



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO 86 OF 2013

MERU NISSAN SACCO LTD.....APPELLANT

VERSUS

MARY WAKARIMA KIRUTHI.....RESPONDENT

RULING

1. The application is a Notice of Motion dated 6th November, 2013. It has been brought under order 42 Rule 6 (6) of the Civil Procedure Rules and sections 1(a) (b) and 3(A) and 79(G) of the Civil Procedure Act. It seeks the following orders:-

2. ...

3. ...

4. That this Honourable Court be pleased to issue an order for stay of execution and/or enforcement of the order of the Business Premises Rent Tribunal Chairman made on 15.2.2013 in BPRT Case No. 26 of 2012 and the subsequent Certificate permitting levy for Rent issued thereof pending the hearing and determination of the Appellant/Applicant's application for leave to file an Appeal out of time and thereafter pending the hearing and determination of the Appeal.

5. That this Honourable Court be pleased to grant to the Applicant herein leave to file an Appeal out of time against the decision and Ruling of the Chairman of the Business Premises Rent Tribunal (Hon. Mochache D) made and delivered on the 15th day of February, 2013 between MARY WAKARIMA KIRUTHI and MERU NISSAN SACCO LTD.

6. ...

7. That the costs for this application be costs in the cause.

2. It is premised on the following grounds

- a. The Appellant/Applicants properties have been proclaimed by Quick Line Auctioneers ostensibly in execution of an order of the Business Premises Rent Tribunal Chairman in **BPRT Case No. 26 of 2012.**

- b. The Appellant/Applicant was not aware of the said decision and/or Ruling of the Business Premises Rent Tribunal Chairman and only became aware of the same on 11/10/2013 when its property was proclaimed by Quickline Auctioneers.
- c. The decision and ruling of the Business Premises Rent Tribunal Chairman was made prematurely and without any evidence from the parties and the Appellant/Applicant is dissatisfied with the said decision and Ruling and intends to Appeal against the same.
- d. The said intended Appeal raises serious arguable grounds with high chances of success and the same will be rendered nugatory if execution will have taken place and the Applicant's property sold.
- e. The Appellant/Applicant shall suffer an irreparable loss and damage in the event that execution proceeds as the amount involved is colossal and the Respondent may not be able to refund a single cent once the Appeal succeeds as she is an impecunious individual.
- f. The Appellant/Applicant is ready and willing to abide by the orders of this court as they may be made regarding the issue of security as a condition for granting of stay of execution.
- g. This application is brought to court without undue delay and is made in utmost good faith and the prayers being sought for, if granted, will not in any way prejudice the Respondents case, if any.
- h. The nature, events and circumstances of this case are highly in favour of granting of the orders being sought for by the Appellant/Applicant vide this application.

3. The application is supported by an affidavit of even date sworn by the Chairman of the Applicant Company. It is further supported by an affidavit sworn by the Chairman of the Applicants dated 19th December, 2013.

4. The Application is opposed. The respondent has sworn a replying affidavit which is dated 2nd December 2013.

5. The parties filed written submissions through their advocates, Mr. Nyamu Nyaga for the Applicant and Mrs. Kaume for the Respondent. I considered both their written and oral submissions.

6. The application is brought under Order 42 of the Civil Procedure Rules. Under Rule 6(1) no stay may be ordered without sufficient costs being shown. Under Sub Rule (2) an Applicant for Stay of Execution pending appeal must meet certain criteria set out thereunder. That sub rule provides as follows:

Order 42 Rule 6(1) provides.

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

7. This application has been made by the Applicants to stay the decision of the Chairman of the Business Premises Rent Tribunal that was delivered on the 15th February, 2013 in case No. 26 of 2012. The Applicant has to demonstrate that the application for stay of execution pending appeal has been made without unreasonable delay.

