No. 353

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 187 OF 2010

WILLIAM OUKO.....APPELLANT

-VERSUS-

FARID AHAMED KASSAM.....RESPONDENT

RULING

(Being an appeal from the ruling and Order of Hon.D. Mochache (chairperson) Dated and delivered on the 3rd day of August, 2010

in the original Business Premises Rent Tribunal case No. 45 of 2010, Kisii)

On 31st may 2010 this court delivered a judgment in Civil Appeal number, 112 of 2007 between these parties whose gist was that there was no landlord/tenant relationship between them. The court delivered itself thus ***"….The Notice having taken effect, it follows in the circumstances of this case that after 1st November, 2006, the appellants' continued occupation of the suit premises became untenable. In fact such occupation thereafter amounted to a tortuous act of trespass and the respondent was perfectly entitled to have them evicted therefrom……..".*** The circumstances leading to that holding were that **Mr. William Ouko**, hereinafter ***"the applicant"*** is the registered proprietor of plot number 62A Migori town. The said plot was initially rented out to **Mr. Farid Ahmed Hassah**, hereinafter ***"the respondent".*** It was a controlled tenancy in terms of the Landlord Tenant (shops, Hotels and catering establishments) Act. On or about the 24th September 2000, the applicant decided to terminate the tenancy. Accordingly in terms of the aforesaid Act, he took out a Notice to terminate the tenancy dated the same date and served it upon the respondent. The respondent neither objected to the same nor filed a reference

in the **Business Premises Tribunal** as required. Consequently the Notice took effect on 1st November, 2006.

Upon taking effect, the applicant instituted proceedings before the Migori Principal magistrate's court for purposes of evicting the respondent. The said court duly issued orders of eviction against the respondent. The respondent however appealed to this court against the said orders of eviction. This is the appeal part of whose judgment I have already stated above. Notwithstanding the intent and purport of the judgment aforesaid, the respondent thereafter brazenly proceeded to the Business **Premises Rent Tribunal** and obtained orders in these terms:-

"1. **There exists a landlord tenant relationship between the parties.**

2. The relationship is controlled under Cap 301.

3. The relationship came into being the time the landlord received rent in December, 2006 after the Notice took effect on 1st November, 2006.

4. the landlord be and is hereby restrained and prohibited from evicting the tenant or in any other manner whatsoever from interfering with the tenant's quiet (sic) occupation of the business premises.

5. OCS Migori police station to protect the tenant, ensure compliance and that peace prevails…."

As a result of the above orders, the applicant was aggrieved and filed the instant appeal. Contempreneously with the filing of the appeal the applicant took out an application by way of Notice of motion pursuant to **Order XLI rule 4(1) R(2) of the Civil Procedure rules, sections 3,3A and 63(e) of the Civil Procedure Act** and **All Enabling Provisions of the Law**. He sought in the main that this court do grant an order of stay of execution and or enforcement of the ruling and or order dated 3rd August, 2010 of the **Business Premises Rent Tribunal** and the attendant consequential orders arising therefrom pending the hearing and determination of the instant appeal. He also sought that the costs of the application do abide the outcome of the instant appeal.

The grounds in support of the application in essence are that the orders of the Business Premises Rent tribunal have Impeached and or impugned the orders of this court to the effect that there is no landlord Tenant relationship between the parties. The tribunal is thus guilty of insubordination and has brought this court into disrepute. On those grounds the appeal filed raises salient and or pertinent issues with overwhelming chances of success. The applicant was bound to suffer substantial loss, unless the orders sought is not granted. Conversely, the respondent cannot suffer any prejudice if the order sought is granted. Finally, the applicant opined that the application had been made without unreasonable delay and that it was in the interest of justice that the same be allowed. The affidavit in support of the application merely reiterated the grounds in support of the application above. Suffice to add that pending the hearing and determination of the appeal in **Kisii HCCA No. 112 of 2007**, the respondent had been granted stay on condition that he continued to pay to the applicant the rent whenever it became due and payable. After the appeal was heard and determined, the respondent moved to the tribunal seeking that the applicant be restrained from evicting him. The applicant opposed the application on the grounds that the issue of landlord, Tenant relationship had been heard and determined by this court. Notwithstanding that fact, the

tribunal proceeded to grant declaratory and restraining orders aforesaid. In his view therefore the gist and or effect of the orders of the tribunal was to negate, review and or supersede the judgment and decree of this court in **HCCA no. 112 of 2007.**

From the record, the respondent did not file any papers in opposition to the application. In other words the respondent neither filed grounds of opposition or replying affidavit to the application. Accordingly, what the applicant has deponed to in support of the application are neither challenged, rebutted or controverted.

When the application came up for mention before me on 29th October, 2010, parties agreed to ventilate the application by way of written of submissions. Subsequently though, only the applicant ended up filing his submissions. The respondent did not do so for reasons which are unclear to the court. I have however read and considered carefully the written submissions of the applicant.

Under **order XLI rule 4 of the Civil Procedure rules** no order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant, the application for stay of execution has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

The applicant has deponed that following the orders of the tribunal, he had been denied and or disinherited of the suit premises, whose control had been handed over to the respondent in the absence of any Tenancy relationship whatsoever. That unless the order of stay is granted, he stood to suffer substantial loss, incapable of compensation in monetary terms. These depositions have not been controverted whatsoever. I am satisfied in the premises that the applicant has established the fact that he stands to suffer substantial loss unless the order of stay is granted.

The applicant too has deposed that he is ready and willing to comply with such reasonable conditions, including provision of security as this honourable court may deem fit and expedient in the circumstances. Once again in the absence of grounds of opposition, the replying affidavit and even written submissions in opposition to what the applicant has said hereinabove, I do not find it imperative to impose any conditions on the order of stay that I am about to make.

The order of the tribunal was made on 3rd august, 2010. The applicant filed this appeal on 17th August, 2010. The following day he filed the instant application. That being the scenario, it cannot be said that the application was not made timeously, in good faith and with due promptitude.

On the whole, I am satisfied that the applicant has met the conditions for the grant of stay pending the hearing and determination of the appeal. The application therefore succeeds in terms of prayers 3 and 4. It is so ordered.

Ruling dated, **signed** and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE