



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 45 OF 2012

JOHN MWANGI APPELLANT/ ORIGINAL PLAINTIFF

VERSUS

RICHARD NYAKUNDI RESPONDENT/ORIGINAL DEFENDANT

(Being an appeal arising from the judgment of Hon. P Nditika Principal Magistrate in Civil Case No. 36 of 2011 dated 26th January 2012 at

Milimani Commercial Courts)

R U L I N G

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Application for stay of execution

Notice of Motion 16th February 2012

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I. BACKGROUND

1. John Mwangi (herein referred to as the applicant/tenant) had entered into a lease agreement with one Samwel Waweru Huho (now deceased) herein referred to as the original – late landlord) for rental premises to a dwelling house No. HB4, LR 209/71/16 situated at Harambee Estate, Phase I Nairobi.
2. The tenancy was a “year to year” and first commenced on the 1st November 2000.
3. The parties had a cordial relationship and experienced no conflict and or dispute between them until mid 2009, when Samwel Waweru Huho passed away. According to the tenant, strangers came to interfere with his office possession. This included one Wilson Chege (herein referred to as the respondent.)
4. The tenant filed a civil suit in the subordinate court, seeking protection of the court from such intimidation. By an application dated

13th January 2011, the court granted exparte orders of injunction.

5. During the interparte hearing, the respondent did not attend to the ruling delivered on the 17th May 2011. This ruling confirmed the orders of the court, that there be an injunction restraining the respondent from levying distress of rent.
6. Whereas that court recognized the respondent held no letters of grant of probate for the estate of the deceased, the court ordered that the monthly rents be deposited to court until the suit is heard and determined.
7. The tenant filed application to court dated 29th November 2011 when the respondent levied distress for rent once again. The respondent argued that the orders of the court was clear, that the rents be deposited to court. For four months no rent had been deposited to court totaling Ksh. 64,000/-
8. As a result, the court dismissed the application of 29th November 2011 on grounds of the disobedience of court orders, that no rents had been deposited to court.
9. The respondent obtained exparte orders from another Hon. Magistrate to review the orders of the original Hon. Magistrate for ‘leave’ for the auctioneers to execute the court orders into the [tenant’s] house at Harambee estate to levying distress. That the orders of
29th September 2011 be reviewed to read “*that the officer commanding Buru Buru police station be and is hereby ordered to prove the auctioneer with adequate security while levying distress.*”
10. The tenant stated he had deposited the rent in the joint names of the two advocates as ordered with the Equity Bank, Fourways Branch. Thereafter he deposited rent to court.
11. The review orders were issued in his absence and he was unaware of the same until the levying of execution.
12. The original Hon. Magistrate by his ruling of 26th January 2012 declined to grant orders restraining the respondent from levying distress. The tenant appealed on 16th February 2012. An application notice of motion 16th February 2012 was filed seeking orders of stay of execution of the ruling and order issued on 26th January 2012 by the Hon. Magistrate.

II SUBMISSIONS BY THE APPELLANT/TENANT

13. The main contention that the applicant/tenant raises in this application is the locus of the respondent. As long as the late landlord has no legal representative, the respondent was not entitled to orders of the court.

14. The court had declared the respondent a stranger to the said estate.

15. The orders of the court at the magistrate's court was to deposit the rent in the joint accounts of the advocate, then to the judiciary account on further payments.

16. In reply, the respondent stated that the applicant was misdirected in the whole application. Rents had not been paid as a consequence, the levy of distress. Relying on authorities before court on the following cases, the respondent brought out the following facts:

16.1 **Hotel Marvelon Ltd - Vs - Benson mwangi**

Nakuru HCCC 76/03

Musinga J

Where the Hon. Judge stated that

“a tenant's first obligation to a landlord is to pay his rent [when] it falls due and any court of law will frown upon any conduct on the part of a tenant which is intended to frustrate a landlord's right to receiving such rent.”

16.2 Eldoret Steel Mills Ltd – Vs – Patrick Lumumba Riboi

CA 139/10 Eldoret

F Azangala

The applicant must demonstrate substantial loss.

16.3 **Joseph Rading Wasambo – Vs – Standard Limited**

(2006) eKLR

Kihara Kariuki J

“The appellant should show the damages it would suffer if the order of stay is not granted. The mere fact there are strong grounds of appeal would not, in itself justify an order for stay”

16.4 **Peter Ondande t/a Speawett Chemist**

Vs

Josephine Wangari Karanja

Kimaru J

The applicant had been in default of paying rent. The business premises tribunal held the tenancy should terminate.

The court held that the court would not grant orders of stay of execution. **The respondent had not proved he would suffer substantial loss.**

16.5 **Charles Muthaura Gikunda & Another**

Vs

Helena Wangechi Njoroge

Where orders of stay of execution on grounds of substantial loss had been said was found not to have been demonstrated **and the application for stay of execution was dismissed.**

17. The respondent prayed that the application be not permitted and dismissed.

III OPINION

18. The late landlord is deceased, as of mid 2009. The issue herein lies solely on whether the respondent has locus to be the alleged landlord/agent to levy distress.

19. In the case law of Touristik – Vs – Jane Mbeyu

No person can act upon a deceased estate unless they have letters of grant of probate. This has been the arguments put all along by the tenant in this application.

20. Whereas the subordinate court ordered deposit of rent to safe guard the would be estate, it does not give the respondent locus to levy distress at all.

21. This High Court notes that the application, if not granted would amount to a substantial loss on the part of the applicant. He would be required to answer to the current estate to the deceased landlord and at the same time forced to answer to a stranger.

22. The application was brought without unreasonable delay.

23. The applicant tenant has established grounds that he be granted a stay of execution pending appeal. I hereby grant the said prayers and order that there be a stay of execution of the ruling and order obtained against the appellant by the Hon. Magistrate on 26th January 2012, pending the hearing and determination of the civil appeal.

24. That this court further order that the respondent, his servants, agents or persons acting under his authority from or in particular Garam Investment Ltd, a firm of auctioneers to return the appellant's property attached and proclaimed.

25. That the costs of the auctioneers is to be borne by the respondent.

26. That the tenant be accorded quiet possession of the suit premises.

27. The costs of this application is to be borne by the respondent.

DATED THIS 19TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

- i) *S Nzaku instructed by M/s P K Mutai & Co Advocates for
appellant/plaintiff*

- ii) *J Ochola instructed by Soita Saende & Co Advocates for
respondent/defendant*