



REPUBLIC OF KENYA

IN THE HIGH COURT OF MALINDI

CIVIL APPEAL NO. 14 OF 2017

HANIF IQBAL KHAN.....APPLICANT

VERSUS

WINES & SPIRITS KENYA LIMITED.....RESPONDENT

RULING

(Notice of Motion application dated 20th March, 2017)

1. The only substantive prayer that remains for determination in Hanif Iqbal Khan's Notice of Motion application dated 20th March, 2017 is the request for stay of execution of the decree and ruling pending the hearing and determination of his appeal. The Notice of Motion application which is brought under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and sections 1A & 3A of the Civil Procedure Act is opposed by the Respondent, Wines & Spirits (Kenya) Ltd.
2. The basis of the Applicant's application as gleaned from the grounds and the affidavit in support of the application are that on 7th March, 2017 his suit being Kilifi PMCC No.46 of 2013 Hanif Iqbal Khan v Wines & Spirits (Kenya) Ltd was dismissed by the trial magistrate for want of prosecution. That he did not cause the delay in the prosecution of his case. Further, that the Respondent was preparing to evict him and unless an order of stay of execution is issued, he will be evicted and his appeal will be rendered nugatory.
3. The Applicant avers that an order of injunction was issued by the Magistrate's Court at Kilifi on 27th December, 2013 restraining the Respondent from evicting him from the premises. He avers that after the order was issued the Respondent filed Miscellaneous Application No.166 of 2014 in Mombasa and by November, 2014 he was still busy defending the matter in Mombasa.
4. It is the Applicant's averment that he was not aware that where no action is taken in a matter within one year the suit is liable to be dismissed. He blames his advocate for not giving him the timelines applicable in prosecution of his case. It is his case that immediately he was served with the application seeking to dismiss his case he sacked his advocate and appointed another one in his place. He disclosed that he is willing to abide by any conditions imposed by the court.
5. The Respondent opposed the application through a replying affidavit sworn on 27th March, 2017 by its Managing Director, John Waiganjo. The Respondent's case is that the effect of the orders obtained by the Applicant before the Magistrate's Court was to deny it access to the premises. It is the Respondent's case that it is yet to get a cent as rent from the Applicant from the time the orders were issued.
6. In opposing the application, the Respondent dismisses the Applicant's claim that his suit was dismissed

because he is a layman contending that he had an advocate on record and neither has he demonstrated that he followed up the case with his advocate.

7. The Respondent is however not averse to the Applicant being granted a stay but on the condition that he is ordered to pay the rent arrears and continue paying monthly rent pending the hearing and determination of the appeal.

8. The Applicant swore a further affidavit on 5th June, 2017. He denies owing the Respondent any rent arrears and avers that he has been paying rent since 2013. Further, that the issue of rent payment is the same issue in the suit that was dismissed and any matter touching on rent has to be determined by the trial court if the suit will be reinstated.

9. The question in this matter is whether the Applicant has met the conditions for grant of stay pending appeal. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 states:

“No order of stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Therefore in an application like the one before this court, the applicant has to convince the court that unless an order of stay is issued, he will suffer substantial loss. The applicant must make the application promptly and should provide security as directed by the court.

10. In the case at hand, it is agreed by the parties that the Applicant is in occupation of the Respondent's premises. Unless the order dismissing the Applicant's suit is stayed, the Applicant is likely to be evicted by the Respondent thus disrupting the Applicant's business operations. Such a scenario would render the Applicant's appeal nugatory. I am thus satisfied by the Applicant that he will suffer substantial loss if the order prayed for is not granted.

11. That the application was brought without delay is not in doubt. The decision which the Applicant desires to challenge by way of an appeal was made on 7th March, 2017. This application was filed less than fifteen days later. The application was thus made promptly. The Applicant has thus met the second ground for grant of stay pending appeal.

12. The Applicant has indicated that he is ready to abide by any conditions set by the court. In the written submissions, the Respondent indicated that it is owed Kshs. 2,160, 000 and this is the amount that the Applicant should deposit in court as security. The Respondent also prays that the Applicant be directed to pay the monthly rent of Kshs. 40,000.

13. The Applicant counters the Respondent's submissions by asserting that he used Kshs. 716,000 to renovate the premises but has nevertheless continued paying the monthly rent of Kshs. 30,000.

14. An order of stay pending appeal is meant to protect an applicant from suffering loss that cannot be repaired should his appeal succeed. In granting the order, the court should also be alive to the interests of the Respondent. The stay order should not be prejudicial to the Respondent's affairs. The court should therefore balance the competing interests of the parties before it.

15. The Respondent avers that no rent has been paid by the Applicant since 2013. The Applicant says that he has been paying rent. He also claims to have renovated the premises at great expense. The Applicant did not produce any evidence of payment of rent. In a situation where there is a dispute between a tenant and a landlord, and the tenant is in occupation, the landlord will always be prejudiced if there is no order securing his rent. If an order of payment of rent is made against a tenant, there is no risk

incurred by the tenant as the rental premises will always act as security for any excess money paid to the landlord.

16. In the circumstances of this case there is need to secure the rent arrears, if any, by asking the Applicant to deposit some money in court. However, there is no clarity as to the outstanding amount. The Respondent talks of over two million shillings. The Applicant claims there is nothing owing to the Respondent. Even the monthly rent payable is in dispute with the Respondent talking of Kshs. 40,000 and the Applicant saying it is Kshs. 30,000.

17. In the circumstances of this case, I grant stay of execution of the Magistrate's Court ruling dated 7th March, 2017 on condition that the Applicant deposits the sum of Kshs. 500,000 in court within 30 days from the date of this ruling. Failure to comply will lead to the automatic lapse of the stay order. The Applicant shall also pay the monthly rent as per the tenancy agreement pending the hearing and determination of the appeal. The costs of the application to abide the outcome of the appeal.

Dated, signed and delivered at Malindi this 28th day of Sept., 2017

W. KORIR,

JUDGE OF THE HIGH COURT