



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 2 OF 2013

PETER GATAMU GACHIMU.....APPELLANT

VERSUS

DANIEL ONG'ONG'O OKONDORESPONDENT

RULING

The Notice of Motion application dated the 1st day of March, 2013 seeks for a stay of execution of Rent Assessment by the Rent Restriction Tribunal made on the 20th day of December, 2012 in Rent Restriction Tribunal (Mombasa) Case number 36 of 2011 pending the hearing and determination of the appeal herein.

The grounds are that by assessing the standard rent at Ksh. 15,000/= the Rent Restriction Tribunal acted without jurisdiction and effectively removed the appellant from the protection of the Rent Restriction Act Cap 296 Laws of Kenya.

That owing to the removal of the protection under the Act the Respondent was now at liberty to carry out his earlier threats of eviction which would lead to substantial loss and damage.

Further that there is a stranger who has introduced himself as the new landlord and who on several occasions has demanded that the Applicant do vacate the premises.

The application is supported by the Affidavit of **PETER GATAMU GACHIMU** the Applicant herein.

In his Replying Affidavit the Respondent depones that he has subsequent to the assessment of the standard rent never issued any notice to the Appellant demanding for vacant possession of the demised premises.

Further that before the assessment of the standard rent, the appellant had been directed to file his own rent valuation report which he did on 20th April, 2012.

Subsequently the assessment was done procedurally with no prejudice whatsoever to either party. It is further deponed that there are no intentions whatsoever to evict the appellant without regard to the due process.

It is submitted for the Respondent that in his Supporting affidavit that the appellant has made several allegations which are totally untrue intended to mislead the Court. Such allegations include, the contention that there is a New Landlord whereas the sole holder of the title deed for plot No.

Mombasa/Block XI/982 is the Respondent **DANIEL ONG'ONG'O OKONDO**.

Counsel for the Respondent has cited the Case of **PATRICIA NJERI & OTHERS – VS- NATIONAL MUSEUM OF KENYA (2004) eKLR** where Justice Alnashir Visram rendered himself thus,

“An order for injunction pending appeal is a discretionary matter and such discretion must be exercised judicially and not in whimsical or arbitrary fashion. This discretion is guided by certain principles some of which are as follows:-

(a) The discretion will be exercised against an applicant whose appeal is frivolous.

(b) The applicant must state that a reasonable argument can be put forward in support of his appeal.

(c) The discretion should be refused where it would inflict greater hardship than it would avoid.

(d) The Court should also be guided by the principles laid down in Giella –Vs- Cassman Brown”.

It is contended that the applicant has not proved a single allegation in his application and there is nothing to show that if the orders sought are not granted the hardship that shall be inflicted on the Respondent would be far greater than it would avoid.

The Respondent also relies on the case of **JOSEPH RADING WASAMBO –VS- THE STANDARD LTD. (2006) eKLR** where Kariuki Judge as then was had this to say,

”In our view, the mere fact that there are strong grounds of appeal would not in itself, justify an order for stay. A party is expected to prefer an appeal only when there are strong reasons for doing so”.

It is contended that the assessed Standard rent for the sum of Ksh. 15,000/= took effect from January, 2013 and the appellant had commenced the due payment thereof and that the decision of the Rent Tribunal has already been effected and execution process completed. That the appellant has the remedy of having the excess amounts paid in rental offset against future accruals in the event the appeal succeeds.

The brief facts of this case are that the Respondent made an application to the Rent Restriction Tribunal for assessment of Standard rent for his premises situated at plot No. Mombasa/Block XI/982 located at Tudor Mombasa. The Rent Tribunal subsequently assessed rent at Ksh. 15,000/= per month.

Being aggrieved of the decision of the Rent Restriction Tribunal the appellant lodged an appeal.

By way of a Notice of Motion application dated the 1st day of February, 2013 he now prays for a temporary stay of execution of the Rent assessment by the Rent Restriction Tribunal made on the 20th day of December, 2012 in RRT (Mombasa) number 36 of 2011 and stay of the execution of the Rent assessment pending hearing and final determination of the appeal.

It is not in dispute that the assessed standard rent for the sum of Ksh. 15,000/= took effect from January, 2013 and that the Defendant has substantially complied with the decision of the Rent Restriction Tribunal.

The criteria set out in order 41 rule 4(2) is that,

“No order for stay of execution shall be made under rule (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.

(b) Such security as the Court orders for performance of such decree or order has been given by the applicant”.

In the Case of **VENTURE CAPITAL & CREDIT LTD. -Vs- CONSOLIDATED BANK OF KENYA LTD.** Civil Application No. 349 of 2003 Court of Appeal was of the view that,

“An order for injunction pending an appeal is a discretionary matter. The discretion should be exercised judicially and not in whimsical or arbitrary fashion”.

In the case of **Patricia Njeri & Others –Vs- National Museum of Kenya (2004) eKLR** Justice Alnashir Visram proceeded to amplify on the principles;

“(a) That the discretion will be exercised against an applicant whose appeal is frivolous. The applicant must state that a reasonable argument can be put forward in support of his appeal.

(b) The discretion should be refused where it would inflict greater hardship than it would avoid.

(c) The applicant must show that to refuse the injunction would render his appeal nugatory.

*(d) The Court should also be guided by the principles in **Giella – Vs- Cassman Brown & Co. Ltd. (1973) E.A 358”.***

In his submissions the appellant contends that if the order for stay of the execution of the rent assessment by the Rent Restriction Tribunal is not granted then he stands to be evicted from the premises.

Further that there is a new landlord who is threatening to evict him.

This has been denied by the Respondent in his affidavit and it is said that the allegations are totally untrue to mislead the Court.

If there are no threats of eviction then what substantial loss would the appellant suffer?

He has already complied or substantially complied with the Decision of the Rent Restriction Tribunal and as argued by the Respondent the execution process is complete. I find that this is a matter that should proceed to appeal. In the event that the appeal succeeds the appellant has the option or remedy of seeking for the refund of the calculated rentals difference.

It has not been submitted or pleaded that the Respondent is a man of straw and will not be in a position to refund the balance of the Rent accruals.

I find this application has no merit and its dismissed with costs.

Ruling delivered dated and signed this **16th** day of **June, 2014.**

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M. MUYA

JUDGE

16TH JUNE, 2014

In the presence of:-

Court clerk

Absence of parties Counsels