



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 47 of 2006

PANAFRICAN NEWS AGENCYAPPLICANT

AND

TELEPOSTA PENSION SCHEME 1ST RESPONDENT

LLYOD MASIKA LIMITED 2ND RESPONDENT

BOB MORGAN SERVICES LIMITED 3RD RESPONDENT

(Application for an order of injunction pending the hearing and determination of an intended appeal from the High Court of Kenya at Nairobi (Wendo, J.) dated 10th February, 2006

in

H.C.C.C. NO. 1434 OF 2005)

RULING OF THE COURT

We have before us an application expressed as being brought “***Under Court of Appeal Rules 5(2)(b) and Section 3 and 3A of the Civil Procedure Act***” in which the applicant, *Pan African News Agency*, seeks the following orders:-

“i

ii ***THAT there be a stay of execution of the orders of the Superior Court made on the 10th February, 2006 pending the hearing and determination of the intended appeal.***

iii ***THAT the respondents whether by themselves agents, servants or any person howsoever be restrained from denying the applicant/appellant egress or vacation of premises known and comprised in L.R. No. 209/1357/2 Teleposta Towers or detaining any property whatsoever belonging to the applicant/appellant pending the hearing and determination of the intended appeal.***

iv ***THAT the respondents be barred and restrained from levying distress or demanding any further rent, service charge, mesne profit or any other charges whatsoever howsoever accruing from the 28th June, 2005 to determination of the intended appeal.***”

The application is stated to have been brought on the following grounds:-

- “i. The applicant/appellant having paid all the rents due and other charges (sic) upto and until the 28/6/2006 is under no obligation to pay the 1st respondent any more money on account of the lease.***
- ii The lease agreement does not provide for its termination and the appellant/applicant having given requisite notice cannot be forced to stay for the period that is undesirous for it.***
- iii The nature of the appellant and the respondent relationship is mere month to month tenancy.”***

From the foregoing, it would appear that we are dealing with an application which is rather confusing. It could have been framed in a better way than what is before us. When the matter came up for hearing before us on 26th April, 2006 Mr. Omino, the learned counsel for the applicant, informed us that the 3rd respondent, **Bob Morgan Services Limited** had been served but had not appeared. Mr. Omino complained that his client had been denied permission to carry away its property. Mr. Bundotich, the learned counsel for the 1st and 2nd respondents, submitted that his clients had not levied distress and that they have no objection to prayer 2 of the application. That being the stand taken by the counsel for the 1st and 2nd respondents, the matters which call for determination are **prayers (iii) and (iv)** of the application. These prayers have been set out at the commencement of this ruling and as we have already stated they could have been spelt out in a better way than the way they have been presented. What we are able to decipher from what is before us is that the applicant was a tenant of the 1st respondent but an attempt to create a formal lease aborted as the lease was not executed since only the applicant signed it. The aborted lease which was dated 21st July 2004 was for six years. Even before the expiry of the six years, the applicant found alternative accommodation and decided to terminate the tenancy. When the applicant attempted to leave the premises the 1st respondent hired the 3rd respondent to stop the applicant from removing its property from the premises. It was that action of stopping the applicant from removing its property that provoked this litigation. There was yet a further demand by the 1st respondent to the effect that the applicant must pay rent for the remaining period of the lease before it (applicant) could be allowed to remove its property from the premises.

In a bid to enforce its rights, the applicant filed **High Court Civil Suit No. 1434 of 2005** in which it sought judgment against the respondents for:-

- “(a) A permanent injunction barring the defendants whether by themselves, agents or servants from refusing the plaintiff vacation of the 1st defendants premises situate in Teleposta Towers or demanding payment of rent or mesne profit accruing after the 1st of October, 2005 by nature of the plaintiff’s occupation of the said premises.***
- (b) Damages for illegal confinement.***
- (c) Cost of the suit.”***

On the same date (1st December 2005) that the plaint was filed, the applicant filed a chamber summons under **Order XXXIX rules 1 and 2** of the **Civil Procedure Rules** seeking the following orders:-

- “i THAT the instant application be certified as urgent and be heard ex parte in the first instance.***
- ii THAT the defendants whether by themselves, agents or servants or any person howsoever, whosoever be restrained from denying the plaintiffs/applicant egress or vacation of premises known and comprised in L.R NO. 209/1357/2 twentieth floor Teleposta Towers or detaining any property whatsoever howsoever belonging to the plaintiff/applicant pending the hearing and determination of the suit.***
- iii THAT the defendants be barred and restrained from demanding any further rent, service***

charges or any other charges whatsoever howsoever or payments accruing from the time of lapse of vacation notice given by the plaintiff/applicant letter dated 28th June, 2005.

iv THAT the defendants be condemned to pay the cost of the application.”

It was that application that was before the superior court (*Wendoh J*) for determination. The learned Judge considered the application and came to the conclusion that it lacked merit and dismissed it. In dismissing the application the learned Judge stated, inter alia:-

“The plaintiff’s case is not that clear and incontrovertible that the court would decide it at once. The court would have to establish whether or not the lease agreement can be determined by giving of notice by the plaintiff or in any other manner. This has to be by way of viva voce evidence at a full hearing. In the circumstances the plaintiff are (sic) not entitled to prayers (ii) and (iii) of the Chamber Summons for a mandatory and prohibitory injunction dated 28th November, 2005. The plaintiff did not even offer any security.

As a result I dismiss the plaintiff’s application dated 28th November, 2005 with costs.”

Being dissatisfied by that ruling, the applicant filed a notice of appeal and subsequently filed this application for the same or similar injunctive relief.

As it has been stated on numerous occasions, the jurisdiction exercisable by this Court under **rule 5(2) (b) of the Rules** is both original and discretionary. For the applicant to succeed, it must satisfy the twin guiding principles that the intended appeal is not frivolous or is arguable and that unless a stay or injunction is granted, the appeal or intended appeal, if successful, would be rendered nugatory. Those principles will, of course, be considered against the facts and circumstances of each case – see **GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (No.2) [1988] KLR 838 J.K. INDUSTRIES LTD V. KENYA COMMERCIAL BANK LTD (1982-88) 1 KAR 1688** and **RELIANCE BANK LIMITED (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED – Civil Application No. 98 of 2002 (unreported)**.

We have attempted to set out the salient aspects of the dispute herein and it is now apparent that this was a landlord and tenant dispute. The applicant as the tenant wanted to leave the premises but the landlord (1st respondent) insisted that the applicant had no such right unless it paid the rent for the remaining period of the six year lease. It is the applicant’s contention that it had the right to determine the lease and move out with its property. The 1st respondent on the other hand contended that the applicant could not leave until it had paid the rent for the remaining two years.

Having considered the peculiar circumstances of this case and taking into account the fact that the 1st and 2nd respondents have no objection to prayer 2 of the application which we hereby grant, we are of the view that the applicant should also be allowed to remove its property from the suit premises upon payment of the total rent due as at the date of leaving the premises and we so order. Costs shall abide the appeal.

Dated and delivered at Nairobi this 5th day of May, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR