



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CIVIL APPEAL NO.09 OF 2016

ESTHER WAMBUA.....APPELLANT

VERSUS

(1) MOMBASA PORT SACCO LTD.

(2) NAIROBI HOMES (MSA) LTD..... RESPONDENTS

RULING

Outline

1. The Appellant/applicant has by his Notice of Motion dated 16.2.2016 invoked the courts jurisdiction under order 42 Rule 6 and sought stay of execution of the decision by the lower court, **G. Kimanga** Resident Magistrate in Mombasa and No. 1785 of 2014 dated the 2.2.2016 pending the hearing and determination of the appeal.

2. The History of the dispute between the parties is a little convoluted. However it may be put simply that by a letter of offer dated 11.2.2008 the Respondent put the Applicant into possession of the suit premises for a period of five(5) years three (3) months. That tenancy was by its plain words of the letter of offer due to terminate by effluxion of time on the 31.10.2012. When the lease was so terminated by effluxion of time, the tenant did not yield up vacant possession but sought to get protection of the Business Premise Rent Tribunal twice. The first complaint was dated and filed at the tribunal on 19.2.2013 which was withdrawn on the 1.4.2013. The second was filed on 19.4.2013 which the tribunal heard and determined on a preliminary objection that it was not seized of jurisdiction as the term exceeded five years. That decision was challenged by the current applicant in Mombasa HC.Misc.Application No. 46 of 2014(JR) which was equally dismissed on the 29.7.2015 by the High Court upholding the decision by the tribunal.

3. The parties then found themselves before the Resident Magistrate Hon. G.Kimanga (RM) in the matter giving rise to this appeal when the Respondent sued the Applicant seeking vacant possession.

4. My reading of the pleadings before the lower court reveal that the Respondent sought vacant of the Applicant was not its tenant on the provisions of section 60 Land Act, there was no tenancy between the parties and the matter had been litigated before the Business Premises Rent Tribunal which held for the Respondent.

5. On the 31.12.2012 and that on the provisions of section 60 Land Act, there was no tenancy between the parties and that the matter had been litigated before the Business Premises Rent Tribunal which held for the Respondent that there existed no tenancy between the parties.

6. To that plaint the Applicant now before me filed a statement of defence in which it was alleged among other things that the tenancy between the parties was interefered with by the Respondent in the year 2010 and therefore a controlled tenancy was created and further that after the contractual period ended, the Respondent had accepted rent and levied distress for rent and thereby creating a new controlled tenancy that could only be terminated by a notice in the prescribed manner under the provisions of the Landllord and Tenant(shops, hotels & catering establishments) Act Cap 301. For that reason the Applicant challenged the jurisdiction of the lower court to entertain the suit while maintaining that only the Tribunal could entertain the matter. That defence was dated 14.10.2014 and filed in court 15.10.2014.

7. By an application dated and filed in court on 14.8.2015 the plaintiff/respondent sought the striking out of the defence and entry of judgment for vacant possession on the grounds among others that the Appellant was a trespasser to the suit premises and that litigation by the appellant before the Tribunal and in the High Court had failed and ended in favour of the Respondent.

8. The application was opposed by the Appellant who filed a replying affidavit and raised the issues as had been raised in the defence; payment of rent and acceptance without demur and assertion of right under Distress for rent Act; subsequent to the determination by the tribunal.

9. The trial magistrate heard the application and in a reserved ruling dated 2.2.2016 allowed the application while holding that there was not tenancy between the parties. It is that ruling that has given rise to the appeal in which the Appellant alleges among other grounds that the trial court was wrong in the way it dealt with the application in that;

a) The prayers for striking out and summary judgment were mutually exclusive.

b) That there were triable issues in the defence.

c) That the interpretation of section 60 Land Act was erroneous.

