



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLICATION 87 OF 2009
BETWEEN

PATRICK WAMULA *t/a* PATROS AGENCIES LTD1ST APPLICANT
SALAM SHABID MOHAMMED2ND APPLICANT

AND

ESTHER WAMBUI KIBERESPONDENT

(An application for stay of proceedings pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Waweru, J) dated 27th March, 2009

in

E.I.C. Suit No. 602 of 2008)

RULING OF THE COURT

This application expressed to be brought under **Rule 5** of the Court of Appeal Rules seeks orders as follows:

- “1. **THAT this application be certified as urgent and the same be set down for hearing on priority basis.**
2. **THAT pending the lodging and determination of the applicant’s intended appeal the order and sentence issued by the Honourable Mr. Justice Waweru on 27th March, 2007 in H.C. ELC. No. 602 of 2008 (Nairobi) be stayed and/or suspended on such terms as this Honourable Court may think just.**
3. **THAT the costs of this application be provided for.**

The application is based on the grounds set out thereon, namely:-

- (a) ***unless the application herein which seeks to stay the order and the sentence of the applicant to prison pending the lodging, hearing and determination of the intended appeal is heard without delay, the applicant would have served the sentence by the time the said application will be fixed for hearing normally hence render the appeal, nugatory and occasion irreparable loss and prejudice.***
- (b) ***The applicant has an arguable appeal with overwhelming prospects of success for reasons inter-alia:***
 - (i) ***The learned Judge failed to take into account relevant facts which he ought to have taken into account hence arriving at an erroneous decision:***
 - (ii) ***The learned Judge erred in law and in fact in failing to take into account that the entire instituted contempt proceedings were fatally defective and flawed and***

failed to adhere to the provisions and procedures of the rules as provided by the Supreme Court of England.

- (iii) *That the learned Judge erred and misdirected himself fundamentally in committing the applicant to prison when in fact (sic) were impractical as they were issued and served after the respondent had already vacated the premises at hand.*
 - (iv) *The learned Judge erred in law and in fact in holding that the applicant was quickly (sic) of contempt.*
- (c) *The intended appeal will be rendered nugatory in the event that the stay of the order and/or suspension of the sentence of the superior court is not granted.*
- (d) *The applicant stands to suffer prejudice in the event that the order's sought are not granted.*

Apart from the grounds set out on the face of the application the same was also supported by an affidavit deposed to by one **Salam Shahid Mohamed** who describes himself as the landlord of all that shop known as number A2 located on **LR No. 209/138/4** along River Road Nairobi. In the supporting affidavit the deponent states that on 18th December, 2008 the superior court granted orders in favour of the plaintiff/applicant pursuant to an application dated 5th December, 2008 and filed on the same day but that the respondent deliberately distorted and misrepresented facts which were relevant and material to the issues before the Honourable Court. According to the affidavit, **order 4** of the said Orders issued on 18th December, 2008 directed as follows:

“That the defendant shall also, upon deposit by the plaintiff in order 2 above forthwith open the premises and give the plaintiff restricted access to and possession of the premises.”

That the respondent failed to disclose to the superior court that a new tenant called **ADAN MOHAMUD ALI** had taken possession of the shop pursuant to a Lease Agreement dated 15th December, 2008 immediately thereafter; and that in the circumstances the applicant was not able to comply with the said orders considering that the effect of **order 4** aforesaid had already been overtaken by events. The deponent swore further that he was served with the said order of 18th December, 2008 and a Penal Notice dated 22nd December, 2008 by a **Mr. Enose M. Lubutsi** on 29th day of January, 2009. The deponent states in the supporting affidavit that he had been advised by his counsel that an order has no effect unless service thereof has been duly effected and reiterated that at the time the order was served upon him, he had already entered into a fresh lease agreement with a new tenant who currently had taken possession of the shop.

That in view of the fact that the respondent had withheld and suppressed from the superior court facts relevant and material to the issues herein, the applicant instructed advocates to file an application seeking to review the orders of 18th December which application was still pending before that court. The affidavit states further that on 15th January, 2009 the said application dated 9th January, 2009 came up for hearing before **Honourable Justice Waweru** who declined to hear it but directed the respondent to proceed and file contempt proceedings against the applicant in view of the fact that the latter had not complied with the orders of 18th December, 2008.

Since the respondent filed contempt proceedings and in view of the fact that the applicant's liberty was at stake in the event that contempt proceedings were determined against him, the applicant filed a Notice of Appeal to challenge the orders of 18th December, 2008 followed by the application for stay of proceedings in the Notice of Motion **Civil Application No. Nai 31 of 2009** to this Court which application has not yet been heard. But when **Honourable Justice Waweru** delivered his ruling in the contempt proceedings in which he ordered that the applicant be sentenced to 6 months imprisonment the latter filed the present application for stay pending the intended appeal. The deponent states further that he has been advised by his advocates, which advice he verily believes to be true and relies on that the respondent's application dated 30th January, 2009 was fatally defective on the grounds that it failed to comply with the mandatory provisions of **order 52 rules 2 and 3** of the Supreme Court Practice which regulate contempt proceedings and therefore the same should be struck out

for being an abuse of the court process and that the applicant has strong grounds in the intended appeal.

