



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 139 OF 2010

**PETER AYOYI MACHIKAAPPELLANT/
APPLICANT**

V E R S U S

**GRACE AYUMA
WANDALORESPONDENT**

R U L I N G

1. The Application dated 1.11.2010 seeks orders that an order be granted staying execution of the orders made on 19.10.2010 by the Chairperson of the Business Premises Rent Tribunal until the Appeal herein is heard and determined.
2. In the Supporting Affidavit sworn on 1.11.2010, the Applicant who was the tenant in premises known as Plot No.2, Amalemba Shopping Centre, depones that on 19.10.2010, the reference before the Tribunal came for hearing and without hearing the parties, the Chairperson of the Tribunal unilaterally ordered him to pay rent for the months of February – June 2010 and yet the said rent was contested and evidence ought to have been taken to determine the issue. In any event, that for that period, the premises were locked up by the Respondent and that he had installed electricity on the premises at his own cost and he had also renovated the premises at his own cost.
3. Further, that auctioneers had been sent to levy distress for rent allegedly due and owing and he stood to suffer immensely should the attachment proceed.

4. The Respondent filed no Replying Affidavit but on 3.12.2010, filed the following grounds of opposition.

(a) *“That the Appellant has not paid rent since February 2010 to-date.*

(b) *That the Appellant shall not suffer substantial loss.*

(c) *That the Appellant has not made any proposal [as] to security for the due performance of the order of the Tribunal*

(d) *That the application has been made in response to execution and no explanation has been offered for the delay.*

(e) *That the appeal and the application are incompetent.*

(f) *That the application is a clear abuse of the due process of the court intended to prejudice and embarrass the respondent.*

(g) *The application lacks merit.”*

5. I have read the proceedings of the Business Premises Rent Tribunal and I note that on 9.2.2010, the Applicant filed a reference raising a number of issues regarding his tenancy. On 1.3.2010, the Tribunal made the following orders;

1. “The complaint is allowed in the following terms;

(a) *The landlord be and is hereby ordered to accept rent and failure to do so, the tenant is directed to deposit the same in the tribunal for collection by the landlord at her convenience less collection charges.*

(b) *The landlady either by herself, her servant, agents and or employees be and are hereby prohibited and restrained from harassing the tenant forthwith.*

(c) *Should the landlady opt to accept rent, she is ordered to issue receipts and/or maintain a rent book.*

(d) *The landlady is ordered to reconnect power back to the tenant’s premises and failure to do so; Commercial Engineer KPLC is authorized to assist the tenant to acquire his own sub-meter immediately.*

(e) *OCS Kakamega Police Station to protect the tenant, ensure compliance and that peace prevails.*

(f) Costs of KShs.16,800/= to the tenant.”

6. From the above order, a number of issues were in contest and before they were determined, the Respondent on 23.7.2010 issued a notice to terminate tenancy under **section 4(2)** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

7. I have also seen a Hearing Notice dated 28.9.2010 and it related to the reference filed by the Applicant and on 19.10.2010, the Respondent begun giving evidence while being led by her advocate, Mr. Onsando. She finished her evidence-in-chief and while being cross-examined by Mr. Khayumbi for the Applicant, apparently something happened and then the court noted as follows;

“Cross examined by Mr. Khayumbi -

“The tenant filed a reference, that’s why we are in court. My advocate told me that I am supposed to come to court. I have no documents to show that I am the owner of the property. My husband left the property for me.

Court

The landlord is too emotional

Mr. Onsando: I need to take further instructions

Court – the tenant is ordered to deposit rent outstanding from February 2010 to October 2010 with the landlords advocate on or before 22nd

October 2010. Failure to do so the landlord is authorized to levy distress and recover the arrears.

O.C.S. Kakamega police station to ensure compliance and that peace prevails following the distress.”

8. To my mind and without in any way pre-determining the Appeal, there was something, prima facie, untoward about the proceedings and the final order made. That is all I can say.

9. Where a party may not have received a fair hearing before a judicial body and where orders are made abruptly and prima facie without a reasonable basis, certainly an appellate court ought to stay further proceedings as the matter is investigated in depth during the Appeal.

10. I have already made certain orders including the rent for July – November 2010 being deposited in court and the rent for December, 2010 and January – February 2011 being paid directly to the Respondent. The issue of rent for February – June 2010 is contested and I see no prejudice if I order as follows;

11. Let the Application dated 1.11.2010 be granted in terms of prayers 4 and 5 on the condition that the rent for February to June 2010 being deposited in court. Further, the rent for July – November 2010 not being contested should be released forthwith to the Respondent.

12. The Appeal is ready for hearing and having admitted it, let priority hearing dates be given.

13. Costs of the Application shall abide the Appeal.

14.Orders accordingly.

Delivered, dated and signed at Kakamega this 17th day of March, 2011

ISAAC LENAOLA

J U D G E