8. The notice of motion was filed by the Applicant on the 8th November 2013 nine months after the ruling was delivered. The applicant has averred that he was unaware of that ruling until the proclamation of his properties by Quickline Auctioneers which was done on 11th October, 2013.
9. I have confirmed from the record of the ruling delivered by the business tribunal that at the time the ruling was read neither the applicant nor his advocate was present.
10. I have also confirmed from the proclamation order which is an annexure to the Applicants Affidavit that the Proclamation was done on 11th October, 2013. I am satisfied that the Applicant had demonstrated that the delay in bringing this application was caused by the fact the ruling was delivered in his absence. I also noted that the difference between the date of the proclamation when the applicant became aware of the ruling and the date the application was filed is 27 days which in my view is not inordinate.
11. The Applicant has annexed a draft memo of Appeal alongside this application which also seeks for leave to appeal out of time. The Applicant has therefore demonstrated that he does have grounds for appealing the decision of the Tribunal.
12. The Respondent claims that this application is res judicata on account of being a second application by the applicant. The Respondent counsel urged that the applicant had sought a similar application before the Environment and Land court which application was declined. The said application is annexed to the Replying Affidavit.
13. I have looked at the annexure; it is an application to the Environment and Land court No. 37 of 2013 it seeks stay of the orders of the Business Premises Rent Tribunal Case No. 26 of 2012. Even though the case cited and the ruling sought to be stayed are the same as those in the application before this court, the applicant before the Environment & Land Court is not the applicant before this court. In that regard the Respondent has not established that the application before this court is Res Judicata for reason it was made by the same party who appeared before the Environment & Land Court.
14. I have also considered all the evidence before this court in the form of affidavits by the parties the application and the grounds on which it is premised. I am satisfied that there is an arguable appeal arising from the pleadings and proceedings before this court. One pertinent issue I note is the fact that the business premises which are the subject matter of the tribunal case and of these proceedings have an ownership dispute. I noted that one of the averments made by the Applicant is that it did not know who to pay rent for the premises to for reason two parties were claiming ownership of the property. The Appeal is therefore arguable as it is clear there is a contentious issue which needed to be resolved.
15. The court has to be satisfied that the applicant may suffer substantial loss if stay is not granted. The Applicant is a company which operates business from the premises which are the subject matter of these proceedings. There is good will involved, the Applicant having operated from the premises for the last five years. There is also the aspect of the ownership dispute which may exonerate the Applicant from the Rent Dispute given the fact that failure to know where to pay the rent between two parties claiming ownership cannot be blamed on the applicant.
16. Even if the loss the Applicant may suffer if stay is not granted could be ascertainable and compensatable by an award of damages gives the fact that the Applicant has been on the premises for long doing business and is not entirely to blame for the rent dispute it finds itself in on a balance of convenience I find that it tilts in favour of granting the stay sought.
17. The law required the court to make an order for security to be provided by the Applicant for the due performance of such decree or order as may ultimately be binding on him. In this case the Applicant has already deposited the sum of Ksh. 180,000/- to court as security. In the pleadings before the court it appears that the rent was 5,000 per month and the period of the tenancy so far has been 5 years. In order to provide sufficient security for the due performance of the decree that may be ultimately binding on

Applicant I find it will be necessary an additional sum of money be deposited with the court.

18. Having come to the conclusion I have of this matter I find that this Application should be allowed on the following terms.

- 1. Additional Security in the sum of Ksh. 300,000/- be deposited with the court by the applicant in addition to the earlier deposit of Ksh.180, 000/.**
- 2. A Stay of execution and or enforcement of the order of the Chairman in BPRT Case No. 26 of 2012 and all consequential certificates or orders issued thereof be and is hereby issued pending the hearing and determination of the appeal.**
- 3. The stay in (2) above shall be for a period of 12 months from the date hereof unless extended by the court for good cause shown.**
- 4. Costs of this application shall abide the outcome of this appeal.**

DATED SIGNED AND DELIVERED THIS 27TH DAY OF MARCH, 2014

LESITJ.

JUDGE.