



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 5 OF 2016**

**ANDREW WANJOHI KABURU.....APPELLANT**

**VERSUS**

**KABURU MUTETI & CO.....RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 4TH MARCH, 2016 BY THE BUSINESS PREMISES RENT TRIBUNAL AT NAIROBI BY HON. MR. MBICHI MBOROKI (Chairman) IN TRIBUNAL CASE No. 86 of 2014)***

**RULING**

I have before me an application filed by the appellant/applicant under certificate of urgency seeking the following orders:-

1. ***Spent.***
2. ***That pending the hearing and determination of the application, the Honourable Court be pleased to grant an order of stay of execution of the judgment of the Chairman, Business Premises Rent Tribunal delivered on 3rd March 2016.***
3. ***That an order of temporary injunction be issued to restrain the respondent by itself, its agents, and/or employees from evicting, locking out or harassing or in any manner interfering with the running of the appellant's business in the suit premises pending the hearing and determination of the appeal herein.***
4. ***That pending the hearing and determination of the intended appeal, this Court be pleased to direct that the appellant deposit rent in Court in the event the respondent fails to accept.***
5. ***That the OCS Kerugoya ensure compliance with the orders.***
6. ***That costs of and incidental to this application abide by the result of the intended appeal.***
7. ***That such order and/or further relief be granted as this Honourable Court may deem fit and just to grant.***

The application is grounded on the reasons set out therein and supported by the affidavit of the appellant/applicant in which he has deponed, inter alia, that he filed Business Premises Case No. 86 of 2014 seeking to challenge the notice to vacate issued by his landlord the respondent herein but that reference was dismissed on 4th March 2016 and he was ordered to give vacant possession on or before 1st May 2016. That he is desirous of appealing against that decision having been a tenant in the suit premises for over 20 years and has heavily invested in the bar business that he runs therein and therefore he is likely to suffer irreparable loss and damage. Since the respondent is now sending him eviction threats through text messages, he seeks the orders as prayed.

The application is opposed and in a replying affidavit dated 8th April 2016, **STANLEY KINYUA GACHARIA** one of the landlords herein has deponed, inter alia, that the appellant/applicant is their

tenant on plot No. 15 Kigumo but since April 2015 to-date, he has not paid rent and the Court had to issue an order for him to pay. That the landlords wish to demolish the premises for up-grading and the appellant/applicant has not demonstrated what substantial loss he will suffer if the order sought is not granted.

Submissions have been filed both by the firm of Chege Wainaina Advocates for the appellant/applicant and that of Ngigi Gichoya Advocates for the respondent.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

There are two issues for my determination in this application being:-

1. ***An order for stay of execution of the judgment delivered by the Business Rent Tribunal on 3rd March 2016 in Tribunal Case No. 86 of 2014 and,***
2. ***An order of temporary injunction restraining the respondent, by itself, agent or employee from evicting the appellant/applicant from the suit premises pending the determination of the appeal herein.***

It is not really in dispute that the appellant/applicant has been the tenant of the respondents plot No. 15 at Kagumo (herein the suit premises) where he runs a bar business for the last 20 years. It is also clear that by its judgment dated 4th March 2016 the said Tribunal ordered the appellant/applicant to give vacant possession of the suit premises on or before 1st May 2016 failure to which an eviction would follow. It is that order that the appellant has appealed against and meanwhile seeks a stay of execution pending the determination of the said appeal.

**Order 42 Rule 6 (2) of the Civil Procedure Rules** provides that the following condition must be fulfilled before an order of stay of execution pending appeal is granted:-

1. ***The Court must be satisfied that substantial loss may result to the applicant if the stay is not granted.***
2. ***The application must be made without un-reasonable delay.***
3. ***That such security as the Court orders for the due performance of such decree an order appealed against has been given.***

The judgment sought to be appealed against was delivered on 4th March 2016 and this application was filed on 1st April 2016 and this Court is satisfied that there was no in-ordinate delay in filing the same.

A stay order is however not granted as a matter of course or simply because a party has filed an appeal. The party moving the Court for an order of stay must demonstrate that he is likely to suffer substantial loss if the stay order is not granted. Indeed it has been stated that substantial loss is the core of any order of stay pending appeal. In **KENYA SHELL LTD VS KARUGA 1982 -1988 1 K.A.R 1018**, the Court of Appeal said:-

***“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”***

See also the case of **MUKUMA VS ABUOGA 1988 K.L.R 645.** Similarly, in the case of **MACHIRA T/A MACHIRA & CO. ADVOCATES VS EAST AFRICAN STANDARD (NO. 2) 2002 2 K.L.R 63**, the Court had this to say:-

***“If the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the***

***Court looking at what will happen unless a suspension or stay is ordered, must be satisfied such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award, decree or order before disposal of the applicant's business (e.g. appeal or intended appeal)"***

It must also be remembered that the Court has a discretion whether or not to grant a stay. As the late **MADAN J.A** (as he then was) put it in **BUTT VS RENT RESTRICTION TRIBUNAL 1982 K.L.R 417**

***"It is in the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution"***

The general consideration is that while the Court recognizes that a successful party is entitled to the fruits of his judgment, this has to be weighed against the duty of ensuring that the appeal is not rendered nugatory.

Guided by the above principles, I now examine whether the appellant/applicant in this case has shown that he will suffer substantial loss if an order of stay is not granted. In doing so, I have looked at the judgment sought to be impugned and the affidavit of the appellant/applicant in support of this application. As stated above, the appellant/applicant was a tenant of the respondents in the suit premises. That is conceded in the appellant/applicant's own supporting affidavit in which he has deponed at paragraph 6 as follows:-

***"That I have been a tenant over the suit premises for a period of around 20 years and I have heavily invested in the suit premises which I run a bar business and the respondent's actions are likely to cause me to suffer irreparable loss and damage"***

Of course nothing has been placed before this Court to demonstrate what substantial loss the appellant/applicant will suffer. The appellant/applicant has only made a bare statement. That is not sufficient to entitle him to an order of stay of execution pending appeal. In the case of **KENYA SHELL LTD** (supra), **GACHUHI J.A** stated:-

***"It is not sufficient by merely stating that the sum of Ksh. 20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be. In an application of this nature, the applicant should show the damages it would suffer if the orders for stay is not granted"***

In paragraph 6 of the applicant's affidavit reproduced above, it is not indicated what it is that he has ***"heavily invested in the suit premises"*** or what irreparable ***"loss and damage"*** he will suffer. All he has done is make a bare statement. He has not established what substantial loss he will suffer if the order of stay is not granted and he is clearly not deserving of that remedy.

It is also trite law that such an order being a discretionary remedy will only be granted on sound basis. In other words, such discretion must be exercised judiciously and that involves being fair to both sides. In paragraphs 8 and 9 of his replying affidavit, **STANLEY KINYUA GACHARIA** one of the landlords depones as follows:-

**8** ***"That the appellant is not serious in paying the rent herein as he has never paid rent from April 2015 to-date.***

**9** ***"That the last time he paid was March 2015 when the Court issued an order for payment of the arrears (annexed here and marked SKG 4 is a copy of the order"***

That averment was not rebutted. In this case therefore, we have a party who does not meet his obligation of paying rent and only does so when the Court so directs yet at the same time, he seeks this Court to

exercise its discretion in his favour. I am not in the least persuaded that the applicant is deserving of the orders of stay of execution and I must dismiss that request.

With regard to the prayer for temporary injunction pending appeal, the principles upon which the Court will grant such a relief are generally the same as those for granting an order of interlocutory injunction pending trial under **Order 40 Rule 2 of the Civil Procedure Rules**. The principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** would therefore apply and that would mean that the applicant should show that he has an arguable appeal and that if no temporary injunction is granted, he may otherwise suffer irreparable loss. If in doubt, the Court will determine the application on the balance of convenience. The Court also takes the following into account:-

- ***Such an application is granted at the Court's discretion***
- ***Such an application will not be granted where the appeal is frivolous***
- ***Such a discretion should not be exercised in favour of one party where more prejudice or hardship will be caused to the opposite party***
- ***Such application will be granted where the appeal may be rendered nugatory.***

Taking all that into account and appreciating that this Court is not considering the appeal at this stage, I can see from the memorandum of appeal that the appellant/applicant raises the issues that the Tribunal erred in ordering vacant possession of the suit premises while there were contentious issues of ownership and also by not giving the appellant/applicant enough time to vacate etc. However, in the appellant/applicant's own supporting affidavit, he has conceded that he has been the respondent's tenant for around 20 years (paragraph 6) and that he was given upto 1st May 2016 to vacate the suit premises (paragraph 9). That is a whole two (2) months from 4th March 2016 when the Tribunal delivered its judgment and it has not been suggested that that period is not adequate. I do not see what arguable appeal the appellant/applicant has in the circumstances of this case and neither has he demonstrated what irreparable loss he will suffer if the order of temporary injunction is not granted. More fundamentally, it has been demonstrated above that he is in arrears of rent since April 2015 and only paid rent for March 2015 following a Court order. The appellant/applicant has not only approached the Court with soiled hands but is also seeking the Court to indulge him when he is himself in breach of a covenant to pay rent. A party who breaches his part of an agreement cannot obtain an order of injunction to restrain the other party from exercising an option that is legally available to him. The respondents herein have the option of evicting the appellant/applicant granted to them by a Court of competent jurisdiction. It would be inequitable to restrain them when the appellant/applicant is himself in breach of a covenant.

Ultimately therefore and upon considering all the matters herein, I find no merit in the appellant/applicant's Notice of Motion dated 30th March 2016 and filed on 1st April 2016. The same is hereby dismissed with costs.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> MAY, 2016**

Ruling dated, delivered and signed this 13<sup>th</sup> day of May 2016 in open Court.

Ms Nyamuata for Applicant present

Mr. Mwangi for the Respondents present.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> MAY, 2016**