



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 7 OF 2014

JAMAL ISAPAAPPELLANT

V E R S U S

SWALEH MUHSIN SHIGOG.....RESPONDENT

(Being an appeal from the Ruling and Order of the Chief Magistrate's Court at Mombasa by Hon. S. K. Gacheru (PM) made on 14th January 2014 in Civil Suit No. 2177 of 2012)

RULING

1. Appellant **JAMAL ISAPA** has filed a Notice of Motion dated 13th June 2014 which is the subject of this Ruling seeking the following orders-

- **That there be a stay of execution of the ruling, judgment, decree, eviction order and all consequential orders Civil Suit No. 2177 of 2012 until the hearing and final determination of the Appeal herein.**
- **That the Appellant herein be allowed to continue paying the current monthly rent of Kshs. 115,000/- until the final determination of the Appeal herein.**

2. The background as I gather from the parties affidavits and submissions is that the Appellant was a tenant of the Respondent, **SWALEH MUHSIN SHIGOG**. He had a lease of 5 years and 3 months from 1st January 2007. That term of lease terminated on 31st March 2012. Respondent filed a suit being **Mbsa CMCC No. 2177 of 2012** seeking delivery of possession of the premises and mesne profits. Parties entered into two consents in that suit that the Appellant do give vacant possession on or before 31st May 2013, and secondly that vacant possession be surrendered on or before 31st August 2013. Appellant by the application dated 4th October 2013 sought stay of execution of that consent. That application was dismissed on 14th January 2014. This appeal is directed at that dismissal.

APPELLANT'S SUBMISSIONS

3. Appellant deponed in the affidavit in support that he carries on series of businesses on the premises which will be '**paralyzed**' if the Respondent carries out eviction. That he would suffer irreparable loss and damage that may not be compensated by an award of damages if stay as sought is not granted. Appellant annexed to the application business permits for those businesses. Although Appellant deponed

that he had been in occupation of the premises for 20 years, he did not provide proof of occupation for that period. Appellant deponed that he has continued to pay to date the rent of Kshs. 115,000/-. Appellant proceeded to rely on the following case thus-

“In the case of Royal Media Services Ltd V Attorney General & 2 Others [2013]eKLR, the trial court observed that “on the nugatory aspect, it was trite law that the Court had to weigh and balance the competing claims of both parties and each case had to be determined on its own peculiar facts.” The Court went on and quoted the case of African Safari Club Limited – Vs- Safe Rentals Limited, Nairobi Civil Appeal [application] No. 53 of 2010 (unreported), in which it was observed inter alia thus-

‘... with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales ... We think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable ...’ ”

RESPONDENT’S SUBMISSIONS

4. Although Respondent relied on case law his Learned Counsel failed to attach copies of those cases and I am unable to benefit from their pronouncement in this Ruling.

5. Respondent submitted that Appellant having failed to demonstrate likelihood of suffering substantial loss it followed that requirement of Order 42 Rule 6(2) of the Civil Procedure Rules had not been satisfied.

ANALYSIS

6. Order 42 Rule 6(2) requires an Applicant who seeks stay of execution pending appeal to satisfy the Court that he will suffer substantial loss unless the order was granted; and that the application had been made without undue delay. The Court under that rule may order the Applicant to provide security for the due performance of the decree or order.

7. On substantial loss Appellant has deponed, and it was not controverted, that he runs a series of businesses on the premises. Bearing in mind the decision of **ROYAL MEDIA SERVICES LTD** (supra) I need to balance the competing rights or claims. The Appellant alleges he will suffer irreparable loss if stay is not granted. The Respondent too argued that he will suffer if vacant possession is not granted. The Respondent does not say that if Appellant vacates he is more likely to get higher rent for the premises. It is therefore not clear what loss the Respondent would suffer if stay was granted. On the other hand, there is no doubt that Appellant has built a certain good will of his business on the premises. If he is evicted, no doubt Respondent will let out the premises to another person. If this appeal does succeed Appellant will not be able to return to the premises in those circumstances. Accordingly the scales of justice tilt in favour of the Appellant thereof. The Respondent did not deny that he is receiving rent of Kshs. 115,000/- from the Appellant. That I believe seals the argument on substantial loss.

8. Respondent did not oppose the application on the ground of it not having been brought without unreasonable delay and accordingly no more will be said on that.

9. The issue of security is one which is reserved for the Courts discretion. Appellant has offered as security to continue paying rent at Kshs. 115,000/-. Respondent did object to the offer on the ground that the decree of the lower court was not a money decree and that Appellant should give an undertaking to vacate if the appeal is dismissed.

10. Having in mind the parties submission I find and hold the payment of Kshs. 115,000/- per month by

Appellant is sufficient security pending the determination of this appeal.

CONCLUSION

11. In the end I grant orders that-

(a) There shall be stay of execution of the order made on 14th January 2014 in Mombasa CMCC No. 2177 of 2012 until the hearing and determination of this appeal.

(b) Such stay granted in (a) above shall be on condition that the Appellant do continue to pay to the Respondent Kshs. 115,000/-, being mesne profit. In default of any one payment the stay granted in (a) above shall automatically be vacated/lifted.

(c) The costs of the Notice of Motion dated 13th June 2014 shall abide with the outcome of this appeal.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE