



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 25 OF 2014**

**FORMERLY EMBU HCA NO. 32 OF 2014**

**DAVID WAINAINA GIKURU.....APPELLANT**

**VERSUS**

**ALICE NYAMBURA WAMAI.....RESPONDENT**

**RULING**

**INTRODUCTION**

By his notice of motion of 24<sup>th</sup> October 2014, the applicant/appellant has applied to this court for the following orders:

1. An order for stay of execution of the judgement of the tribunal which was delivered on 3<sup>rd</sup> October 2014.
2. An order to issue directing as to who should pay for the costs of this application.

The application is opposed by the respondent/landlady. She has filed a replying affidavit which runs to 16 paragraphs.

**The Case for the Applicant/Tenant**

In his supporting affidavit the applicant has stated that he has lodged an appeal in the High Court being civil appeal number 32 of 2014, which he filed on 24<sup>th</sup> October, 2014. The memorandum of appeal has set out 4 grounds of appeal in which he has raised both issues of law and fact. According to him, his appeal has high chances of success. It is for this reason that he says that this court ought to grant an order staying the orders of the Business Premises Rent Tribunal in that Tribunal's case number 47 of 2014. The tribunal had ordered the tenant to vacate and deliver vacant possession of the suit premises on or before 31<sup>st</sup> December, 2014 in default an eviction order to issue.

Furthermore, the applicant has stated that unless the orders of that tribunal are stayed, he is likely to be evicted from the rental business premises. Finally, he says that this is the only source of his income for the support of his family and himself.

**Case for the Respondent:**

The respondent has filed a replying affidavit dated 17<sup>th</sup> November, 2014. In that affidavit, she has opposed the application for stay of execution. According to her, the applicant has not demonstrated what irreparable loss that he will suffer if he is evicted on the due date. She has also stated that the applicant has not shown that she is not in a position to financially compensate him for whatever losses he may incur should he win the appeal.

As far as she is concerned, the applicant did not challenge the validity of the notice of termination of tenancy during the trial at the tribunal. She has also stated that she took a loan which is attracting interest and therefore it would not be in the interest of justice to stay the orders of the tribunal. Finally, she says that the applicant has not shown what substantial loss may result if the orders sought are not granted.

### **The Law Applicable**

The law that governs the grant of orders to stay the execution of the orders appealed from is found in Order 42 of the Civil Procedure Rules of 2010. In addition to this statutory provisions, the Court of Appeal in the case of **Butt v Rent Restriction Tribunal (1982) KLR 417**, held that the power of the court to grant or refuse an application for stay of execution is a discretionary power.

According to that court, the discretion is not to be exercised in such a way as to prevent an appeal. Finally, that court stated that the general principle in granting or refusing stay is that if there is no other overwhelming hindrance, stay must be granted. This ensures that the appeal that is lodged may not be rendered nugatory should it succeed after being heard.

### **Issues for determination**

In the light of what I have stated above, the issues for determination in this application are as follows:

1. Whether or not the applicant has made out a case for the grant of an order of stay of execution.
2. Who should bear the costs of this application.

### **Evaluation of the Affidavit Evidence, Findings and the Law:**

I have carefully considered the affidavit evidence of both parties. I have also considered their oral submissions and the applicable law.

Having done so, I have come to the conclusion that the applicant has made out a case for the grant of an order of stay of execution pending the hearing and determination of the appeal.

### **Verdict and Disposal Orders:**

In the light of the foregoing, I hereby make the following orders:

1. An order of stay against the execution is hereby granted in terms of prayer 1 of the notice of motion
2. An order that the costs of this application shall be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this ...17<sup>th</sup> .....day of ... December,....2014

In the presence of

Mr David Gikuru in person and M/S Muriuki holding brief for Mr Mutitu for the Respondent.

Court clerk Mr Muriithi

Right of Appeal under Order 43 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**