



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 102 OF 2021

EDITH MARIGU NJERU.....APPELLANT

=VERSUS=

JAMES MUNYUA KAMAU.....1ST RESPONDENT

PAUL WAITITU KAHUTHU.....2ND RESPONDENT

RULING

1. Through a plaint dated 28/11/2019, **James Munyua Kamau** [the 1st respondent] initiated **Thika CMC MCL & E Case No. 157 of 2019** against **Edith Marigu Njeru** [the appellant] seeking a declaration that the appellant was in breach of a lease agreement between them dated 2/12/2013 relating to a portion of parcel number **Ruiru/Kiu Block 2/3667**. Further, the 1st respondent sought an eviction order against the appellant. Upon hearing the suit, the trial court [Hon C K Kisiangani] rendered a judgment dated 28/10/2021 in which she granted the 1st respondent's plea for an eviction order and gave the appellant three months within which to vacate the demised premises.

2. Aggrieved by the judgment, the appellant brought this appeal through a memorandum of appeal dated 23/11/2021. Subsequently, on 25/1/2022, the appellant brought a notice of motion dated 25/1/2022, seeking an order of stay of execution. The appellant made an alternative plea for an order of injunction pending appeal under **Order 42 rule 6(6)** of the Civil Procedure Rules. The said application is the subject of this ruling.

3. The application was supported by the appellant's affidavit sworn on 25/1/2022. It was canvassed through written submissions dated 10/2/2022, filed through the firm of *Masore Nyangau & Co Advocates*. She contended that the appeal would be rendered nugatory if the plea for stay or injunction order is not granted because she would be evicted from the suit property and her structures would be demolished by the 1st respondent. She added that the 1st respondent was likely to alienate or encumber the suit property. She further contended that in the event of her eviction and demolition of her structures, she stood to suffer substantial loss.

4. The 1st respondent opposed the application through a replying affidavit sworn on 9/2/2022 and written submissions dated 15/2/2022, filed through the firm of *Wanjohi & Wawuda Advocates*. His case was that the applicant had failed to explain the delay of three months in bringing the application under consideration. He added that as at February 2022, the appellant owed him Kshs 1,407,000 in form of unpaid rent. It was his case that the appellant had failed to satisfy the requirements of Order 42 rule 6(2) of the Civil Procedure Rules. He urged the court to dismiss the application. He added that should the court be inclined to grant a stay, it should order the appellant to deposit in court the sum of Kshs 1,407,000.

5. I have considered the application, the response to the application and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in the application is whether the applicant has made out a case for grant of either the principal relief in form of an order of stay of execution or the alternative relief in form of an order of injunction pending appeal.

6. Exercise of jurisdiction to grant an order of stay of execution pending appeal is guided by the framework in **Order 42 rule 6(2)** of the Civil Procedure Rules which provides as follows:

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has

been given by the applicant.”

7. The Court of Appeal in the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & CockarAg. JA)* emphasized the above guidelines in the following words:

“...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

8. The dispute leading to the impugned judgment is a tenancy dispute. The ten year lease commenced in December 2013. The lease was to lapse in December 2023. The appellant was to pay a monthly rent of Kshs 18,000 for the first five years and a monthly rent of Kshs 2500 for the subsequent five years. The 1st respondent sued the appellant seeking an eviction order on the ground that the appellant had defaulted to pay the agreed rent. He did not, however, make a claim for the unpaid rent.

9. The case of the appellant was that the rent due to the 1st respondent from the appellant had been reduced by half owing to the subsequent lease between the 1st respondent and the 2nd respondent. The 1st respondent disputed that contention.

10. It does emerge from the materials presented to the court that the appellant erected some structures on the demised premises. It is therefore true that enforcement of the impugned judgment would entail his eviction from the suit premises and may culminate in the demolition of the structures.

11. The 1st respondent faulted the appellant for not initiating the motion promptly. I have reflected on the delay. The trial court gave the appellant three months within which to move out of the suit premises. The appellant brought the present application before expiry of the three months’ period. At this point, the appellant has filed the record of appeal and all that remains is the disposal of the appeal. In the circumstances, it is the view of the court that a conditional stay would serve the ends of justice. That condition is that the appellant will deposit in court a monthly sum equivalent to the rent that was agreed in the lease, covering the period from 1/2/2022 [the month when she was to have moved out of the suit premises].

12. The court having made a finding to the effect that a conditional order of stay of execution is merited, there will be no need to consider the plea for an injunction under Order 42 rule 6(6).

13. My finding on the single question for determination in the application dated 25/1/2022 is that, to avoid a scenario where the appeal herein is rendered nugatory, the appellant will be granted a conditional order of stay of execution.

14. The result is that the application dated 25/1/2022 is disposed in the following terms:

a) The appellant shall on or before 5/4/2022 deposit in court Kshs 75,000 being the equivalent of rent for February, March and April 2022.

b) Thereafter, pending the hearing and determination of this appeal, the appellant shall deposit in court Kshs 25,000 on or before the 5th day of every month.

c) Subject to the appellant’s compliance with the above conditions, there shall be a stay of execution of the decree in Thika MCL & E Case No 157 of 2019 for a period of 9 months from today.

d) In default of compliance, the 1st respondent shall be at liberty to execute the decree.

e) Costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF MARCH 2022

B M EBOSO

JUDGE

In the presence of: -

Mr Khasabuli for the Appellant

Mr Muturi for the Respondent

Court Assistant: Lucy Muthoni