



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 77 OF 2011

DEKEE HOLDINGS LIMITEDPLAINTIFF

-VERSUS-

GULED HOUSING LIMITED.....DEFENDANT

RULING

The application before this Court is a Notice of Motion dated 27/5/2013 brought under Section 1, 1A, 3, 3A of the Civil procedure Act and Order 45 rule 1(1)(b) of the Civil Procedure Rules 2010. The applicant seeks for the setting aside of the stay of execution of the Business Tribunal judgment made on 11/2/2011 alternatively the appellant deposit Kshs. 4,830,000/- rent in arrears and such rent due from the appellant for its use of the premises until the determination of the appeal.

The application is premised on the grounds that;

The delay on the hearing of the appeal has caused the respondent grave loss as he is not receiving a single cent from the appellant and the appellant cannot use the premises for free.

That the Business Premises Tribunal case no. 254 of 2011 obtained orders that are injurious to the applicant and which were made in violation of the *sub judice* rule aware that the proceedings were pending and the appellant had secured a stay order conditional upon paying the original sum of rent due. At this stage no amount of rent due had been made of rent collected from the subtenants by the appellant's from 29th July 2011.

That the appellant collects on average Kshs. 230,000/- per month and as of now it has collected Kshs. 4,830,000/- which it has failed to account for; that the appellant is unjustly enriching itself from illegal collection of rent received from the tenants it has sublet while the respondent who is the owner of the building has nothing yet there is no lease agreement between the appellant and respondent; that the way the appeal is being conducted is contrary to Article 159(2) of the Constitution as no rent is being remitted to the respondent landlord or deposited in Court; that no security has been deposited in Court and in the event that the appeal is unsuccessful the respondent will have no recourse; That justice tips in favor of granting the relief sought.

The applicant is the registered proprietor of the property known as L.R. 209/6497 which are business premises rent out on terms for various tenants. The applicant moved the Business Premises Tribunal seeking to increase rent of the said premises. This was opposed by the respondents and they filed a reference 949 of 2009. The Business Rent Tribunal in the judgment dated 11th February 2011 and ordered

the respondent to remit Kshs.109, 340/- for its rented premises of 420 square feet. Aggrieved by this decision the tenant appealed the decision in the current appeal. On 28th February 2011, the matter came up before Justice Mwera and was granted a stay of execution of the said Business Premises Tribunal Order. That circumstances changed as the applicant came to know that there were tenants who had been illegally sublet the premises; that whilst the civil appeal was pending the respondent rushed to the Business rent tribunal vide a reference no. 254 of 2011 and sought that the applicant be ordered not to close the tenants business at L.R. 209/497 Nairobi or disrupt in any manner pending the hearing of the application *inter partes* and that the OCS Central Police Nairobi be ordered to enforce the orders.

I have considered the oral submissions made by the Advocates and I find that this is a matter that should go to full hearing. Granting the orders sought in the Notice Motion will not assist in any way as the parties keep filing applications in Court and the Tribunal. I agree with Mr. Mutiso submissions that setting down the appeal for hearing will help resolve and put the matters to rest between the parties. Under order 45 (1) and (1) and (b) the Applicant is required to satisfy the Court that there has been discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. Though the Applicant argues that rent is not being paid by appellants, in my view the Appellant should fix the appeal for hearing so that the matter can be settled once and for all. Setting aside the Order of 28th of February 2011 will not assist the parties in the matter. I therefore decline to grant the orders sought. No orders as to costs.

Orders accordingly.

Dated, delivered and signed this **24th** Day of **October 2014**.

R. E. OUGO

JUDGE

In the Presence of:

.....**Respondent/Applicant**

.....**Appellant/Respondent**

.....**Court Clerk**