



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 370 OF 2013

EAGLES WHOLESALERS LTD.....APPELLANT

VERSUS

ESTHER WANG'ORU MURUGU.....RESPONDENT

(Being an appeal from the judgment of the Business Premises Rent Tribunal delivered on 7th June 2013 by Honorable D. Mochache Chairlady)

IN THE BUSINESS PREMISES RENT TRIBUNAL AT NAIROBI TRIBUNAL CAUSE NO. 418 OF 2012.

ESTHER WANG'ORU MURUGU.....LANDLORD

VERSUS

EAGLES WHOLESALERS LTD.....TENANT

RULING

Before me is a Notice of Motion dated the 3/7/13. It is brought under Order 42 rule 6 (1) & (3) and order 51(1) of the Civil Procedure Rule 2010. The appellant/applicant is seeking the following orders;

- i. That pending the hearing and determination of the substantive appeal this Hon. Court be pleased to issue an order of stay of execution of the judgment and or decree issued by the Hon. D. Mochache at the Business Premises Rent Tribunal on 7th June 2013 in Tribunal case No. 418 of 2013.
- ii. That the court be pleased to make such further or other orders it deems necessary.
- iii. That costs of the application be provided for.

The application is based on 12 grounds stated on the face of the application together with the supporting affidavit of Khuma Mahindra Nagda and his supplementary affidavit sworn on the 5th September 2013.

The application was opposed. The Respondent Esther Wang'oru Murugu filed a replying affidavit dated the 6th August 2014 plus a reply to the applicant supplementary affidavit dated the 16/9/13. Parties field witness submissions.

A brief summary of the facts that led to this application are that on the 7th of June 2013 Hon. Mochache delivered a judgment, allowing the landlord's notice to terminate the tenancy and ordered the applicant to vacate the premises and to hand over vacant possession on the 1st August 2013. The applicant being

aggrieved by the said decision filed a memorandum of appeal and the application dated 3/7/13.

From the affidavits filed the applicant does not dispute that he was given notice to vacate. The applicant's Managing Director deposes that they cannot move as they are yet to get alternative premises for their business within the Central Business District; that it is indebted to various creditors and the impending eviction if not stopped will hinder its ability to meet its obligation; that it will suffer irreparable harm and loss if the orders are not granted because it has occupied the premise for over 25 years since 1987 conducting the business of selling school equipment and has developed a good will which will be disrupted if the stay is not granted; that the livelihood of the applicants' 20 employees will be disrupted if the stay is not granted as they stand to lose their jobs should the respondent be allowed to proceed; that the period within which the applicant has been ordered to vacate the suit premises is too short bearing in mind the applicant's business is seasonal and its largest stock of over 30 million; that the Landlady has no intention to renovate the premises but has an intention of discriminating and kicking them out of the premises as other tenants who would naturally be affected by the intended renovations have not been given notice to vacate and that no loss and that prejudice will be occasioned to the respondent if the orders sought are granted.

In response the respondent admits giving the notice and deposes as follows in brief; that the applicant was given notice to terminate the tenancy in May 2012; that the Tribunal gave him almost 2 months to vacate; that the applicant has not shown the Court the loss it will suffer; that the applicant's indebtedness to various creditors is a matter that is not relevant to the case as she is not a party or involved in any transaction between the applicant and the alleged creditors that the premises is dilapidated and untenable and continues to waste causing her further loss of income; that the applicant's arguments that 20 of its employees will be disrupted and lose their jobs is baseless and leveled loosely and bears no bone as the applicant is to exist the premises with its employees; that the applicant has never undertaken any renovations and that if the application is allowed she will suffer loss.

I have carefully considered all that has been deposed in the affidavits and the submissions filed. The issues I have to consider in this matter are well stated in order 42 rules 6(2) of the Civil Procedure Rules which are;

- i. Whether the application has been made without unreasonable delay.
- ii. Whether the applicant stands to suffer substantial loss if the stay of execution is not granted.
- iii. Whether the applicant is ready to offer security for due performance of the decree or order.

I could also consider if there is an arguable appeal.

The applicant has relied on the following cases, **Kenya Orient Insurance Co. Ltd Vs. Mohamed Dulo Dima Alias Moh'd Omar Dima & 2 others (2013) eKLR**, **National Industrial Credit Bank Ltd Vs. Aquinas Francis Wasike & Another ; Nrb Civil Application 238 of 2005 (Ur 144/05)**, the case of **Mohammed Salim T/A Choice Butchery Vs. Nasserpuria Memon Jamat Civil Appeal No. 20 of 2013 (2013) eKLR** and the case of **Ramadhan Mohammed Ali Vs. Hashim Salim Ghaim (2013) eKLR**

The respondent relied on the following cases, **Patrick Mweu Musimba vs. Richard N. Kalembe Ndile and others Civil Application. No. NAI 231 of 2013 (UR 166/2013)**, of **Kenya Power and Lighting Co. Ltd vs. Khan Nassir Rustam C. A No. 11 of 2012** and the case of **Portreitz Maternity vs. James Karanga Kabia Civil Suit No. 63 of 1997**.

What I need to consider next is whether the applicant has satisfied the principles of granting a stay of execution pending appeal. The application for stay and Memorandum of Appeal were all filed within time. Next will the applicant suffer substantial loss if the stay orders are not granted? I have considered the applicant's arguments on substantial loss. As has been stated before in considering an application for stay the Court has to balance the rights of the applicant/appellant and the respondent. In the case cited of **Portreitz Maternity (supra)** the Court held that;

“ The right of appeal must be balanced against an equally weighty right, that the plaintiff to enjoy the fruits of judgment delivered in his favor. There must be a just cause for the depriving the plaintiff of that right”

From the facts as deposed I find that the applicant has failed to persuade this Court the loss it will suffer if the stay order is not granted. The applicant was given notice to vacate in May 2012 and appears ready to move only that it cannot get premises it deems fit for its premises. Being on premises from 1987 is not adequate reason to grant a stay given the grounds of appeal referred to are matters to be considered by the court that shall hear the appeal. The respondent has explained it needs the premises for renovations, this too I must consider. In being the rights of the parties and having noted that the applicant has failed to demonstrate the substantial loss it will suffer, I therefore find no merit in the application dated 3/7/13 and dismiss it with costs to the respondent.

Orders accordingly.

Dated signed and delivered this **15th** day of **April** 2014.

R. E. OUGO

JUDGE

In the presence of:

.....**APPELLANT/ APPLICANT**

.....**RESPONDENT**

.....**COURT CLERK**