



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 170 OF 2009

ERNEST MURUNGA APPELLANT

VERSUS

JOHN MICHAEL WANJAU RESPONDENT

(Being Appeal against Ruling of Eldoret Chief Magistrate's Court – ELD.CMC.MISC.APP. No. 23 OF 2009 delivered on 6th day of October, 2009 by G.A. M'masi – Senior Resident Magistrate)

R U L I N G

This is a Notice of Motion brought under the provisions of Order XLI Rule 4 of the Civil Procedure Rules Act and all other enabling provisions of the Law. It is sought therein that there be stay of execution pending the appeal. The grounds upon which the application is brought are that the application from which the appeal arises proceeded ex-parte and it is only fair that the same be set aside and parties be heard on merit and if that be not done then the applicant will suffer prejudice. The applicant swore the supporting affidavit in which is reiterated the grounds upon which the application is based.

The Respondent swore in the replying affidavit that it was the applicant who filed a case before the Business Premises Rent Tribunal Case No. 16 of 2008 wherein the respondent here was the respondent there. The applicant lost that case and so the respondent applied to the Chief Magistrate's Court for the adoption of the Tribunal orders as by law required and that was allowed on 21/7/2009 whereupon this applicant filed an application to have that judgment set aside but the court disallowed the application since it (the court) was functus officio. That this application has no merit and the intended appeal has no chance of succeeding.

Submitting for the applicant it was urged that there is an appeal which will be rendered nugatory if the orders sought are not granted.

Opposing the application counsel for the respondent submitted that the lower court became functus officio upon adopting the Tribunal judgment and the subsequent application was rightfully dismissed. The appeal therefore is without merit.

I have carefully considered the application. It is true that the court below could do no more than adopt the judgment of the Tribunal. Order 41 requires that before stay can be granted there must be shown to ensue substantial loss to the applicant if stay be not granted. No such loss is even referred to. Prejudice as is said to be occasioned to the applicant is not synonymous with substantial loss which is the

requirement of order 41. There is not shown any basis for stay of execution and the application under consideration is refused. It is dismissed with costs.

DATED AND SIGNED AT ELDORET THIS 31ST DAY OF DECEMBER, 2010.

**P.M. MWILU
JUDGE**

DELIVERED AND SIGNED AT ELDORET THIS 25TH DAY OF JANUARY, 2011.

**F. AZANGALALA
JUDGE**

In the presence of;

Advocate for Applicant
Advocate for Respondent
Court Clerk

**F. AZANGALALA
JUDGE**