



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 42 OF 2017**

**GEORGE KADU TITI.....APPELLANT**

**-VERSUS-**

**KIJIJI MANAGEMENT LIMITED.....RESPONDENT**

**RULING**

The respondent filed a suit against the appellant in the Chief Magistrates Court at Milimani, namely, Nairobi CMCC No. 999 of 2013(hereinafter referred to as “the lower court”) seeking among others, vacant possession of all that parcel of land known as L.R No. 1055/78 situated at Miotoni Road, Karen (hereinafter referred to as “the suit property”). The appellant filed a defence and counter-claim against the respondent. In a judgment that was delivered on 6<sup>th</sup> October, 2017, the lower court dismissed the appellant’s counter-claim and ordered the appellant to deliver vacant possession of the suit property to the respondent within 30 days from the date of the judgment. The lower court found that the respondent’s tenancy had lapsed on 30<sup>th</sup> September, 2015 and that the same was never renewed. The court found that the appellant had continued to occupy the suit property as a trespasser.

On 31<sup>st</sup> October, 2017, the appellant filed the present appeal against the said judgment of the lower court. On 3<sup>rd</sup> November, 2017, the appellant filed an application dated 31<sup>st</sup> October, 2017 seeking an order for stay of execution. The appellant’s application for stay of execution came up for mention before me on 14<sup>th</sup> November, 2017 for directions. Ms. Mwai advocate who appeared for the appellant during the mention asked for a hearing date for the application and an order for the maintenance of status quo pending the hearing of the application. Mr. Anzala for the respondent opposed the grant of any interim order in favour of the appellant. Mr. Anzala contended that the appellant had been occupying the suit property free of charge from January, 2017 and was indebted to the respondent to the tune of Kshs.1.4 million on account of unpaid rent. After considering the rival submissions by the advocates for the parties, the court listed the stay of execution application for hearing on 28<sup>th</sup> March, 2018 and granted to the appellant a temporary stay of execution pending the hearing of the application on condition that the appellant deposited in court as a security a sum of Kshs. 2.5 million within 7 days from the date of the order in default of which the stay was to automatically stand discharged.

The appellant did not comply with the condition for stay that had been imposed by the court. On 21<sup>st</sup> November, 2017 which was the last day for the appellant to comply with the said condition, the appellant filed a Notice of Motion application dated 17<sup>th</sup> November, 2017 seeking a review of the order of 14<sup>th</sup> November, 2017 that required him to deposit in court a sum of Kshs 2,500,000/- as a condition for interim stay of execution.

The review application was supported by the appellant’s affidavit sworn on 17<sup>th</sup> November, 2017. The

application was premised on grounds that the order to deposit Kshs 2,500,000/- was made on the basis of misleading allegations made from the bar by the respondent's advocate that the appellant was in rent arrears and had not paid rent for the whole of 2017. The appellant averred that he faced imminent eviction. The appellant averred that he had never failed to pay rent from January 2017 save for two months when rent was appropriated towards the repair of the suit property with concurrence of the respondent. The appellant annexed to his affidavit in support of the application, copies of receipts, cheques and bank statements in support of his contention that he was not in rent arrears. The appellant averred that it would serve the interest of justice if the order that required him to deposit Kshs. 2.5 million as a condition for interim stay of execution was reviewed and set aside. The appellant averred that the facts on the basis of which the review application was premised were new facts that were not brought to the attention of the court when the said order was made. The appellant averred that he had brought the application without delay.

The application was opposed by the respondent through a replying affidavit sworn by Charles Waithaka Ndungu on 30<sup>th</sup> November, 2017. The respondent averred that since the commencement of the appellant's tenancy in 2012, the appellant had accumulated rent arrears and interest to the tune of Kshs. 1,838,372/-. The respondent annexed to the replying affidavit a statement of the appellant's rent account from October, 2012 to November, 2017 showing the amount said to be outstanding from the appellant. The respondent averred that the appellant failed to deposit the sum of Kshs. 2,500,000/- as was ordered by the court and that the application for review was an attempt to extend his stay in the suit property from which he was evicted on 23<sup>rd</sup> November, 2017. The respondent annexed to the replying affidavit a copy of a letter dated 30<sup>th</sup> November, 2017 from Leakey's Auctioneers confirming that the appellant was evicted from the suit property on 23<sup>rd</sup> November, 2017. The respondent averred that the orders sought by the appellant were no longer tenable as the same had been overtaken by events.

