



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A.)**

**CIVIL APPLICATION NO. NAI. 44 OF 2011 (UR. 28/2011)**

**BETWEEN**

**VIRIDIANA E. OMONDI & 34 OTHERS.....APPLICANTS**

**AND**

**NATIONAL HOUSING CORPORATION.....RESPONDENT**

*(Application for injunction pending the hearing and final determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Kisii (Makhandia, J.) dated 21<sup>st</sup> January, 2011*

*in*

**H.C.C.C. NO. 182 OF 2010)**

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

**RULING OF THE COURT**

This is an application by way of Notice of Motion, expressed as having been brought “**Under Rules 5(2) (b) and 47 of the Court of Appeal Rules**”. In the application the **35** applicants are seeking one main relief in that:-

**“2. An Injunction be and is hereby issued in favour of the Applicants restraining the Respondent from evicting the Applicants from their respective suit individual rented houses listed and set out in KISII HCCC NO. 182 of 2010, pending the final hearing and determination of the Applicants’ intended Appeal against Hon. Justice Asike Makhandia’s Decision/Ruling and or Orders made on 31<sup>st</sup> January, 2011.”**

The application which is supported by an affidavit sworn by one, Jared O. Orinda, (*the 4<sup>th</sup> applicant*) is brought on the following grounds:-

- “a) The Applicants have timeously filed and served a Notice of Appeal against the Superior Court’s decision/ruling and or orders intended to be appealed from and also applied for typed and certified copies of the proceedings.**
- b) The Applicants have an arguable intended appeal with a likelihood of success against the said Superior Court’s Decision/Ruling and or orders based on their draft Memorandum of Appeal attached hereto.**

**c) Unless the Applicants' application and or orders prayed for herein are granted, the applicants' intended appeal shall be rendered nugatory.**

**d) The respondent shall suffer no prejudice as she or it shall continue to accept monthly rent payments from the Applicants after the expiry of the alleged Tenancy Termination Notices including accepting advance rent payments beyond the expiry date of the alleged Tenancy Termination Notices and even during pendency of the said Superior Court suit proceedings and of this Application and intended Appeal.**

**e) Based on grounds (d) above, the Respondent still recognizes the various suit individual tenancies of the Applicants.”**

When the application came up for hearing on 16<sup>th</sup> June, 2011, Mr. P.J. Otieno appeared for the applicants, but there was no appearance for the respondent. The Court decided to hear the application pursuant to **Rule 56(2)** of this Court's Rules which provides that if the applicant appears and the respondent fails to appear, the application shall proceed in the absence of the respondent, unless the Court sees fit to adjourn the hearing. We saw no reason to adjourn the matter and hence we asked Mr. Otieno to proceed with his application.

In his submissions, Mr. Otieno merely went over the prayer sought and the affidavit in support of the application. He referred us to the dispute between the parties and stated that the applicants were entitled to a notice of 30 days. He faulted the learned Judge in making a finding that the applicants were frustrating the respondent from selling the houses. He submitted that the applicants had an arguable appeal. Finally, Mr. Otieno submitted that if the prayer for injunction was not granted, the applicants stand to suffer.

The background to this application is that the applicants herein filed a suit against the respondent praying for an order of injunction, general damages and costs of the suit. The applicants had been tenants of the respondent in residential rental houses in Homa Bay Provincial Housing Scheme paying agreed monthly rent of **K.Shs.500/=** as a result of individual oral tenancy agreements with the respondent. On or about 14<sup>th</sup> June, 2010, the respondent issued to the applicants notices to vacate their said houses which notices were received by the applicants on 20<sup>th</sup> June, 2010.

Contemporaneously with the filing of the suit the applicants took out a Chamber Summons application under certificate of urgency seeking in the main a temporary injunction against the respondent pending the hearing and final determination of the suit. In response, the respondent pleaded that the 35 houses were advertised for sale in the year 2007 with the occupying tenants being given first priority to purchase. The application for temporary injunction was heard inter-partes and the court declined the injunction on the grounds that the advertised sale was on the basis of willing buyer and seller and the court could not come into an arena of a private contract.

That matter was in a suit that was filed in Milimani Commercial Courts. The suit was then transferred to the High Court of Kenya at Kisii. The applicants revived their earlier application before *Makhandia, J.* The learned judge considered the application and the written submissions by counsel appearing for the parties and in the end dismissed that application. It is after that dismissal that the parties are here seeking the relief set out at the commencement of this ruling. In the course of his ruling, the learned Judge said:-

**“Given the history of the dispute between the plaintiff and the defendant I entertain no doubt at all that the plaintiffs have not been candid to the court and have withheld vital facts of the dispute. By their conduct they are undeserving of the equitable and discretionary remedy of a temporary injunction. In the application, the grounds in support thereof and the supporting affidavit, the plaintiff made no reference at all to the previous litigation between the parties i.e. KISII HCCC No. 48 of 2008 and which has a direct bearing to this case. In that suit the plaintiffs had similarly sought to injunct the defendant from disposing the 35 houses but were unsuccessful.”**

The learned Judge considered other aspects of the case and concluded his ruling thus:-

***“The plaintiffs have had more than adequate notice from the year 2007 when the defendant put up the houses for sale. The defendant has acted fairly against the plaintiffs. If the injunction is granted it will stop the defendant from disposing off its property to willing buyers. The plaintiffs have not at all challenged the right of the defendant to sell the said properties.***

***Accordingly, I find no merit in the application. It is dismissed with costs to the defendant.”***

We have given the factual background to this matter and the rival submissions by the applicant’s Counsel. The principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under ***Rule 5(2)(b)*** of the Rules of this Court are now well known – see ***BUTT V. RENT RESTRICTION TRIBUNAL [1982] KLR 47, J.K. INDUSTRIES V. KENYA COMMERCIAL BANK LTD. & ANOTHER [1987] KLR 506 and BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES [2004] 1 KLR 194.***

In exercising its discretion, the Court must be satisfied that the intended appeal is an arguable one, that is, that it is not frivolous, and that if an order of stay or injunction as the case may be is not granted, the appeal or intended appeal would be rendered nugatory.

We have already stated that the applicants were tenants of the respondent. They were given the first priority to purchase the houses but they failed to comply with the conditions as regards payment of the purchase price. They were given notices to quit but they defied the notices claiming that they needed 30 days notice. Having failed to pay the required purchase price and having refused to vacate from the houses the applicants have engaged in protracted litigation with the respondent. This has denied the respondent its desire to sell the houses. The applicants applied for injunction which has been rejected twice as they failed to disclose the fact that an earlier application had been made and rejected.

In view of the history of this matter, we are not satisfied that the applicants have an arguable appeal which may succeed. On the nugatory aspect, we think that the applicants’ appeal would not be rendered nugatory since in the first place in their suit, they have asked for damages and hence damages would be adequate remedy.

That being our view of the matter, it follows that this application lacks merit and we order that the same be and is hereby dismissed. We make no orders for costs.

***Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2011.***

***P.K. TUNOI***  
.....  
***JUDGE OF APPEAL***

***E.O. O’KUBASU***  
.....  
***JUDGE OF APPEAL***

***D.K.S. AGANYANYA***  
.....  
***JUDGE OF APPEAL***

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**