



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 11 OF 2012

ADAH NYAMBOK T/A FIMODA FASHIONS.....PLAINTIFF

VERSUS

UGANDA HOLDING PROPERTIES LTD.....DEFENDANT

R U L I N G

Coram: Mwera, J.
Kenzi for Plaintiff/Applicant
N/A for Defendants

Court Clerk Furaha

The appellant/applicant filed a notice of motion dated 25th January, 2012 in court under ss. 1A , 1B, 3A, 63 (e), 75 of C.P.A. plus O. 42 and 6 and O. 50 r. 6 of the C.P.R. The prayers put forth were:

- i) that there be a stay of execution of the decision in BPRT No. 147/10 delivered on 7th December, 2011 until this appeal is heard;
- ii) that the respondent be restrained from interfering with the tenancy of the applicant;
- iii) that time be enlarged to file the appeal.

It was contended in the grounds that an appeal had been filed against the decision of the tribunal; a notice to vacate the premises had been served and if effected would cause irreparable damage (not substantial loss?) to the applicant. There was no ground on the prayer to enlarge time within which to appeal.

The applicant swore a supporting affidavit to the effect that pursuant to a tenancy agreement (exhibited) she had been carrying on a dressmaking business in the subject premises for two (2) years. She filed the BPRT case No. 147/10 contesting the rent the landlord/respondent was demanding. Seemingly, the case was lost by the ruling of 7th December, 2011 and that was followed by a vacation notice – hence this application. That if orders are not granted the applicant stood to be evicted from the premises. An unsigned copy of lease was exhibited along with a notice to vacate from the respondent dated 6th January, 2012, not 1st January, 2012. The lower court ruling intended to be appealed from or a memorandum of appeal was not annexed. Neither did the applicant explain why she sought orders to appeal out of time. However, a memorandum appeared to have been filed separately.

Zachary Ngumi, an accountant with the respondent company stated that the applicant was no longer their tenant, the tenancy having been terminated on 7th December, 2011 and that the unsigned tenancy agreement was not agreement to be relied on here. That it was false for the applicant to claim that her reference to the BPRT was on increase of rent. The reference exhibited by the respondent was a:

“.....wish to oppose a notice of termination/alteration of terms

The tribunal decided in favour of the respondent. The applicant filed CMCC 1190/10 which was struck out. The tenancy was terminated when the applicant accumulated rent arrears in excess of Sh. 200,000/=. The applicant had not offered security for the rent arrears and had not paid mesne profits at Shs. 15,000/= per month since December, 2011.

The applicant filed a further affidavit admitting or disclosing for the first time:

“4. That my rent arrears as at November, 2011 was (in) the sum of Kshs. 255,600/=”

She paid Shs. 135,600/= of that, committing herself in writing to liquidate the balance of Shs. 120,000/= not Shs. 200,000/=. But when the ruling of 7th December, 2011 came out in favour of the respondent, it moved to evict the applicant. She would suffer substantial loss if eviction proceeded.

Both sides submitted in essence each standing by its position. Considering all the material placed before this court, this motion must fail. In accordance with the provisions of O. 42 r. 6 C.P.R. the applicant should fulfill three conditions to get a stay order as sought here:

- a) demonstrate substantial loss likely to be suffered in the event a stay order is not granted;
- b) apply for the order without unreasonable delay;
- c) (willingness) to comply with the court’s order to furnish security for due performance of the decree.

In all the above the applicant must be truthful, candid and disclosing all material and relevant facts in the matter.

Regarding substantive loss, the applicant has not demonstrated the big monetary loss to befall her in the event the court does not grant her the stay. She alludes to a counter-claim, it is not said where, to raise against the respondent in respect of expenses she incurred installing power in the rented premises. This cannot constitute substantial loss in the understanding of O. 42 r. 6 C.P.R. She installed power to facilitate her business and what she exhibited are copies of power bills! Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending appeal. The applicant did not do that.

The ruling being appealed against was delivered on 7th December, 2011. This application was brought to court on 27th January, 2012. Even excluding the holidays in between, the applicant does not explain why she took the time she did to apply for stay. Even one day’s delay demands an explanation.

As for furnishing security for due performance, that falls within the jurisdiction of the court to order for one while granting the order. But a prudent applicant should offer such security. And because the stay order is already refused, no more need be said on this aspect.

It should be added that the applicant left the impression of being less than candid on a point or two. While she deposed in the supporting affidavit that in the reference in the BPRT:

“I was contesting rent raised buy the landlord,”

the copy of the reference brought to court by the respondent was a notice of termination/alleviation of terms. And also the applicant did not disclose that at one time she filed CMCC 1190/10 which was struck

out. And until the respondent filed and served a replying affidavit disclosing the rent arrears owed by the applicant, she had not alluded to it, the court had not been told that the reason for terminating her tenancy at all. Then the applicant filed an unsigned lease agreement. Such could not be relied on by this court in the present dispute unless the court was minded to treat it merely as a contract *inter se*. One does not withhold truth or any relevant material from the court and expect favourable a decision from it.

In sum this application is dismissed with costs.

Dated, signed and delivered this 13th day of March, 2012.

J. W. MWERA

JUDGE