



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 48 OF 2017**

**DICKSON KARIUKI t/a DIKEMWA AUCTIONEERS.....APPELLANT**

**VERSUS**

**KAMLESH RAWAL.....RESPONDENT**

**RULING**

1. There is before court for determination an application by the Appellant seeking orders that:-

**i) THAT this matter be Certified extremely urgent and service be dispensed with as a matter of urgency.**

**ii) THAT this honourable court be pleased to issue a temporary order of stay of operation of the ruling of HON. ERIC MUTUNGA delivered on 3<sup>rd</sup> March, pending the hearing of this application interparties.**

**iii) THAT his honourable court be pleased to issue a permanent order of stay of operation of the ruling of HON. ERIC MUTUNGA delivered on 3<sup>rd</sup> March, pending appeal.**

**iv) THAT costs be provided for.**

2. Evidently only prayer 3 remain outstanding for determination because prayer 1 & 2 were spent the moment the application was certified urgent and heard *interpartes*.

3. The application is expressed to be premised upon the provisions of section 3A, 79G and 3A of the Act as well as order 42 Rule 4 and Order 49 of the Rules.

4. Upon perusal of the Record it is plain to me that the provisions of sections 79G, 95 and Order 49 have been improperly invoked. Improperly invoked because the order appealed against was made on the 3/3/2017 and the appeal filed on 16/3/2017 hence no need nor question has arisen to consider whether to grant an extensions of time to lodge an appeal out of time. Equally the special powers of the Registrar, under Order 49 need not be invoked as the application was placed before a judge and not the Registrar. Consequently the application must be seen and considered as one for stay pending appeal. I will treat it as such notwithstanding that the applicant seeks to have a permanent stay of the operation of the ruling dated 3/3/2017. The only time this court can ever issue the orders as desired by the Applicant is not on this application but upon the final determination of the appeal and that order need not be a stay, but can only be ultimate annulment of the decision. That must wait its day and cannot be an interlocutory

intervention. Even Rule 4 of Order 42 is not applicable for this application. Guided by the provisions of Order 51 Rule 10 I will treat the application as one of stay pending appeal under Order 51 Rule 6.

5. For this court to grant a stay of execution pending appeal the dictates of Order 42 Rule 6 must be satisfied. I am in no doubt that there is an appeal filed and that the application was filed with the memorandum of Appeal some 13 days after the ruling hence there has not been delay in seeking the orders from the court. What need to satisfy myself of are two:-

- **Whether the applicant stands to suffer substantial loss if stay is not granted.**
- **Whether the applicant has provided security for the due performance of the decree that may be binding upon it upon the appeal being determined.**

6. The grounds disclosed in the application and the averments in the affidavit in support thereof totally fail to address the prerequisite of grant of an order of stay pending appeal. Instead there is great delving into the merits of the Appeal which must wait the hearing of the appeal. The affidavit nevertheless gives valuable history of the litigation.

8. The application was opposed by a Replying affidavit KAMULESH RAWAL with several annexures exhibited. Of importance are receipts dated 20/1/2017, 24/2/2017 and 6/3/2017 each for Kshs.44,000.00. This is important to court noting that the entire dispute is about rent payable to the appellant to his landlord and alleged to have been in arrears hence the distress.

8. In the affidavit in support of the current application the auctioneer acknowledges receipt of instructions to recover Kshs.264,000.00 and payment of 220,000.00 after such instructions. The letter by the landlord dated 17/1/2017 acknowledges payment of Kshs.220,000.00 which I consider to include the receipt dated 6/1/2017 being rent for February 2017.

9. The landlords letter also complains about failure to pay auctioneers fees but the tenant has put it on oath that on the 10/2/2017 at 4.31pm he did pay the sum of Kshs.25,000.00 to the auctioneer by M-pesa and given the transaction Ref numbers.

10. The question at the hearing of the appeal would be whether on the 8<sup>th</sup> February 2017 and at the date the trial court made its ruling impugned in this appeal, there was arrears of rent in the sum of Kshs.264,000.00.

11. Prima facie and without going to the merits, both parties agree and have availed evidence that such were not the outstanding arrears of rent.

12. If that be the position, the question is what injury is sufficiently proved to be capable of visit upon the appellant that ought to be prevented by an order of stay? In answering that question if must be born in mind that the order by the trial court simply require the seized goods to be returned and refund of all sums paid the auctioneer be refunded, without giving the quantum of such money. At this level and without delving into the merits of the appeal I am unable to identify any substantial loss to be suffered by the appellant. His stake in the matter beyond his statutory duty as an auctioneer and officer of the court is only his fees. That is demonstrated to have been paid and that fact has not been denied by him.

13. On the second limb of provision of security for the due Performance of the decrees that may be binding you him, at the conclusion of the appeal, I take it that the order is for the return of the goods distrained upon. They are the substratum of the suit between the parties. They need be preserved so that the appeal does not stand out as a pure academic exercise. That preservation to me, on the evidence of payment of outstanding rent is best bestowed upon the owner and not the auctioneer who would be put to the incur storage charges and even insure them pending final determination of the appeal. To leave them with the auctioneer would not meet the overriding objective of the court to make costs of litigation affordable. The effect would be to escalate costs. That would not do justice.

14. It is clear to me that the applicant has not demonstrated being entitled to an order of stay as prayed

and even pending the outcome of the appeal.

15. However, there is the element of an order that he refunds all sum paid to him. That may include his fees which may or may not have been earned as claimed and alleged to have been paid. There is no allegation that the Appellant would be unable to effect a refund if the appeal succeeds.

16. In order to do justice to the parties, I direct that the trial courts orders be complied with to the extent of release of the distrained goods. The goods be released to the tenant forthwith and in any even before lapse of the next 24 hours. The release will be effected by the appellant ferrying back the good to the suit premises. This however, shall be on terms that the tenant continues to pay the reserved rent as and when the same fall due but not later than the 5<sup>th</sup> of the relevant month.

17. I however stay the refund of any sums paid to the auctioneer pending the hearing and determination of this appeal. This stay is also granted on terms that this appeal be fast tracked as follows:-

- The Appellant shall file a Record of Appeal within 30 days from today and the file be placed before a judge for perusal within 14 days after the Record of Appeal shall have been filed.
- If there shall be default in compliance with the order for release and filling of the Record of Appeal as aforesaid the order of stay shall stand discharged and vacated without the need of any party applying to court and the Respondent shall be at liberty to execute the Orders by the trial court.
- The costs of the application are ordered to be in the Appeal.

**Dated and delivered at Mombasa this 21st day of April 2017.**

**HON. P. J. O. OTIENO**

**JUDGE**