



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 123 & 91 OF 2010**

- 1. JOHN GACHIE GICHIMU**
- 2. PAULINE WAMAITHA MBUGUA**
- 3. JEMIMAH NDINDA MUSYOKA**
- 4. DAMARIS WANJIKU NJUGUNA**
- 5. CAROLINE DAMARIS NDUTA KAMAU**
- 6. DOUGLAS MUTUA MUEMA**
- 7. JUDITH ADHIAMBO MIGAI**
- 8. PETER ODHIAMBO OYOO**
- 9. CAROL KIRAGU**
- 10. JANE KANYAWARE**
- 11. SEBASTIAN MBATHA MBITHI**
- 12. GODFREY OWINO OTIENO**
- 13. SAMUEL OBOTE ALANGO**
- 14. FRANCIS MAINA KAMAU**
- 15. ROBERT NJOROGE NGARUIYA**
- 16. FREDRICK NYAKWAKA ARWANGO**
- 17. BONIFACE MUTUA**
- 18. DOLLY ANYANGO OKENO**
- 19. ROSE ACHIENG OTUTU**
- 20. EUNICE WAGIO KARIUKI**

21. MAGDALENE LUCY WANAE.....APPLICANTS

AND

1. MUKUA TUTUMA

2. WACHIRA NDERITU, NGUGI & CO. ADVOCATES.....RESPONDENTS

(An application for injunction from the ruling and orders of the High Court of Kenya at Nairobi (Mwera, J.) dated 17<sup>th</sup> May, 2010

in

H.C.C.C. No. 98 of 2010)

\*\*\*\*\*

### **RULING OF THE COURT**

This application by notice of motion is made under **rules 5(2(b))** and **42** of the Court of Appeal Rules. It seeks an order of temporary injunction to issue against the respondents jointly and/or severally to restrain them from evicting the applicants from their individual business and/or residential premises and houses situate on L.R. No. 209/9692 at Huruma Shopping Centre Nairobi pending the final hearing and determination of their intended appeal against the ruling/decision and orders of the superior court in **H.C.C.C. (NBI) No. 98 of 2010** delivered on 17<sup>th</sup> day of May, 2010.

The application is based on several grounds set out on the face thereof and also on the supporting affidavit sworn to by *Sebastian Mbatha Mbithi* the 11<sup>th</sup> applicant, and filed herein together with the application on 4<sup>th</sup> June, 2010.

In a suit by the applicants filed in the superior court against the respondents on 22<sup>nd</sup> February, 2010, the former describe themselves as business or residential tenants of the 1<sup>st</sup> respondent while the 2<sup>nd</sup> respondents are the advocates for the said 1<sup>st</sup> respondent. During the month of January, 2010, the firm of **M/s Gachie Mwanza & Company Advocates** served a uniform notice upon the applicants dated 28<sup>th</sup> day of January, 2010 on behalf of the 1<sup>st</sup> respondent giving them three months' notice of termination of tenancies, and requiring them to vacate the 1<sup>st</sup> respondent's premises on the 15<sup>th</sup> day of April, 2010. Immediately after service of that notice the applicants were again served with another notice dated 5<sup>th</sup> day of February, 2010 asking them to vacate the suit premises by 28<sup>th</sup> February, 2010. The applicants read mischief in the conflicting notices and this led them to file the suit herein as above stated. Together with the filing of the suit the applicants filed an application for temporary injunction to restrain the respondents, their agents and/or servants from evicting the said applicants from the business and residential premises on Plot No. 209/9692 situate at the said shopping centre in Nairobi pending the final hearing and determination of the application and/or the suit. The application was heard by way of written submissions. The ruling thereon was delivered by the superior court (*Mwera, J.*) on 17<sup>th</sup> May, 2010, and it is the ruling with which the applicants are aggrieved and which they intend to appeal against, hence the present application.

When the application was placed before us for hearing on 20<sup>th</sup> July, 2010 **Mr. Ogotu**, learned counsel for the applicants submitted that though the premises the applicants occupied were controlled, the dispute in respect thereof was not referred to either the Business Rent or Rent Restriction Tribunals as should have been done. He also submitted that since the notices issued by the 1<sup>st</sup> respondent were illegal the applicants could not react to them and the superior court had no jurisdiction to deal with the matter.

On the nugatory aspect, counsel submitted that unless the order for injunction is issued, the

applicants risk being evicted from the premises by the respondents before the appeal is heard. **Mr. Ngugi**, learned counsel for the respondents opposed the application and argued that the 1<sup>st</sup> and 2<sup>nd</sup> applicants were covered by the business premises rent tribunal and should have gone to the right forum instead of filing the suit in court.

For an application of this nature to be granted, the applicants need to demonstrate the requisite two limbs which need to be satisfied under **rule 5(2)(b)** of this Court's Rules, firstly, that the intended appeal is arguable and secondly that if the application is refused and the appeal is eventually successful, its result would be rendered nugatory; see ***Civil Application No. Nai. 328 of 2009 – CFC Financial Services Limited vs Juja Road Fancy Stone Limited***.

The applicants' concern is whether, after the respondents issued them with the notice dated 28<sup>th</sup> January, 2010 to vacate the suit premises on 15<sup>th</sup> April, 2010 it was proper or legal for them to issue another notice dated 5<sup>th</sup> February, 2010 requiring them to vacate the premises by 28<sup>th</sup> February, 2010 and whether these notices were valid. We feel that given the circumstances of this case, this is an arguable point and that the intended appeal is not frivolous. On the nugatory aspect, we agree that the applicants have a genuine fear that if the order of temporary injunction sought is not granted they stand a risk of being evicted from the premises before the intended appeal is determined. Should this happen and later the intended appeal is successful; its result would be rendered nugatory. The respondents' argument that the tribunals were the proper forum for the applicants to go to does not weigh against the argument put forth by the applicant above. And whether or not the 2<sup>nd</sup> respondent was properly joined to the case or application will be determined at the hearing of the intended appeal.

We allow the application and issue a temporary injunction to restrain the respondents jointly and severally from evicting the applicants from their individual business and residential premises and houses on plot known as L.R. No. 209/9692 at Huruma Shopping Centre Nairobi pending the hearing and final determination of their intended appeal. Costs of the application shall abide the outcome of the appeal.

***Dated and delivered at Nairobi this 19<sup>th</sup> day of November 2010***

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**