



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, WAKI & ONYANGO OTIENO)**

**CIVIL APPLICATION NO. 74 OF 2007**

**BETWEEN**

**DAVID THIONG'O T/A WELCOME GENERAL STORES ..... APPLICANT**

**AND**

**MARKET FANCY EMPORIUM ..... RESPONDENT**

*(An application for an injunction pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court at Nairobi (Visram, J)*

*Dated 28<sup>th</sup> February, 2007*

**In**

**H.C. C. Appeal No. 914 of 2005)**

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**RULING OF THE COURT**

David Thiongo who trades in the name of Welcome General Stores and who is the applicant herein has been and still is a tenant of Market Fancy Emporium, the respondent herein. The premises which is the subject of the tenancy is known as LR NO. 209/2648, Muindi Bingu Street/Tubman Road, Nairobi. The tenancy between the parties appears to be a controlled one within the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, **Chapter 301** of the Laws of Kenya, "*the Act*". According to the averments in the respondent's plaint dated **11<sup>th</sup> November, 2004** and filed in the Principal Magistrate's Court at Milimani, the respondent issued a notice dated **27<sup>th</sup> May, 2004** notifying the applicant of its intention to terminate the tenancy on the ground that the respondent itself wished to occupy the premises for a period of more than one year. Such a notice, if it was actually given, would have been so given under **section 4** of the Act. Under **section 6** a party receiving such notice is required to make a reference to the Business Premises Tribunal if he wishes to contest the termination. Such a reference is to be made within a specified period. The respondent alleged in the plaint that apart from the applicant telling them that he (the applicant) would not comply with the notice, the applicant did not make any reference to the tribunal with the result that the notice of termination took effect. The suit filed in the Magistrate's court sought the eviction of the applicant from the premises, and though the applicant

filed a defence to the suit, the Magistrate struck out the defence and entered summary judgment for the respondent. The applicant filed an appeal in the High Court and pending the hearing of the appeal, he sought an order of stay against the Magistrate's order. Visram, J, as he then was, refused to grant the order of stay sought. The applicant proposes to appeal to this Court against the order of the Judge refusing to grant to him an order of stay, but pending the filing, lodging, hearing and determination of the appeal, the applicant has come to the Court asking for an order:-

***“THAT an injunction do issue to restrain the Respondent from evicting the Appellant/Applicant from his business premises on L.R. No. 209/2648 Muindi Bingu Street/Tubman Road pending the lodging, hearing and determination of the intended appeal against the ruling and order of Hon. Justice Visram delivered on 28<sup>th</sup> February, 2007.”***

The principles which the Court applies when it is asked to invoke its jurisdiction under **Rule 5(2) (b)** are well known and well settled. The applicant was bound to satisfy the Court, first, that he has an arguable appeal, i.e. an appeal which is not frivolous, and secondly, that if the Court were to refuse to grant to him the injunction he seeks and his proposed appeal were to succeed in the end, that success would have been rendered nugatory by the refusal to grant the injunction.

On the question of whether the applicant has an arguable appeal, we note that Visram, J was not asked to grant an order of injunction; he was asked to grant an order of stay. If we grant the order of injunction now sought, we would in effect be directly preventing the implementation of the Magistrate's order and not any order made by Visram, J. If the Judge had been asked for an order of injunction and he had refused to grant one, then this Court, exercising its original jurisdiction under **Rule 5 (2) (b)** would consider whether or not to grant the injunction which the superior court had declined to grant. We are not convinced that the applicant's proposed appeal is arguable, looked at from that stand-point.

Secondly, if the matter is governed by the provisions of the Act we have already cited, and on the face of it that appears to us to be the position, then this Court would have no jurisdiction at all to hear the appeal under that Act. The proviso to **section 15 (4)** of the Act provides:-

***“Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.”***

Visram, J purported to grant to the applicant leave to appeal but if the matter falls to be determined under the provisions of the Act, it is doubtful to us that the granting of leave by the learned Judge would override the specific provisions of an Act of Parliament.

On this aspect of the matter, we are also not satisfied that the applicant has an arguable appeal.

The applicant having failed to satisfy us that his intended appeal is arguable, we need not concern ourselves with the second principle of whether the proposed appeal will be rendered nugatory. That consideration can only arise where the Court is satisfied that a proposed appeal is arguable.

That being the view we take of the matter, we order that the applicant's notice of motion dated 4<sup>th</sup> April, and lodged in the Court on 5<sup>th</sup> April, 2007 be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Nairobi this 11<sup>th</sup> day of June, 2010.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**