When the matter was placed before us for hearing on 21st May, 2009 **Dr. Khaminwa** learned counsel for the applicant took us through the superior court record and in particular the court order of 18th December, 2008 and the direction of the superior court (*Waweru, J*) that the respondent file contempt proceedings which the counsel termed most unfortunate. Counsel further complained that though the application for contempt was eventually filed, the procedure laid down in the White Book were not followed. That no leave to file such proceedings was sought nor was notice thereof served upon the Attorney General nor was the contempt order served upon the applicant in time. On these issues counsel submitted that the applicant has an arguable appeal. On the nugatory aspect learned counsel for the applicant stated that if the stay sought was not granted the six months imprisonment imposed upon the applicant would have been served by the time the appeal is determined. He submitted further that the applicant had not disobeyed the court order by the time he entered into the lease agreement with the third party who now occupies the suit premises because by then he had not been served with the court order. **Mr. Wangalwa**, learned counsel for the respondent opposed the application and submitted that the Notice of Appeal filed herein did not comply with **rule 74(6)** of the Court of Appeal Rules hence the jurisdiction of this Court was not properly invoked; and because of this there was no intended appeal and no reason had been advanced why the court should exercise its discretion to grant an order of stay. According to counsel, there had been an earlier order made on 3rd January, 2009 by the Business Premises Rent Tribunal for the respondent to be put back to the suit premises and the order was carried out. However, the applicant evicted the respondent by removing the doors from the premises and confiscating his property thereon. According to counsel when the order of 18th December, 2008 was made the applicant was represented in court and his application to review that order on the pretext that there was a new tenant on the premises was not genuine because by 3rd January, 2009 the respondent had been reinstated onto the premises with the assistance of the police but the applicant, had not returned the respondent's merchandise to comply with the order of the court. Counsel stated that this application was an abuse of court process.

Dr. Khaminwa's submissions were really pegged on whether the court order in relation to the contempt proceedings were served upon the applicant and if this was not done then the applicant was not aware, hence he could not comply, or that proper procedure in contempt proceedings was not followed as required. All these procedures are in the White Book as reproduced in **High Court Civil Case No. 45 of 2005** at Malindi (V.R) all of which **Dr. Khaminwa** took us through during his submissions. He also submitted that leave to file contempt proceedings was obtained and that if this was not done, then the whole exercise culminating in the ruling of the superior court and which is the subject of the present application was a nullity. To answer the issues raised in the application, we wish to reproduce the ruling of the superior court (*Waweru, J.*) made on 15th January, 2009.

“The orders of 18th December, 2008 were made upon representations by learned counsels of both sides. Nothing about another tenant and a lease of 15th December, 2008 was mentioned by the defendant's learned counsel. It appears to me that the application by notice for (sic) Motion dated 9th January, 2009 has been brought with the sole purpose of dressing up contempt of the orders of 18th December, 2008 and then legalizing the contempt that cannot be permitted. I direct that the defendant shall not have audience in this matter until they table evidence that they have fully complied with the orders of this Court of 18th December, 2008. I therefore decline to fix for hearing of motion dated 9th January, 2009. I also direct that the plaintiff do forthwith institute appropriate contempt proceedings against the defendants.”

The 2nd applicant is aware that on 18th December, 2008 certain orders were made directing him to carry out certain functions relating to his premises which he had leased to the respondent; amongst them

- (3) ***to forthwith and unconditional release to the respondent/plaintiff her goods he had detained on the latter depositing into court a disputed rent of Kshs.88,000/=.***
- (4) ***to forthwith open the premises and give the respondent/plaintiff unrestricted access to and possession of the premises.***

When these orders were made counsel for the applicant, then a **Mr. Onyango** was present. He complied with none but instead he made an application dated 9th January, 2009 to vary/or review the above sated order of 18th December, 2008. The notice of motion was mentioned on 15th January, 2009 at his instance when he asked that it be fixed for hearing, but was reminded by counsel for the respondent that he had no right of audience because he had not complied with the court order of 18th December, 2008. This is how the order we have quoted above arose. With this background information in mind, we doubt, that the grounds raised by the applicant's counsel about the need for seeking leave of the court to institute contempt proceedings and/or serve the court order made on **the representations by both counsel** are arguable. What the superior court was doing on 15th January, 2009 was asserting its authority to have the court orders obeyed with which we entirely agree. In the circumstances of this case, we see no justifiable reason to stay the superior court's order. There is no merit in this application which we order to be dismissed and further direct that this matter be mentioned before the superior court (*Waweru, J*) or if he is no longer at this station, before any other Judge in the same division for the appellant to purge his contempt, or seek other orders from the superior court.

Dated and delivered at Nairobi this 3rd of July, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR