



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 500 OF 2012

ANASTACIA AGORO

(T/A SAOLA HEALTH CLINIC)APPELLANT

VERSUS

1. **JOSEPHAT NJUGUNA,**
2. **ROSELYN WANJIRU,**
3. **STEPHEN ONYANGO,**

(CHAIRMAN, TREASURER & SECRETARY,

KANU DELEGATES KENYATTA

GOLF COURSE WARD).....RESPONDENTS

R U L I N G

1. The Appellant is the Respondents' tenant in certain business premises. She filed a reference before the **Business Premises Rent Tribunal** (the **Tribunal**) in response to the landlords' notice to terminate her tenancy.
2. Her appeal before this court is against an order of the Tribunal by which the Tribunal refused her application to adjourn the hearing of the reference before it to enable her to call her witness, and thus forced her to close her case.
3. Together with the memorandum of appeal the Appellant filed **notice of motion dated 27th September 2012** by which she seeks the main order for stay of the proceedings before the Tribunal pending disposal of the appeal. The application is made upon the grounds, *inter alia* -
 - (i) That the Appellants' appeal has high chances of success and shall be rendered nugatory unless stay is granted.
 - (ii) That the Appellant stands to suffer great injustice if the Tribunal is allowed to proceed before the appeal is disposed of.
 - (iii) That the Respondents will not suffer any prejudice by the stay sought.

4. There is a supporting affidavit sworn by the Appellant. It gives the factual background to the appeal and application. There are some documents annexed.
5. An interim stay of proceedings is in place pending disposal of the application.
6. The Respondents have opposed the application by **replying affidavit filed on 22nd October 2012**. It is sworn by the 1st Respondent, Josephat Njuguna. Grounds of opposition emerging from the affidavit include –

- (i) That the application is “fatally incompetent...having been drawn and filed by a firm of advocates not properly on record”.
- (ii) That the application otherwise lacks merit.

It is to be noted that the lengthy replying affidavit is argumentative and delves into the merits of the appeal.

7. The application was canvassed by way of written submissions (order of Onyancha, J of 24th October 2012). The Appellants’ submissions were filed on 15th November 2012 while those of the Respondents were filed on 29th November 2012. It was not until 29th January 2014 that the fact of the filing of the submissions was brought to the attention of the court. I have considered the submissions together with the cases cited. I will not consider the technical objection to the application raised; I will rather consider the merits thereof.

8. The court has an unfettered discretion under **Order 42, rule 6(1)** to order stay of proceedings in the event of an appeal or second appeal. The discretion is not limited even by the need to show “sufficient cause” as is necessary for stay of execution. The mandatory conditions set out in sub-rule (2) of rule 6 also do not apply to stay of proceedings; they apply only to stay of execution.

9. The Appellants’ main complaint in this appeal is that after finishing her testimony before the Tribunal at about 5.30 pm., she was refused adjournment to call her valuer who had already indicated to her counsel that he was engaged elsewhere for 2 days and would thus be unable to attend court. The Respondents’ answer to this was that it was about 4.30 pm, not 5.30 pm. The merits or otherwise of this complaint will be decided when the appeal is heard. But I am satisfied that the Appellant has an arguable appeal.

10. As far as this application is concerned, the Appellant fears that shutting out of her valuer from testifying before the Tribunal will be highly prejudicial to her case there and her appeal to this court will in any event be rendered nugatory.

11. The Respondent’ case before the Tribunal was that the Appellant was served notice of termination of tenancy upon the ground of non-payment of rent. The Appellant’s case, on the other hand, was that she had agreed with the Respondents that she would carry out repairs and renovations to the premises, and recover the costs thereof from future rent. The valuer was to testify on the value of the said repairs and renovations.

12. I am satisfied that the testimony of her valuer was crucial to the Appellant’s case before the Tribunal. It is therefore meet and just that her appeal to this court should be heard and determined first so that she may know whether she will be able to call the valuer to testify; otherwise her appeal will be rendered nugatory.

15. In the circumstances I will allow the application and grant the stay of proceedings sought pending hearing and determination of the appeal. The Appellant shall move with expedition towards that end. It is so ordered.

16. Costs of the application shall be in the appeal.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 21ST DAY OF FEBRUARY 2014