The application was argued before me on 5<sup>th</sup> December, 2017. Ms. Mwai advocate who appeared for the appellant reiterated the contents of the affidavit in support of the application. Ms. Mwai submitted that the court was misled into giving a conditional stay of execution. She submitted that the appellant had placed evidence before the court showing that he had paid rent in full save for the rent for January and April, 2017 that were used to carry out repairs to the suit property. Ms. Mwai admitted that the appellant was evicted from the suit property on 23<sup>rd</sup> November, 2017 but contended that the said eviction was illegal since the present application had been served upon the respondent. Ms. Mwai contended further that the statement of account that was attached to the replying affidavit was incorrect. She urged the court to grant the orders sought.

In response, Mr. Henia advocate who appeared for the respondent submitted that the application before court was filed on the last day when the appellant was supposed to comply with the condition that the court had imposed on the stay order that was made in favour of the appellant on 14<sup>th</sup> November, 2017. Mr. Henia submitted that the order sought to be reviewed was not attached to the application. He submitted that since the stay order lapsed on 21<sup>st</sup> November, 2017 and the appellant was evicted from the suit property on 23<sup>rd</sup> November, 2017, there was no order to be reviewed. Mr. Henia argued that if the appellant felt that the court had been misled by the respondent on 14<sup>th</sup> November, 2017, he should have moved the court immediately thereafter. He submitted that the appellant's application was an afterthought. Mr. Henia submitted that the appellant who was a tenant of the respondent since the year 2012 had not produced receipts for the year 2012 whose rent remained unpaid. He submitted that even for the year 2017, rent for September and November 2017 remained unpaid. He argued that no reason had been advanced for the appellant's failure to comply with the court order of 14<sup>th</sup> November, 2017.

I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the respondent's replying affidavit in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. What I need to determine is whether the appellant has established a case for the review of the orders made herein on 14<sup>th</sup> November 2017. Section 80 of the Civil Procedure Act that gives the court power to review its orders provides as follows:

*"Any person who considers himself aggrieved –*

*a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or*

*b) By a decree or order from which no appeal is allowed by this Act;*

*May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."*

Under Order 45 rule 1 of the Civil Procedure Rules, the grounds upon which an aggrieved party can seek review are the following:

*a) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.*

*b) Where there is a mistake or error apparent on the face of the record.*

*c) For any other sufficient reason.*

The order made on 14<sup>th</sup> November, 2017 sought to be reviewed granted the appellant a temporary stay of execution on condition that he deposited in court a sum of Kshs 2,500,000/- as security within 7 days of the order failure to which the stay was to lapse. The appellant's application as I have mentioned earlier is premised on the ground of new and important evidence which was not available when the order was made. The appellant has also argued that the orders made on 14<sup>th</sup> November, 2017 were issued on the basis of misrepresentation by the respondent.

I am not satisfied that the appellant has placed before the court any new evidence that was not within his knowledge when the order of 14<sup>th</sup> November, 2017 was made. The material that the appellant has placed before the court relates to rent payment. In his affidavit in support of the stay application that was before the court on 14<sup>th</sup> November, 2017, the appellant stated at paragraph 13 that he had paid his monthly rent as and when the same fell due and was continuing to pay the same. The fact that the appellant had paid rent is therefore not a new matter or evidence that was not within the appellant's knowledge when the order of 14<sup>th</sup> November, 2017 was made.

I am also not in agreement with the appellant that the court was misled by the respondent into making conditional stay order. Whether or not to grant an interim stay was at the discretion of the court. Under Order 42 rule 6 of the Civil Procedure Rules, the court is prohibited from granting an order for stay of execution unless the applicant furnishes security for the due performance of the decree or order appealed from. The imposition of security as a condition for the interim stay order that was granted to the appellant was an exercise of discretion. It was not based solely on what the court was told by the respondent.

In any event, the appellant has not satisfied this court that he had paid rent for the suit property from the year 2012 to the month of November, 2017 when he approached the court for an order for stay of execution. The appellant's rent statement attached to the respondent's replying affidavit which shows that the appellant has an outstanding rent balance of Kshs. 1,123,500/- exclusive of interest of Kshs. 714,872/- has not been controverted save for a statement from the bar that the same is not correct. The claim that was made by the respondent's advocate on 14<sup>th</sup> November, 2017 that the appellant had an outstanding rent of Kshs. 1.4 million was therefore not misleading.

It was common ground that the appellant was evicted from the suit property on 23<sup>rd</sup> November, 2017 when he failed to fulfill the condition for the stay that the court had granted on 14<sup>th</sup> November, 2017. I am in agreement with the respondent that the orders sought by the appellant have been overtaken by events. The orders sought even if the same were to be granted would be in vain.

