



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

**CIVIL APPEAL NO. 150 OF 2017**

**1. ELIJAH MUSAU KITELE**

**2. DAPHINE MUSYOKI MWOSE KITELE**

**3. ELIZABETH NGII MAINGI.....APPELLANTS**

**-VERSUS-**

**SKYLINK HOUSING CO-OPERATIVE SOCIETY LIMITED**

**T/A SKYLINK BAR AND RESTAURANT.....RESPONDENT**

**RULING OF THE COURT**

1. The appellant have filed a notice of motion based **15/11/2017** seeking orders that.

a. That a temporary order of stay of execution of the ruling delivered on **13/11/2017** in Machakos **CMCC No. 525 of 2017** and subsequent order(s) issued pending the hearing and determination of the appeal herein.

b. That the costs of this application be provided for.

2. The application is based on the grounds set out on the body of the application and the supporting affidavit of Elijah Musau Kitele the 1<sup>st</sup> appellant on his own behalf and on behalf of the other two appellants. He raised the following issues:

a. That the appellant/applications are the administrators of the estate of the landlord in plot number Machakos Town Block 11/89 and that the Respondent is the tenant therein operating a business by the name Skylink Bar and Restaurant.

b. That the Respondent was in rent arrears of about Kshs.5,493,200/= as at 4/8/2017 and secured the premise by locking it up.

c. That the Respondent filed suit being Machakos CMCC No. 525 of 2017 seeking interim orders of re-opening the premises.

d. That the Respondent had earlier intimated to the applicant of its intention to fold up its business on the premises as it was not doing well.

e. That the Respondent have failed to demonstrate ability to pay the rent arrears and thus it became

clear that the only security for the payment of the rent arrears was the distrained goods and which the applicant should be allowed to hold onto.

f. That the lower court vide its ruling dated 13/11/17 ordered the premises to be reopened and the Respondents do pay all the rent arrears within 30 days from the date of ruling.

g. That it is the applicant's apprehension that the ruling by the lower court gave the Respondent a free hand to re-enter the premises and to remove the distrained goods from the demised premises which would defeat the applicant's interest.

h. That there is real danger that the Respondent shall remove the distrained goods and or alienate them if undeterred by an order of this court thereby rendering the entire suit Otiose.

i. That if stay of execution is not granted, the Respondent will suffer substantial loss and the appeal will be rendered nugatory.

j. That there has been no delay in bringing the application.

k. That the applicant is willing to abide by any conditions and terms as to security as the court may deem fit to impose.

3. The application was strenuously opposed by the Respondent through its chairman who raised the following grounds of objection:

a. That the applicants had on **30/7/2017** locked the premises and thereafter purported to proclaim goods in the premises in the pursuit of distress for rent which the trial court heard and made a ruling dated **13/11/2017** in which the applicant was ordered to reopen the premises.

b. That the applicant's concerns have been taken care of in that the Respondent has already been ordered to pay the rent arrears within 30 days from the date of ruling and therefore no substantial loss will be occasioned to the applicant.

c. That the applicants are in contempt of the orders of the court as per the lower court ruling as they have failed to re-open the premises as ordered.

d. That the applicant's failure to re-open the premises is occasioning damage to stock in trade and food stuffs in the demised premises.

e. That the applicants be compelled to re-open the premises and the application be dismissed.

4. Learned counsels for the parties made oral submissions. It was submitted by Mr. Mulei for the applicants that there is need for stay of execution of the orders of the lower court made on **13/11/2017** in order to protect the rights and interests of the applicants who are ready and willing to offer security for costs and that the application has been made timeously. As regards the aspect of substantial loss, it was submitted that the Respondent is already in rent arrears of over Kshs.5 million and that since the Respondent had earlier indicated its intention to fold up its business and move out it is likely to take away the distrained goods which will be out of reach by the applicant. It was also submitted that the Respondent has failed both in the lower court and this court to demonstrate its ability to pay the outstanding arrears. It was finally submitted that the Respondent has not even contacted the applicant on the issue of re-opening of premises and thus the applicants have not been in contempt as claimed and further that the premises have been closed since **30/7/2017** and issue of damage of stock goods is belated. The applicant therefore urged this court to grant stay of execution of the order of **13/11/2017** as the appeal will be rendered nugatory in that in the event of success of the appeal there would be nothing to attach in execution.

Mr. Mburu for the Respondent submitted that there is no substantial loss suffered by the applicant since

there is an order compelling the Respondent to pay rent within 30 days and in any case by dint of section 9 of the Distress for Rent Act the goods could still be attached even if they will have been moved. He further submitted that the applicant have not established that indeed the Respondent intends to move out of the premises. He finally submitted that it is the Respondent who is suffering from the illegal locking of the premises since **30/7/2017**.

