



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

Civil Appli 3 of 2007 (U R. 2/2007)

REAL VENTURES LIMITED 1ST APPLICANT
 WILLIS OPUKA 2ND APPLICANT
 ODHIAMBO M. T. ADALA 3RD APPLICANT
 HORST KRUMEICH 4TH APPLICANT

AND

AKIBA BANK LIMITED 1ST RESPONDENT
 ENDEBESS DEVELOPMENT COMPANY LIMITED.... 2ND RESPONDENT
 COMMISSIONER OF LANDS 3RD RESPONDENT

(Application for leave to apply for contempt of court arising from the order of the Honourable Mr. Justice O’Kubasu, Honourable Justice Onyango Otieno and the Honourable Justice Deverell dated the 13th of December, 2006 in the Court of Appeal Civil Application No. NAI. 287 of 2006 (UR.162/2006) being an application for an injunction/stay of execution of the order of the High Court of Kenya at Nairobi (Lady Justice Mary Kasango) delivered on the 11th of October, 2006 In H.C.C.C. NO. 534 OF 2006)

RULING OF THE COURT

We have before us an application by way of Notice of Motion expressed to have been brought “Under **Rule 5 (2) (b)** and **Rule 47** of the Court of Appeal Rules; the inherent Powers of this Honourable Court and all enabling provisions of the law”. In this application the applicants, **Real Ventures Ltd.** (1st Applicant), **Willis Opuka** (2nd Applicant), **Odhiambo M. T. Adala** (3rd Applicant) and **Horst Krumeich** (4th Applicant) are seeking the following orders:

“1. **THAT** leave be granted to commence contempt proceedings against the 2nd Respondents, and its director Mr. Fred Gumo.

2. ***THAT the 2nd Respondent be restrained from harassing, evicting and/or interfering with the Applicants quiet enjoyment of the suit property pending the hearing and determination of the Notice of Motion application filed herein on 14.11.2006.***
3. ***THAT the orders of this Honourable court be enforced with the assistance of the O.C.S., Kileleshwa Police Station.***
4. ***Any other relief this Honourable Court may deem just and fit to grant.***
5. ***THAT the costs of and incidental to this Application be costs in the intended appeal***".

The application is brought on the following grounds:

- (a) The 2nd Respondent and in particular Mr. Fred Gumo (Director of 2nd Respondent) have blatantly failed to obey the Court Order issued on 13th December, 2006 and despite the undertaking given by their advocate which order was given pending the hearing and determination of the Application filed on 14th January, 2006.***
- (b) The said Mr. Fred Gumo and his guards have persistently harassed, intimidated and threatened to evict the Applicants unless they vacate the suit premises.***
- (c) The Applicants have now been locked out of suit premises.***
- (d) The 2nd Respondents Director Mr. Fred Gumo is in breach of the said Court Order and is in contempt of this Honourable Court.***
- (e) The honour and dignity of this Honourable Court ought to be maintained by all and sundry.***
- (f) The administration of Justice will otherwise be brought into disrepute***".

When the application came up for hearing before us on 14th February, 2007 Mr. Wambua Kilonzo appeared for all the applicants while Mr. S. K. Bundotich, appeared for the 1st respondent, Mr. Ochieng Oduol, for the 2nd respondent and Miss S. Langat, for the 3rd respondent.

Mr. Kilonzo started his submission by referring to the order of this Court made on 13th December, 2006. It is that order that is said to have been breached by the respondents and particularly Hon. Gumo.

It was Mr. Kilonzo's submission that the undertaking had been breached since the 3rd and 4th applicants were evicted from the premises. Mr. Kilonzo went on to argue that Hon. Gumo had decided to treat this matter as a rent problem. We were reminded that when the undertaking was given, the applicants had sought a stay and that there was no order as to rent. The Court was also told that by the time this application was being argued before the court all the applicants were out of the premises. It was clarified that this application was by the 3rd and 4th applicants.

Mr. Bundotich informed us that since the matter was between the 3rd and 4th applicants and 2nd respondent, he chose to leave the matter to this Court.

Mr. Ochieng Oduol resisted this appeal with zeal, vehemence and clarity. He submitted that he had endeavoured to supervise the undertaking to the best of his abilities, and that he had advised his client accordingly. It was Mr. Oduol's contention that the undertaking had not been breached. He went on to state that Hon. Gumo had applied for the order to be discharged. We were informed by Mr. Ochieng that the only issue in dispute was rent and that the applicants were already out of the premises. Mr. Oduol urged us to dismiss this application.

In reply, Mr. Kilonzo contended that the order of the court was that the applicants were to remain in the premises but subsequently water and electricity supply were disconnected.

The genesis of this matter can be traced to an order of this Court made on 13th December, 2006. In that order this Court stated:

"We have considered the rival arguments and Mr. Ochieng Oduol's undertaking. At the base of it all, Mr. Bosire is not prepared with his client's case and we cannot, in law, be fair in forcing him to proceed when he knows nothing or very little about the matter. In the interest of justice, adjournment is called for. We adjourn this matter to a date to be taken at the Registry on priority basis. Mr. Ochieng Oduol undertakes to ensure that the second, third and fourth applicants have access to the premises the subject of this application".

From the forgoing, it was understood that the applicants herein would have access to the premises until the application was heard and determined or until further orders of this Court. From the submission and material placed before us, it is now clear that the applicants are no longer in the premises. It has been alleged that Hon. Gumo either by himself or by his servants/agents has evicted the applicants from the premises. Hon. Fred Fidelis Gumo has sworn a long replying affidavit in a bid to show that he breached no order of this Court.

From the submission and material placed before us, we are satisfied that Mr. Ochieng Oduol gave an undertaking to the effect that the applicants (*at least 3rd and 4th applicants*) would have access to the premises. From his own admission, the applicants are no longer in the premises. Reasons have been given as to why the applicants are out of the premises. In the first place, electricity and water supply was disconnected hence forcing the applicants to leave the premises. We have been informed about dispute of rent. The parties and their legal advisers know where to direct rent disputes. This Court is certainly not such a forum.

Since all the applicants are out of the premises, we are unable to grant an order restraining the 2nd respondent from harassing, evicting and/or interfering with quiet enjoyment of the suit property. We also decline to bring O.C.S. of Kileleshwa Police station into this matter.

Having carefully considered the affidavit of Mr. Odhiambo M. T. Adala vis-à-vis the replying affidavit of Hon. Fidelis Gumo, we are of the view that there may have been a case of breach of a court order pursuant to the undertaking by Mr. Oduol. From the material placed before us and the submission by counsel, we are of the view that the conduct of Hon. Gumo falls short of honourable behaviour. We say no more in that respect.

In view of the foregoing, we decline to grant **prayers (2), (3) and (4)**. We however, grant **prayer (1)** in that leave is hereby granted to commence contempt proceedings against the 2nd respondent and it's Director Hon. Gumo.

Costs of this application shall be in the intended appeal. These shall be our orders.

Dated and delivered at Nairobi this 9th day of March, 2007.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR