



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 7 OF 2020

GRACE NJERI WANGARI.....APPELLANT/APPLICANT

VERSUS

SOPHIA DOKWE.....1ST RESPONDENT

JAMES CHITIBWI MUMBA.....2ND RESPONDENT

RULING

1. There are two applications pending in this matter. The first one is the Appellant's Notice of Motion application dated 13/2/2020 substantively seeking stay of execution against the Ruling of the trial court delivered on 12/2/2020. The second one is the Respondents' Notice of Motion Application dated 30th July, 2020.

2. But before I dwell into the merits of the two applications and shine light unto the issues under consideration, I will briefly bring out the background of the facts that gave rise to this appeal.

3. The Appeal is traceable to the facts that the Appellant/Applicant had sued the Respondents in Mombasa CMCC. No. 1426 of 2019 vide a Plaint dated 22/8/2019. In the said Plaint, the Applicant pleaded that he had leased the Respondents' apartment vide a lease agreement dated 13/6/2018 which was intended to last for two years. She averred that she had been paying rent regularly up to May 2019 when a controversy arose after the Applicant had requested for receipts of payment from the Respondents' agent David Awori. From thereon, the Applicant avers she was not certain who to pay subsequent rent to and the Respondents were making effort to evict her from the back door. He therefore filed a suit in the trial court seeking for a declaration that the notice issued to her was illegal, null and void and ought to be vacated. Further, that the Defendants be ordered to render accounts for the rent paid to them and a permanent injunction restraining the Defendants from evicting her (the Applicant).

4. Of importance for consideration is the application dated 14/10/2019 by the Respondents whereby they sought the trial court to order the Applicant to pay rent arrears of Kshs. 495,000/=. After considering the evidence presented before it the trial court vide a ruling delivered on 12/2/2020 directed the Applicant to pay to the Respondents Kshs. 440,000/= within 10 days from the date thereof, failure to which the Respondents would proceed to levy distress.

5. This ruling triggered the appeal herein and the grounds for appeal against the said ruling are outlined in the Memorandum of Appeal dated 12/2/2020 and filed on 14/2/2020.

6. Contemporaneous to the filing of the Memorandum of Appeal, the Appellant/Applicant filed an application dated 13/2/2020 seeking for inter alia orders that;

a) Spent

b) Spent

c) That this Honourable court be pleased to issue orders in the nature and realm of stay of execution of such ruling, judgment, decree, and order and consequent precipitate action issued by the subordinate court sitting in Mombasa; Honourable C. N Ndegwa Senior Principal Magistrate vide Chief Magistrate Civil Suit No. 1426 of 2019 Grace Njeri Wangari –vs-Sophia Dokwe and James Chitibwi Mumba on the 12th day of February 2020 pending hearing and determination of the substantive Appeal filed herein.

d) That this Honourable Court be pleased to grant such further orders in the interest of justice.

e) That the costs of this application be provided for.

7. The application is premised on the grounds on its face and further supported by the affidavit of Grace Njeri (the Appellant herein) sworn on 13/2/2020. She deponed that the trial court by its ruling authorized the Respondents to levy distress within 10days of the ruling and yet her prayer to render accounts was still pending, depicting a scenario of double payment.

8. That notwithstanding, the Applicant averred that the trial court in granting its orders ignored an attempt for contempt of court and went beyond its jurisdiction in granting a prayer that was not sought i.e. the payment of Kshs. 440,000/=. According to the Applicant she was condemned unheard and the figures she was being compelled to pay were unsubstantiated.

9. The Respondents opposed the application vide a Replying Affidavit sworn by the 1st Respondent, Sophia Dokwe, on 21/2/2020. She averred that the supporting affidavit is unsigned and has no legal value. According to her, she had terminated the lease agreement vide a letter dated 19/8/2019 due to persistent non-payment of rent and as things stand, the Applicant was an illegal tenant.

10. With regard to the ruling being appealed against, the Respondents explained that the court had ordered the payment of future rent by the Applicant and consequently the Applicant issued a cheque dated 13.5.2019 for Kshs. 220,000.00 but the same cheque was dishonoured on grounds that the account was dormant.

11. The Deponent further deposited that the Applicant has all long been unfaithful and in breach of the lease agreement in not paying the agreed monthly rent amounts of Kshs. 55,000/=. As such she has come to court without clean hands and in the event that the court is of the view of allowing the application then it should conversely order for the deposit of security as a condition of stay.

12. On 24/2/2020, the court directed that that the application be disposed by way of written submissions. Each party was consequently granted a time span of 14 days to comply with those directions. On perusal of the court record, it is only the Respondents who complied with the same by filing their submissions on 6/3/2020 whilst the Applicant never complied with the said orders.

13. On 3/8/2020, the Respondents filed the second application pending in this matter and in my view, it is a further response to the first application. It is a Notice of Motion application dated 30/7/2020 which sought the following orders;

a) Spent

b) Spent

c) That the Appellant's application dated 13/2/2020 be dismissed with costs to the Applicant.

d) That this Honourable Court do issue orders against the Appellant to pay rent arrears of Kshs. 440,000.00 to the Applicants immediately and unconditionally failing which the Applicants proceed to levy distress against the Appellant as directed in the court order issued on 12/2/2020 by Hon. C. N. Ndegwa.

e) That in the alternative to prayer (d) herein above, orders do issue that the Appellant to pay the accumulated rent arrears of Kshs. 715,000.00 as at July, 2020 immediately and unconditionally to the Applicants herein and vacate the suit premises upon clearing any monthly accrued rent and or any other outstanding rent arrears.

f) That the costs of this application be provided for.