5. I have considered the application together with the rival affidavits as well as the submissions of the learned counsels. The application is based on Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.

That Rule provides as follows:

**“ 6 (1) No appeal or second appeal shall operate as a stay of a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may deem it just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such orders set aside.**

**(2) No order for stay of execution shall be made under sub-rule (i) 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 be ultimately be binding on him has been given by the applicant.”**

The above rule was considered in the case of **PETER ONDANDE T/A SPREAWETT CHEMIST Vs JOSPHINE WANGARI KARANJA [2006] eKLR** where the court held thus:

**“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further the applicant must have filed the application for stay of execution without unreasonable delay. For that the applicant must provide such security as may ultimately be binding upon him.”**

6. In the instant case it is noted that the applicants filed the present application two days after the ruling was delivered by the lower court on **13/11/2017**. Hence I find the application has been filed without undue delay.

7. On the issue of furnishing of security, i note the applicants have indicated their willingness to abide by any conditions and terms as to security as the court may deem fit to impose. That being the position, i find the applicants have met the second condition for grant of an order of stay of execution.

8. On substantial loss, the applicant’s contention is that the Respondent had earlier on indicated its intention to fold up its business and move out of the premises and further that the Respondent has not demonstrated its willingness or ability to pay up the colossal rent arrears which is now in excess of Kshs.5 million. The applicants have maintained that if the premises are re-opened, the Respondents will swiftly remove the goods already distrained and as such it would be difficult for the applicants to trace the Respondent and to attach the goods. The Respondent on the other hand maintains that the order by the lower court directed the Respondent to pay up the arrears of rent within 30 days and that even if the Respondent thereafter moves from the premises, the applicants could still attach the goods from wherever they may be taken. The applicants appear to suggest that they are wary of the Respondent who not only has neither demonstrated an ability to pay up the rent arrears nor denied a claim that it intends to fold up

its business from the applicant's premises. Indeed the applicant's affidavit both in the lower court and in this court has raised the issue that the Respondent had earlier indicated its intention to fold up its business and move out due to lower sales. I find the Respondent did not rebut the said allegations in the form of a replying affidavit. Indeed the issue of the Respondent's intended move to fold up its business and remove the distrained goods was one of the key issues before the trial court and in this application and which is the applicants great concern and in which they are asking for an order of stay of the execution of the lower court's order dated **13/11/2017** pending the determination of the appeal herein. The applicants have expressed their fears that the Respondent intends to fold up its business and further alleged that the Respondent has not demonstrated its ability to pay the rent arrears and as a result the applicants only survival is to attach the goods already distrained. I find that once the applicants expressed the fact that the Respondent would be unable to pay up the rent arrears the evidential burden must shift to the Respondent to show what resources it has or demonstrate its ability to pay since that is a matter which is peculiarly within its knowledge. The Respondent failed to dislodge the applicants averments that if the Respondents accesses the premises and thereby move out with the goods. They shall suffer substantial loss. I am not persuaded by the Respondents assertion that the applicants would still attach the goods from wherever they will have been taken because once the Respondent folds up and carts away the goods it would be difficult for the applicants to trace them an order to recover the rent arrears which is close to Ksh.6 million. I find that if that happens then even the appeal herein would have been rendered nugatory even if it succeeds in the end. Consequently I am satisfied that the applicants have demonstrated that they stand to suffer substantial loss if the stay of execution is not granted to them.

9. One other issue raised by the Respondent is that the applicants are guilty of contempt of court order by failing to re-open the demised premises. The applicants have indicated that the Respondent had not contacted them over the same as they could not just open it without the presence of the Respondent. Since the applicants have filed an appeal against the ruling of the trial court two days after it was delivered, I find they cannot be said to have been in contempt yet they were pursuing an appeal which is within their constitutional right to do so. Hence I am unable to agree with the Respondent's assertion that the applicants have come to this court with unclean hands.

10. As regards the issue that some goods in stock and other merchandize are likely to be damaged, I find that the applicants have lodged an appeal against an order to reopen the premises and which must be canvassed before the court. The matter could be given priority and that if loss or damage to the goods is disclosed in the end, then monetary compensation upon proof will be considered by the court.

11. In view of the foregoing, I find the appellant/applicant has satisfied the requirements of **Order 42 Rule 6** of the Civil Procedure Rules meriting a grant of stay of execution. An order of stay of execution of the lower court ruling dated **13/11/2017** is allowed on the following conditions:

*a. The appellant/applicant to deposit the sum of Kshs.300,000/= with the court as security for costs within the next thirty (30) days.*

*b. In default, execution do issue.*

*c. The costs of the application to abide in the appeal.*

**Dated and delivered at Machakos this 27<sup>th</sup> day of November, 2017**

**DK KEMEI**

**JUDGE**