THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

MISCELLANEOUS APPLICATION NO. 80 OF 2015

(Arising from Miscellaneous Application No. 79 of 2015)

Impala Associates Limited:: Applicant

VERSUS

1. Daisy Okware
2. Sam Okware ::Respondents

Coram: Hon. Mr. Justice Remmy Kasule, JA, Sitting as a single Justice

RULING

This is an Application for orders of an interim injunction and stay. The applicant prays this Court to order, in the interim that the respondents do not evict them (applicant) from occupation of the residential premises on Plot 32 Lake Drive, Port Bell pending hearing and final determination of the substantive **Miscellaneous Application No. 79 of 2015** for temporary injunction and/or stay. The applicant also in the same measure seeks an interim stay of the orders made by the High Court in **High Court Miscellaneous Application No. 1193 of 2014** arising out of **HCCS No. 583 of 2014.**

The application is made pursuant to Rules **2(2), 6(2)(b), 32(1) and 42(2)** of the Rules of this Court

Learned Counsel Abbas Bukenya appeared for the applicant while Stanley Omony was for the respondents.

By way of background, on 28.01.2011 the first respondent (Daisy Okware) as land lady executed a tenancy agreement with the applicant in respect of the premises situate at Plot 32 Lake Drive, Port Bell, whereby the applicant rented the said premises from the first respondent at a monthly rental of US$ 1500. The tenancy was for two years starting 01.03.2011. Rent was payable six months in advance initially and three months in advance subsequently. At the end of the tenancy the applicant as tenant was to hand over to the landlady the demised premises in as good state of repair and condition as they were in at the commencement of the tenancy (paragraph 5(h) of the Tenancy Agreement). The landlady was to re-enter the premises if rent payment was in arrears for thirty (30) days. In paragraph 6(i) of the same agreement both the landlady and the tenant agreed as follows:-

"6(i) It is understood that the landlord is interested in selling the property and that the tenants are also interested in purchasing the same with a period not exceeding one year. It is therefore agreed by the parties that of any sale the property by the landlady the tenant shall have first right of refusal to purchase the same".

After the execution of the tenancy agreement, the applicants entered and occupied the demised premises.

Subsequently disputes arose between the applicant as tenant and the respondents as owners of the suit property. These resulted into the applicant filing in the High Court (Land Division) **Civil Suit No. 538 of 2014** against the respondents on 07.09.2014. In the suit the applicants claimed that the respondents committed breaches of

warranty and made misrepresentations with regard to the demised premises and this caused the applicants to suffer loss and damage by reason thereof they claimed damages, both general and special from the respondents. The suit remains pending determination in the said High Court. The applicant also filed in the High Court **Miscellaneous Application No. 1193 of 2014** against the respondents seeking an injunction order as prayed for in the application the subject of this ruling. The High Court (Eva K. Luswata J.) found the applicant's application without merit and dismissed the same with costs to respondents. The applicant then proceeded to lodge a Notice of Appeal and this application in this Court.

The burden is upon the applicant, if the application is to succeed, to show that there is a prim facie case with a probability of success in the substantive application for a temporary injunction and/or stay and also in the intended appeal. The applicant has also to make out a case that in case the order prayed for is not granted then the applicant is likely to suffer irreparable loss. Lastly, just in case Court is in doubt as to the considerations of a prima facie case and irreparable damage, then a decision will be taken on the application basing on the balance of convenience.

The interim order ought to be made only in compelling circumstances, to prevent defeat of justice and strictly pending ascertained hearing of a substantive application by the full Court: See **Wilson Mukiibi vs James Ssemusambwa, Civil application No. 9 of 2003 (SC).**

I have gone through the affidavit of Susan Kaggwa a Director of the applicant in support of the application and that of Daisy Okware, the first respondent, in opposition to the application. I have also carefully considered the submissions of counsel for the respective parties to the application.

With respect to the applicant showing that there is a prima facie case against the respondents, it is unexplained by the applicant why the tenancy agreement of 28.01.2011, the foundation of the applicant's claim was executed with the first respondent who has never been a registered proprietor of the suit premises, Plot 32 Lake Drive, Port Bell.

Further, it appears that the applicant has not been paying rent for the suit premises for some considerable time. The consideration for the tenant/landlord relationship is the payment of the agreed upon rent by the tenant and then the landlord making available the rented premises for occupation to the rent paying tenant. By not paying rent, the claims the applicant has against the respondents notwithstanding, the applicant undermines the very status of being a lawful tenant, upon which the said applicant's case against the respondents is based.

Lastly, on the face of it, in this application the applicant appears to have determined, without the prior consent and approval of the true owner of the demised premises to carry out repairs on the said suit premises, set the amounts of money as costs of those repairs and then refused to pay due rent on the basis that the money determined by the applicant as the cost of repairs is to be utilized in settling the said rent. I have not been able to come across any provision in the tenancy agreement, or any other evidence, vesting such exercise of arbitrary powers in the hands of the applicant.

I also find that the provision in the tenancy agreement as relates to the purchase of the demised premises did not vest in the applicant any powers to conduct themselves as they did in respect of the suit premises.

It is noted that the applicant has as yet not lodged any appeal to this Court. All that there is, is a Notice of Appeal and **Civil Application No. 79 of 2015** being the substantive application for similar orders like those sought in this application. The applicant

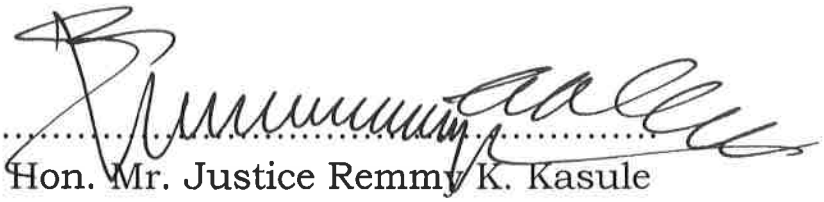
offered no explanation as to why the appeal could not be lodged since 26.03.2015 when the High Court delivered its ruling. Such a failure to lodge an appeal gives credence to the respondents' assertion that the applicant is pursuing this litigation to cause delay while at the same time the applicant is occupying the suit premises.

It is also appreciated that the subject matter of the dispute involves in the main claims of amounts of money that the applicant claims as special and general damages. Thus the applicant's claims are easily ascertainable in money terms. Accordingly the issue of the applicant suffering irreparable loss that cannot be compensated for does not arise.

Even with regard to balance of convenience, the applicant, though not paying the monthly rent, is enjoying occupation of the premises. The lawful owner of the suit premises is, on the other hand, not receiving any rent from the said premises. The applicant, in case he succeeds in his claims for damages, can easily recover the same from the respondents by caveating and attaching for sale the suit property. By way of contrast, the rent due is not being paid to the owner of the suit premises and the tenancy agreement has expired. The owner of the property remains kept away from use and occupation of his property. Thus the second respondent who is registered proprietor of the suit property is therefore suffering more inconvenience than the applicant.

Bearing the above considerations in mind, I have come to the conclusion that the applicant has not made out a case to be granted the orders prayed for in this application. Accordingly this application is dismissed with costs to the respondents.

Dated at Kampala this **29th** day of **April 2015**.



Hon. Mr. Justice Remmy K. Kasule

Justice of Appeal