



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 57 of 2009 (UR 32/09)

JOANINAH WANJIKU MAINA..... APPLICANT

AND

TRATTORIA LIMITED RESPONDENT

(An application for stay of execution and of any further proceedings from the Ruling and/or Order of the High Court of Kenya at Nairobi (Benjamin Kubo J.) dated 15th day of December 2008

in

H.C.C.C. NO. 126 OF 2008)

RULING OF THE COURT

JOANINAH WANJIKU MAINA, the applicant, invites us to exercise our discretionary jurisdiction under **rule 5 (2) (b)** of our Rules to order a stay of execution of the ruling and orders made by the superior court (Kubo J.) on 15th December 2008 and any further proceedings thereto pending the hearing and determination of an intended appeal by the applicant.

The primary facts giving rise to this application are briefly as follows. **Trattoria Limited**, the respondent herein and the successful party in the suit before the High Court of Kenya at Nairobi, is a company incorporated in Kenya in 1981 under the **Companies Act Cap 486 Laws** of Kenya. It owns the famous restaurant known as "**Trattoria**" with its premises located in the Central Business District of Nairobi in the building known as **Town House** being L.R. No. 209/2363, the suit premises, pursuant to a lease dated 11th November 2005. The building was at the time of setting up the business owned and managed by Kenya National Assurance Company Limited which went into liquidation in or about 1996. Subsequently a new entity, Kenya National Assurance Company [2001] limited, took over the ownership and management of the building.

By a Sale Agreement dated 20th March 2007 the applicant bought the suit premises. It is the applicant's case both in the superior court and before us that she bought the suit premises subject to all registered and unregistered leases, licences and informal tenancies and easements subsisting at the time. The applicant further states that the Sale Agreement provided that in the event that the details and particulars of respective leases and tenancies were not complete, satisfactory and acceptable to the applicant, the latter would notify the vendor for the necessary rectifications before the completion date. It is averred that the applicant did not exercise her rights under the agreement and was therefore deemed to

have been satisfied with the Sale Agreement.

The respondent states that it continued to enjoy peaceful and quiet possession of the suit premises until 31st August, 2007 when the applicant caused the disconnection of water supply to the restaurant by failing to pay the water account due to Nairobi City Water & Sewerage Company Limited though the Lease provides that the cost of supplying and installing a water meter all other charges are included in the rent it pays and will not be charged separately. On or about 7th September 2007 the respondent received a notice from the applicant demanding that it either renegotiates several terms of the lease or the said lease would be terminated.

In its suit lodged in the superior court simultaneously with a chamber application, the respondent sought several orders, injunctive in nature, together with an order of reference of the matters in dispute to arbitration. The basis of its case, was that there is presently subsisting, a registered lawful and valid lease in its favour, and under the terms therein all questions in dispute and claims not mutually settled and agreed between the parties shall be referred to arbitration. The respondent further averred that the notice of termination of the lease by a letter of 14th March, 2008 giving the respondent three month's notice was illegal. In consequence of the notice, the respondent states, the applicant has refused to accept rent and has interfered with the supply of water to the restaurant.

In its defence to the suit and in opposition to the application aforesaid the applicant contends that subsequent to the completion of the Sale Agreement it was discovered or has emerged that there was a variance between the area purportedly let as per the lease agreement and the actual area occupied by the respondent; and, that the rent was too low as to amount to fraudulent misrepresentation. Further, the applicant had belatedly discovered other anomalies related to water bills and that the respondent had breached, in many aspects, fundamental terms of the lease. She contended that the respondent had lost its right in law to arbitration by virtue of **section 6** of the Arbitration Act. The application by way of the Chamber Summons dated 4th April 2008 was heard on 29th October 2008. It sought, mainly, injunctive orders and reference to arbitration.

In his reserved ruling the learned Judge, Kubo J. held that there is a clear dispute between the parties on weighty issues pertaining to the lease and that in such circumstances the said lease provides for mandatory referral of such dispute to arbitration. He further held:-

“..... that the omission, in the application, of a prayer for referral to arbitration is a curable procedural irregularity not fatal to the application.”

The learned Judge then granted the application. He ordered, inter alia, that the dispute between the parties be referred to arbitration; restrained the applicant from interfering with the respondent's possession and ordered the applicant to pay forthwith any and all outstanding water bills and to accept rent paid to her by the respondent in terms of the lease.

The applicant being aggrieved by the ruling promptly filed a notice of appeal; and subsequently, this notice of motion.

It is now well established that for an application under **Rule 5(2)(b)** of the Court's Rules to succeed the applicant must satisfy the Court that:

- (i) The appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.***
- (ii) Unless the order of stay of execution is granted, the intended appeal or appeal, if it eventually succeeds, will be rendered nugatory.***

As regards the first requirement, a copy of the draft Memorandum of Appeal and a copy of the ruling the subject matter of the intended appeal are annexed to the supporting affidavit.

The applicant will contend in the intended appeal, inter alia, that failure to apply for stay of proceedings under **Section 6** of the Arbitration Act of 1955 was fatal and not a curable defect and that injunctive orders cannot be issued when the notice of termination of lease the subject matter of the suit premises expired. Upon our consideration of the grounds of appeal, the ruling and submissions of counsel we are satisfied that the intended appeal raises arguable grounds of appeal on both law and fact.

Would the intended appeal if it eventually succeeds be rendered nugatory? We do not think so. The orders granted to the respondent against the applicant relate, in essence, to payment of money which can be easily quantified and recovery of the same may be decreed if the appeal eventually succeeds. Further, if the tenancy of the respondent in the suit premises is found wrongly to have been maintained by the superior court, payment of money would constitute adequate remedy. Again, if the appeal succeeds and the arbitration proceedings are terminated, costs would constitute adequate remedy.

Accordingly in the exercise of our discretion and for the foregoing reasons this application is dismissed with costs.

Dated and delivered at Nairobi this 8th Day of May, 2009

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR