



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 482 OF 2014

PRILSCOT COMPANY LIMITED.....APPELLANT

VERSUS

MONICA HEHO.....RESPONDENT

RULING

1. Before me is the appellant's notice of motion dated 27th October, 2014. The appellant essentially seeks orders that:
 - a. Pending the inter parties hearing of this application, this honourable court be pleased to order a stay of execution of the ruling of the Honourable A. Lorot (Ag. Chief Magistrate delivered on 23rd September, 2014).
 - b. Pending the inter-parties hearing of this application, this honourable court be pleased to order a stay of execution of all actions and/or proceedings incidental to the above ruling including the intended eviction or removal of the applicant from Apartment A1, Rahma Estate, Westlands ('*the apartment*').
 - c. Costs of the application be provided for.
2. The application is premised on the grounds on the body of the application and the supporting affidavit of Hon. Luka Kigen sworn on 27th October, 2014. He stated that the appellant is a tenant in respondent's apartment pursuant to a lease entered into on 1st August, 2013 ending on 31st July, 2014. That before the lease expired, the respondent made an offer to renew the lease on 7th July, 2014 which offer the appellant accepted. Despite the offer, the respondent purported to terminate the lease through an improper notice resulting to Milimani Commercial Court Civil Suit No. 4492 of 2014 in the subordinate court. The said court granted interim orders restraining the respondent from evicting the appellant pending hearing of the application dated 4th August, 2014. The application was however after a number of mentions and direction that it be heard on 23rd September, 2014 was dismissed. It is his case that following the dismissal of the application, the appellant is in danger of being evicted and come 31st August, 2014. That the appeal is meritorious and that no prejudice shall be suffered by the respondent since the appellant continues to pay rent.
3. The application was opposed vide a replying affidavit of Loise Munywoki sworn on 6th November, 2014. She contended that a letter from the appellant seeking renewal of the lease was received after a notice to vacate the apartment had been issued. That the notice was extended until 30th August, 2014 but the appellant in an unprecedented move filed the CMCC No. 4492 of 2014 in an attempt to stop the respondent from evicting it. She maintained that there was no tenancy agreement between the appellant and the respondent.

4. The application was canvassed by way of written submissions. It was submitted on behalf of the appellant that it had an arguable appeal and such was a factor to be considered by court in allowing an application for stay of execution. It was argued that the issue of whether or not there existed a lease between the parties is an arguable point on appeal. The appellant cited **Nyeri HCCA No. 217 of 2012., Charles Ngatia Nguyo v. Ekira Gathoni Kariithi & Another** and **Kisumu Civil Appeal No. 39 of 2013., Chris Munga N. Bichage v. Richard Nyagaka Tongi & Others.**
5. The respondent on the other hand submitted that the appellant had not established substantia loss. Reliance was placed on **Bai Lin (K) Ltd & 2 Others v. Zingo Investments Limited & Another Civil Case No. 428 of 2012** and **Vista International Limited v. Span Image Limited., Civil HCCC No. 464 of 2011.** It was argued that it was the respondent's right to demand vacant possession since the lease had ended. On this point the respondent relied on **Velji Shamji Construction Ltd v. Westmall Supermarket Ltd Civil Case No. 254 of 2004.** It was also argued that the appellant had not offered security as required Order 42 Rule 6 of the Civil Procedure Rules.
6. I have considered the rival depositions and the submission together with the authorities cited thereof. Order 42 Rule 6 (2) of the Civil Procedure Rules lay down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending an appeal. The applicant must establish that; he/she stands to suffer substantial loss if the orders are not granted; the application must be filed timeously and the applicant must offer security for due performance of the decree or order. See: **Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365.**
7. It is not contended that the application was filed timeously. What is in contention is whether the appellant has demonstrated that he stands to suffer substantial loss and the issue of security of cost. I shall address the issue seriatim.
8. Substantial loss was by Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** where he stated as follows:

“...substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

9. The appellant's uncontroverted facts are that it was still in occupation of the apartments and continue to pay rent. It has contended that it accepted the offer of renewing the lease. To my mind this is an arguable point on appeal. In the circumstances, if the appellant is evicted and the appeal succeeds, it shall be prejudiced. It is also note-worthy that the respondent has not demonstrated how it would be prejudiced by the appellants occupancy of the apartment, furthermore the appellant continues to pay rent. In the circumstances, I find that the appellant has established that he stands to suffer substantial loss.
10. The court in **Kenya Tanzania Uganda Leasing Co. Ltd v. Mukenya Ndunda (2013) eKLR** stated as follows on the issue of security:

“As I stated in the case of KENYA COMMERCIAL BANK LIMITED vs. SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced...”

Such balance is arrived at by making an order for suitable security for due performance of the decree awaiting the outcome of the appeal. The upshot is that the application is allowed and I make orders as follows:

- a. There be stay of execution of the ruling of the Honourable A. Lorot (Ag. Chief Magistrate) delivered on 23rd September, 2014 in Milimani Commercial Court CMCC No. 4492 of 2014.
- b. There be a stay of execution of all actions and/or proceedings incidental to the above ruling including the intended eviction or removal of the applicant from the apartment.
- c. Costs shall abide the outcome of this appeal.

Orders accordingly.

Dated, Signed and Delivered in open court this 23rd day of January, 2015.

J. K. SERGON

JUDGE

In the presence of:

Ndungu for the Appellant

Kulecho h/b for Okuku for the Respondent