



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 20 OF 2015

SAMWEL KURIA KAMAU APPLICANT

VERSUS

SAMMY KANDIE RESPONDENT

RULING

1. The appellant /applicant moved this court by a Notice of Motion dated 10th February 2015 seeking one substantive order: that the court grants him orders staying execution of the orders of the Business Premises Tribunal (the tribunal) in cause Number 70 of 2012 pending the hearing of his appeal filed on 5th February, 2015.

2. The application is premised on six grounds which are stated on its face which can be summarized as follows;

(i) That the applicant's appeal has high chances of success; that if stay orders are not granted and the orders appealed against are executed, the appeal will be rendered nugatory.

(ii) That if stay orders are not granted, the applicant will suffer substantial loss.

(iii) That the applicant is ready, able and willing to abide by any condition the court may be pleased to order.

3. The application is supported by an affidavit sworn by the applicant on 10th February 2015. In the supporting affidavit, the applicant replicated some of the grounds supporting the application. He further deposed that he was a tenant in the business premises owned by the respondent; that he filed a reference to the Business Premises Tribunal (the tribunal) in Cause No. 70 of 2012 over a rent dispute he had with the respondent who was his landlord.

4. The applicant contended that as the tribunal remained without a chairman for over 3 years, his dispute was determined on 8th October, 2014 after a new chairman was appointed; that in the tribunal's ruling, the rent payable by the applicant to the respondent was enhanced from Kshs.6,000 to Ksh. 8,450 and the effective date for payment of the new rent was backdated to 1st December, 2012; that his application for review of the effective date was rejected in a ruling delivered on 21st January, 2015 as shown in the annexure marked SKK2 (annexure shows ruling was delivered on 23rd January, 2015 and not 21st January, 2015 as stated); that he was dissatisfied with the orders made in that ruling especially on the effective date for payment of the new rent hence his appeal to this court.

5. The application is opposed. The respondent filed a replying affidavit in which he deposed that the applicant's application was frivolous and vexatious as according to him, the ruling of the tribunal was fair, legal and just; that the application was made in bad faith with the aim of frustrating him. In addition, the respondent contended that the applicant's appeal had no chances of success and that therefore, the application should be dismissed with costs for lack of merit.

6. The application was argued before me on 4th March, 2015. The applicant was represented by learned counsel **Mr. Mbugua** while the respondent was represented by learned counsel **Mr. Kigamwa** who held brief for **Mr. Omboto**, Counsel on record for the respondent.

In support of the application, **Mr. Mbugua** elaborated on the depositions in the applicant's supporting affidavit. In addition, counsel referred the court to **Order 42 Rule (6) (2)** of the **Civil Procedure Rules** (the **Rules**) and submitted that the applicant had satisfied all the requirements for the grant of stay. He emphasized that the applicant will suffer substantial loss if the stay orders as sought were not granted since if execution proceeded, he will be forced to pay the respondent arrears of rent created by the retrospective operation of the order challenged on appeal amounting to Kshs.56,000 being the difference between the old rent and the rent assessed by the tribunal and an additional Kshs.20,000 adjudged as costs; that the applicant was ready to abide by any order the court may make as a condition for the grant of stay; and lastly that the application was made in good faith and ought to be allowed with costs to the applicant.

7. In opposing the application, **Mr. Kigamwa** submitted that the application was not merited and should be dismissed as in his view, the applicant had failed to satisfy the conditions precedent to the grant of stay pending appeal as stipulated under **Order 42 Rule 6** of the **Civil Procedure Rules**.

Counsel contended that if stay orders were not granted, the applicant would not suffer any loss because irrespective of the outcome of the appeal, he would still remain the respondent's tenant and if the applicant was forced to pay the money owed in execution of the impugned orders, the court can order restitution under **Section 91** of the **Civil Procedure Act** and direct that the money paid be utilized as future rent. That in any case, the respondent being the applicant's landlord was a person of means and was able to refund any money paid by the applicant should his appeal become successful.

Counsel urged the court to find that the applicant had not shown sufficient cause to warrant the exercise of the court's discretion in his favour and that the application should be dismissed with costs.

8. I have carefully considered the application, the affidavits filed by both parties and the rival submissions of counsel. Having done so, I take the following view of the matter.

Under **Order 42 Rule 6(2)** of the **Rules**, it is not necessary for a party to demonstrate that an intended appeal has high chances of success before the court can order stay of execution pending appeal. All an applicant must demonstrate to the satisfaction of the court is that he would suffer substantial loss if stay was not granted; that he had filed the application without unreasonable delay and that he was ready and willing to furnish security for the due performance of the decree.

9. On the issue of delay, I find that in this case, it is not disputed that the instant application was filed without any delay. I will not therefore waste any time belabouring the issue of whether or not the application was filed without unreasonable delay.

10. What was strongly contested in this application was the applicant's claim that he will suffer substantial loss if stay orders are not granted and he is forced to pay rent arrears and costs awarded to the Respondent in the event that the tribunal's orders are executed. I am unable to agree with **Mr. Kigamwa's** submissions that the applicant will not suffer loss if he is forced to pay the amounts ordered by the tribunal as the same can be utilized as future rent since the tenancy relationship between the parties would not be determined by the pendency of the appeal. This submission has no factual basis and it is in my view untenable. It is based on pure speculation since the respondent as indeed the court has no way of ascertaining how long the appeal would take to be concluded and whether the applicant will still be the

respondent's tenant at the time it is concluded.

11. It was also argued on behalf of the respondent that the fact that the respondent is the applicant's landlord is by itself proof that he is a man of means who will be able to refund the money paid in execution if the appeal is successful. That may currently be so but nothing is static in life. It is common knowledge that circumstances change with time including people's financial status due to the vagaries of life.

12. Taking everything into account, I am satisfied that the applicant has sufficiently demonstrated that if the court declines to grant stay orders as sought, he will be forced to make a lump sum payment of a total of Kshs.76,000 being rent arrears accumulated over a period of about two years given the retrospective effect of the impugned orders and costs. This in my view will be unfair and unjust to the applicant since he was not to blame for the failure to appoint the tribunal chairman in good time to expeditiously resolve the disputes filed with the tribunal including his dispute with the respondent. In the circumstances of this case, I am satisfied that the applicant has demonstrated that he will suffer substantial loss if the instant application is not allowed.

13. For the foregoing reasons, I am persuaded to find that the application is merited and it is hereby allowed but on one condition which am going to state very shortly.

As the applicant is not opposed to the payment of the new rent assessed by the tribunal in the sum of Kshs. 8,450 per month, I will grant stay of execution of the Tribunal's orders as prayed on condition that for as long as the applicant remains the respondent's tenant, he will pay to the respondent the new rent assessed by the tribunal with effect from the month of May 2015 and on each subsequent month until his appeal is heard and determined failing which this application will stand dismissed with costs to the respondent.

In the event that there is compliance with the above condition, the costs of this application will abide the outcome of the appeal.

14. It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th DAY OF April 2015.

In the presence of:-

Ms. Kimaru holding brief for Mr. Mbugua for the applicant.

Mr. Mwinamu holding brief for Mr. Omboto for the respondent .

Mr. Kemboi ct/clerk.