rent; that the applicant’s pleas to the first respondent to compel George Ouma Nyakan to pay rent despite enjoying half of the rental space were not heeded; that the action by the first respondent denied the applicant peaceful and quiet enjoyment of the premises; and that the applicant was unjustifiably defamed by the first respondent’s action of levying distress when in fact the applicant was not in arrears of rent.
6. Simultaneously with that suit, the applicant filed a chamber summons under Order 39 of the Civil Procedure Rules seeking temporary injunctive relief to restrain the respondents from levying distress for rent or interfering with applicant’s possession of the premises pending the hearing and determination of the suit.
7. After hearing the parties on the chamber summons, the High Court was not persuaded that the applicant had made out a case and declined to grant him interlocutory injunctive relief.

Submissions by counsel

8. Before us, the applicant says that at the hearing of the intended appeal, he will demonstrate that the High Court erred by failing to consider the merits of the issues that were before the court; that the judge did not address the question whether the applicant’s law firm was capable of attachment or proclamation; that the judge failed to consider whether the ‘lease’ between the parties contravened section 34 of the Advocates Act; that the judge erred in finding that the applicant had defaulted in the payment of rent; and that the judge failed to appreciate that the premises were offered and allocated to two different tenants, amongst other grievances.
9. Mr. O. P. Ngoge learned counsel who appeared in person before us submitted that he complied with the conditions stipulated in the letter of offer including the payment of legal costs for the preparation of a lease despite which a lease was never prepared; that the first respondent breached the terms of the tenancy by overcharging rent and levying distress based on figures that were never agreed; that this Court has a duty to protect him; that the lower court ruled that he was in arrears of rent without any basis for doing so; that contrary to the assertion by the first respondent, he is not a joint tenant with George Ouma Nyakan as no joint tenancy agreement was produced before the lower court; that in the absence of a lease there is no basis for the contention by the first respondent that rent was in arrears; and that even though the orders he seeks will not serve any useful purpose having been overtaken by events, we should nonetheless allow the application for “academic purposes.”
10. Opposing the application, learned counsel for the respondents Mr. Change submitted that the

applicant's application is frivolous; that the orders sought to be stayed are incapable of being stayed being as they are in negative terms as the High Court merely dismissed the applicant's application; that an order for stay of execution can only apply to orders in positive terms that require the applicant to do or refrain from doing something; that the applicant is clearly in default of his obligations under the tenancy agreement and that the intended appeal is not arguable. Counsel concluded his address by urging that should this Court be inclined to allow the applicant's application, it should do so on condition that the applicant furnishes security for outstanding rent and costs.

Determination

11. We have considered the application and the arguments advanced on behalf of the parties. The power to grant or refuse relief under Rule 5(2)(b) of the Rules of this Court is discretionary and exists in order to ensure that the objective of just and effective determination of appeals is not defeated. Githinji JA articulated the approach this Court should take in

Equity Bank Limited vs. West Link Mbo Limited Civil Application No Nai 78 of 2011 (Ur. 53/2011) where he said:

“It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance...”

... It is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

12. Earlier in **Ishmael Kagunyi Thande V HFCK Civil Application Nai No. 157 of 2006** this Court held:

“The jurisdiction of the court under Rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

13. Guided by those principles, we are alive to the fact that we are not at this stage dealing with the substantive appeal. That said, has the applicant demonstrated that he has an arguable appeal? Based on our perusal of the plaint presented to the High Court, the essence of the applicant's case is that the respondents should be pursuing George Ouma Nyakan as opposed to the applicant for any outstanding rent on the basis that the premises “were offered and allocated to two different tenants”; that the respondents should therefore heed the applicant's call to “compel George Ouma Nyakan to pay rent”; and that the “lease” was drawn by an unqualified person.

14. On the face of it the offer to lease the premises contained in the letter of offer dated 11th March 2005 from Bageine Karanja Mbuu Limited on behalf of the first respondent was addressed to the applicant and George Ouma Nyakan. The applicant and the said George Ouma Nyakan signified their acceptance of the terms and conditions of the offer by signing the letter of offer. We are in those circumstances not persuaded that the applicant is right to ask the first respondent to ask George Ouma Nyakan to “cater for his share” of rent when the premises demised to the applicant and George Ouma Nyakan comprised of the same office space without distinction who was taking what space as between the two of them. In other words, we are not satisfied that the tenant's obligations under the letter of offer are severable between the applicant and the said George Ouma Nyakan. We do not think that the intended appeal is arguable.

15. Even if we were to consider whether the intended appeal would be rendered nugatory should the appeal succeed unless we grant the orders sought, the applicant informed us during the hearing before us that the application has been overtaken by events and is academic. Clearly therefore the question of

granting the relief sought by the applicant so as to ensure that the objective of just and effective determination of the intended appeal is not defeated does not arise.

16. For those reasons, the application fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014.

S. GATEMBU KAIRU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

*I certify that this is a true copy
of the original.*

DEPUTY REGISTRAR