Analysis and determination:

10. When the appeal ultimately comes up for hearing, the all only determining issue will be whether or not there was a triable issue raised in the defence to entitle the defendant to proceed to hearing and whether or not, after considering that issue, the trial court was entitled to allow the application for striking out and summary judgment. That would be then. However for now, I am concerned with an application for stay pending appeal and my jurisdiction is confirmed to the parameters set out by order 42 Rule (2). I need to be persuaded that an appeal has been filed which would be defeated by the appellant suffering substantial loss unless the application for stay is granted; that the application has been made without unreasonable delay and that the applicant has availed security for the due performance of the decree that may ultimately be binding upon him.

11. As in the expected the parties have in their submissions on the application adverted to the merits of the appeal and its prospects of success. While the appellant says that his appeal is meritorious and would be rendered useless and academic in that eviction would ensue if stay is refused, the Respondent on the other side says the appeal is not arguable as the issues raised in it had been raised and determined by both the tribunal and the High Court and determined on the Respondents favour.

12. I will not delve so much onto the merits of the appeal as that is yet to come before me but I wish to note that the sole substratum of the appeal is to possession of the suit premises. It is equally noted that by the impugned ruling, the Respondent has a decree in its hand which it is entitled to enforce unless there is inforce an order of stay.

13. The question that the court has to grapple with is what would be the effect if that order is enforced, the Respondent takes possession for own use as it contends and later on the appeal succeeds? Put the other way, would the subject of litigation be available once the order is executed and later on appeal succeeds?

14. I hold the view that once the order appealed against is executed, the premises will not be available and ready for occupation by the Appellant whichever way the appeal ends and that to me would render the entire exercise in prosecuting the appeal academic and substantive. For that reasons, I find that to put a litigant in a situation that whatever it pursues in court would not be available at the end of litigation is to defeat the very purpose of litigation and to me a substantial loss.

15. At paragraph 7 of the affidavit in support, the applicant swears that she is prepared to abide by all reasonable orders for security as the court may in own discretion impose.

16. I have noted that the decision by the lower court was delivered on the 2.2.2016 and the current application filed on the 16.1.2016, some 14 days thereafter. That to this court evidences promptitude and shows that it was presented without unreasonable delay.

17. Incoming to this conclusion I have taken into account the definition of controlled tenancy under the Land Act, Landlord and Tenant (shop, hotel and catering establishments Act) the Land Registration Act, 2012, and the interpretation given to the term Controlled Tenancies in the now celebrated case of **Rogan Kemper -vs- Grosvenor [No.2] [1979-80]1 KLR** as well as **Kinsil Muslim investments Co. Ltd. -vs- Mwalimu Hotel Kisu Ltd. [1995-98] 2 EA 100** and I am persuaded that the appeal presents arguable POINTS that need to be given a chance to be canvassed.

18. I have said that the subject and only substratum in this litigation is the right to occupy the suit premises. The Appellant says she has been paying rent and is prepared to continue paying rent. For the above reasons I grant stay and the order on security which commends itself to court in the circumstances of this case is that the tenant shall forthwith and within 7 days from today, pay all and every arrears of rent to the Respondent and continue to pay the reserved rent as and when the same falls due.

19. The other condition I impose on the applicant is that the Appeal must be prosecuted expeditiously and within the next Eight (8) months for which reason it is ordered that:-

- a) The Record of appeal be filed and served within 45 days from today together with any written submissions on the appeal.
- b) Upon service the Respondent shall within 14 days file and serve written submissions in opposition to the appeal.
- c) A hearing date must be taken within 70 days from today.

20. Should there be a default in meeting any of the conditions herein, the stay granted stand lapsed and discharged and the Respondent shall be at liberty to execute the decree resulting from the ruling of the lower court dated 2.2.2016.

21. Costs of the application are in the cause.

22. It is so ordered.

Dated, signed and delivered at Mombasa this 29th day of April, 2016.

In the presence of:-

Mr.Mwakisha for Appellant.

Mr.Kaburu for the Respondent.

P.J.O.OTIENO

JUDGE