14. The application is supported by an affidavit sworn by the Applicant's advocate Ms. Violet Mosiara whereof she explicated the grounds on face of the application. She laments that the Applicant had failed to comply with the directions to file written submissions to her application dated 13/2/2020. That the Applicants having failed to file their submissions then the application dated 13/2/2020 should be dismissed and the interim orders for stay granted thereof vacated.

15. It is further deponed that the Respondent (tenant) continues to be in contempt of court and continues to enjoy residence in the suit premises without paying the rent ordered by the trial court of Kshs. 440,000.00 which has now increased to Kshs. 715,000.00.

16. On 16/7/2020 the Applicants (Landlords) learnt that the Respondent (Tenant) intended to vacate the suit premises without paying the rent arrears. The Applicants (Landlords) do not know any other attachable assets of the Respondent/Tenant besides the households proclaimed and justice would be met if the Applicant/Landlords are allowed to proceed to levy distress and/or executing the orders granted by the Honourable trial court on 12/2/2020.

17. The Applicants/Landlords filed a further affidavit on 2/9/2020. It was sworn on 28/8/2020 by their advocate on record Mr. Allan Mzungu. His case was that the court on 4/8/2020 by allowing prayer (2) in the application dated 30/7/2020 temporarily restrained the Appellant from vacating and/or moving any of the household items as listed in a proclamation notice dated 21/8/2019. Despite being served with those orders, the Appellant vacated the suit premises on 5/8/2020 without settling the rent arrears due to the Appellants. The keys to the premises were handed over to Landlords by the Appellant's advocate on 7/8/2020 and the Applicants/Landlords were of the view that the Appellant was assisted by her advocate on record to escape without paying the accrued rent arrears. Now that the Appellant has vacated the suit premises, the Applicants/Landlords concede that it is now impossible to levy distress against the Appellant.

18. The Appellant never filed any response to the application dated 30/7/2020 but when the same came up for hearing, the Appellant's advocate applied for leave to cease from acting for the Appellant on basis that he had lost contact with the Appellant and could therefore not receive further instructions to act in this matter. Mr. Eguza Counsel for the Appellant submitted and maintained that he did not assist the Appellant to vacate the suit premises and the Keys he handed over were brought to his office by person unknown to him.

The Determination

19. Having set out the pleadings by parties as above and the submission by the Respondent dated and filed on 6/3/2020 I am of the considered view that the main issue is whether the Appellant's application dated 13/2/2020 for stay is merited. Either way, the Respondents' application dated 30/7/2020 is bound to abide with the outcome of the application dated 13.2.2020. If the court grants stay as sought by the Appellant, then Respondents will be bound not execute and vice versa.

20. Having said so stay of execution is governed by **Order 42 Rule 6(2)** of the Civil Procedure Rules which lays down the conditions which an Applicant must satisfy in order to deserve orders of stay of execution pending appeal. A summary of Order 42 Rule 6 shows that an Applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application must have been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court.

21. In this case, the Appellant opted not to file any written submissions. Nonetheless the grounds on the face of the application show that the application was timeously filed without any delay. The ruling appealed against having delivered on 12/2/2020, the application was filed on 14/2/2020. I therefore find that there was no inordinate delay from the date of filing the notice of appeal to the date of filing the instant application.

22. The second limb in an application for stay of execution is whether substantial loss has been established. I am not convinced that in the instant case, that the Appellant has shown that she will suffer substantial loss if the Respondents are allowed to execute the ruling delivered on 12/2/2020. The Appellant does not rebut that she has not been paying rent but avers that she has to be served with the records of her previous payment for rent. I see no reason why the Respondents/landlords should not be allowed to recover rent arrears which have been lawfully commanded by the trial court.

23. Lastly, it is clear from the record that the Appellant has offered no security as a condition for stay. The offer for security must always originate from the Applicant in any application for stay. There being none in this application, I see no reason why this court should exercise my discretion in favour of the Appellant.

24. The other issue that has weighed heavily on my mind against the award of the orders sought by the Appellant arises from her conduct depicted in chronology of events in this matter. She initiated this appeal challenging the figures she was ordered by the trial court to pay as accrued rent and obtained interim orders for stay. It was not shown that subsequent to filing the appeal, she had at any point paid the accruing rental arrears yet she has resided in the Respondents' premises until 5/8/2020 when she vacated the premises without the consent of the Respondents nor the court given that the court had issued orders temporarily restraining her from vacating the premises. This depicts a tricky behavior of a tenant not intending to evade the payment of any rent.

25. The order of stay of execution that the Appellant seeks is an equitable remedy. As the court of Appeal stated in the case of **Star Transport Co. Ltd v Ali Mwinyi Mvita [2016] eKLR**, the conduct of a party who seeks an equitable remedy must in all matters relating to the suit meet the approval of a court of equity before he can obtain an equitable relief. An equitable relief will not be granted to a party who by his conduct has shown himself to be underserving of such a relief.

26. In the event, the Appellant's application dated 13/2/2020 must fail and the same is dismissed with costs to the Respondents therein. There being no stay granted against the ruling made on 12/2/2020 and there being no Judgment or order by this court setting the trial court's ruling aside, the same remains in force, capable of being executed.

27. As regards the Respondents' application dated 30/7/2020 most of the issues raised therein have been addressed and allowed in the analysis above. I however decline to award the alternative prayer No. (5) in the application dated 30/7/2020 since no evidence has been put forth to substantiate the assertion that the accumulated rent arrears was Kshs. 715,000/= as at 13th July, 2020.

28. The cost of the two applications shall be borne by the Appellant.

It is hereby so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of January, 2021.

D. O CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY

JUDGE