



REPUBLIC OF KENYA

High Court at Malindi

Miscellaneous Civil Application 39 of 2012

1. C.J. HAROON

2. KAREN SONJA ANDERSON .....APPLICANTS

VERSUS

UCHUMI SERVICES LIMITED .....RESPONDENT

RULING

1. Before me is a Notice of Motion filed under certificate of urgency on 3rd October, 2012, primarily brought under Order 42 rule 6 of the Civil Procedure Rules. The main prayers are No. 3 and 4, which seek:

***“3. The court be pleased to grant a stay of execution on MSA BPRT CASE NO. 105 OF 2012 pending hearing and determination of the appeal against the judgement made by the Hon. M/s. L. Mochache on the 17th of August, 2012.***

***4. That the honourable court be pleased to grant leave to the applicants to file an appeal out of time.”***

2. The Notice of Motion is supported by the affidavit of C. J. Haroon the 1st appellant on his own behalf and on behalf of Karen Sonja Anderson, the 2nd Appellant.

The subject matter of the appeal is the decision of the Business Premises Rent Tribunal (BPRT) in case No. 105 of 2012, to the effect that:

***“1. The tenant is ordered to pay rent for August, at the rate of Kshs. 50,000/= on or before 21-8-2012***

***2. The tenant is ordered to clear all the outstanding rent arrears on or before 30th September, 2012.***

***3. The tenant is ordered to continue paying his monthly rent on 5th of every month, in default of any of the orders above.***

***(a) The landlord be at liberty to levy distress.***

***(b) The tenancy be terminated.***

***(c) The landlord be at liberty to proceed with execution of (b) above.***

***(d) Costs to the landlord”***

3. The appellants complain that the said award was irregular and unfair as the 2nd appellant was not afforded an opportunity to be heard; that the “huge” award will adversely affect her due to the short time lines for payment; that the appeal will be rendered nugatory if execution thereof is not stayed; that the appellants are willing to offer security and, have come to court with dispatch. That in summary is the substance of the supporting affidavit.
4. In response, the respondents filed Grounds of Opposition. The Respondent describes the appellant's application as vexations and an abuse of the court process and assert the respondent's right to enjoyment of its proprietary rights, including rents, over the suit property. That the appellants have not demonstrated that they stand to suffer substantial loss and/or that the respondent is indigent and would not be able to repay any monies paid to them.
5. In the alternative, the respondent urge that if the application is granted, it should be upon terms that the decretal sum be deposited in an interest earning account in the joint names of the parties and that the appellants continue to pay rent in the sum of kshs. 50,000/- as it falls due, pending the determination of the appeal. In default execution be ordered to proceed. The parties were represented by Mr. Okuto and Mr. ole Kina respectively. The Notice of Motion was argued on 18th October, 2012 and the ruling date set for 23rd November, 2012. However due to a heavy criminal caseload the ruling was not ready and had to be put off.
6. The oral arguments were made in accordance with the material filed by the respective parties. I have now considered all the material canvassed before me in this application. I take the following view. This Notice of Motion is primarily brought under Order 42 rule 6 of the Civil Procedure Rules (erroneously stated as rule 4 in the Notice of Motion) and Section 79G of the Civil Procedure Act. With regard to the prayer for leave to file appeal out of time, there was hardly any contestation. However the respondent opposed the prayer for stay of execution pending appeal citing the persistent default by the appellants in paying rent in respect of the suit property.
7. For their part, the appellants complain that the sums ordered by the BPRT to be paid are large and the time provided short. The question whether the 2nd appellant was denied a right to hearing prior to the impugned order kept surfacing in the application but in my considered view is irrelevant for the purposes of this application.
8. Order 42 rule 6(2) of Civil Procedure Rules is in the following terms:
- “6. (2) No order for stay of execution shall be made under subrule (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; and**
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**
9. While the appellants have undoubtedly come to court without unreasonable delay, the court must satisfy itself that they stand to suffer substantial loss if the order sought are denied, and secondly, that the appellant will furnish security for the due performance of the decree.
- According to the order of the BPRT issued on 17th August, 2012 the appellants were to clear arrears in excess of shs. 2million within a period of about 45 days, and to pay monthly rent of shs. 50,000/- on or before the 5th of every month w.e.f. 21st August, 2012.
10. In default the respondents were at liberty to levy distress, terminate the tenancy, the latter which would effectively mean that the appellants could be evicted. On the face of it, the appellants are occupying premises they have developed upon the land owned by the respondent. Although the respondent's counsel Mr. Ole Kina had asserted that the premises are in ruins, a valuation report done on the order of the court puts the value thereof at shs. 25,000,000/-.

11. From the foregoing, it is self evident that an eviction of the appellants would subject them to substantial loss, if the respondents demanded eviction via removal of the said developments, for example. Besides, the sum of shs. 2Million ordered payable within 45 days is a substantial amount of money even though the respondent may not be indigent. Be that as it may, I do agree with Mr. Ole Kina for the respondent that the appellants cannot hope to continue enjoying free occupation of the respondent's premises. To date, they have neither paid the rent arrears nor monthly rent of shs. 50,000/- as ordered by the BPRT.

12. The appellants seem to have had difficulty paying rent over the years and it is conceivable that a quick payment of shs. 2Million in arrears presents even greater difficulty (see Kenya Shell Ltd vs Benjamin Karuga Kibiru & others (1982 – 88)1 KAR 1018). Their circumstances and right of appeal however must be “balanced against an equally weighty right; that if the plaintiff (respondent) to enjoy the fruits of the judgment delivered in their favor” (per Waki J in Portreitz Maternity v James Karanga Kabi, HCA No. 63 OF 1997).

13. With the foregoing in mind, I am persuaded that the appellants sought to be granted leave to file their appeal out of time, within thirty (30) days of today's date. I will also grant their prayer for stay of execution pending the hearing and determination of their appeal subject to the following conditions:

1. The appellants do deposit a sum of shs. 600,000/- (six hundred thousand) into an interest earning account in the joint names of the parties within 14 days of today's date.
2. The appellants continue to pay monthly rent to the respondent at the rate of shs. 50,000/- on or before the 5th of every month during the pendency of the appeal.

In default the respondent will be at liberty to execute.

Delivered and signed at Malindi this **7th December, 2012** in the presence of Mr. Okuto for the appellants, Mr. ole Kina for the Respondent.

Court clerk - Gladys

**C. W. Meoli**  
**JUDGE**