



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 198 OF 2010

NZAMBA KITONGA PLAINTIFF

VERSUS

JOHN NGUNGIRI NGUGI & ANOR..... DEFENDANTS

Coram: Mwera J
Mrs Wachira for plaintiff
Wananda for Mrs Macharia for defendants
Njoroge court clerk

RULING

On 31.1.11 the defendant filed an application under Order 42 Rule 6 (1) (2) of the Civil Procedure Rules and Section 3A of Civil Procedure Act praying:

i) that the judgement of 20/1/11 be stayed until an intended appeal is finally determined.

It was contended that the applicant had filed a notice of appeal following the said judgement and was apprehensive that the plaintiff would proceed to execute. The defendant had run a butchery in the suit premises for the last 12 years so if a stay was not granted he would suffer substantial loss and that he could deposit security for due performance of degree as the court would order.

The supporting affidavit expanded little on the grounds above save to add that the defendant/applicant had instructed his lawyers to forward a cheque for sh. 194,416/= found due and payable as rent arrears, to the plaintiff. So the stay orders ought to issue.

In his replying affidavit the plaintiff stated that the defendant's lease to occupy the suit premises expired way back on 30.11.09. He notified him and asked to be given vacant possession, a thing he did not Heed. Even after this court ruled that the defendant do pay rent arrears and vacate the premises in 14 days, that had come to nothing. The defendant did not pay *mesne profits* and while his remaining in occupation had made it impossible for the plaintiff to lease out the premises, that had caused suffering of loss and agony. The stay orders were not warranted.

Directed to submit the defendant/applicant went off in what the court was minded to observe as an irrelevant course, to urge it that under Order 42 Rule 6 Civil Procedure Rules the court should consider to grant/refuse a stay application on the basis:

- a) whether the appeal is arguable;
- b) whether the same will be rendered nugatory in the event a stay order is refused yet the appeal succeeds;

- c) whether adequate security has been furnished; and
- d) if the application for stay is made without unreasonable delay;

It was added that reconciling rent accounts would ultimately resolve the out-standing disputes and so execution should not issue. That will in essence see the applicant out of the premises before the appeal is heard.

The plaintiff repeated more or less what was in his replying affidavit and similarly went off the target as to the conditions of stay pending appeal under Order 42 Rule 6 Civil Procedure Rules, namely that the intended appeal is arguable and that it may be rendered nugatory.

Order 42 Rule 6 Civil Procedure Rules has the following conditions to be considered by the grant inclined to grant or refuse stay pending execution – not a judgement.

“ 6. (1) No appeal or second appeal shall operate as stay of execution or proceedings under decree or order appealed from.....” (underling supplied).

There is nothing like staying a judgement. There must be a decree or order extracted from a judgement or ruling that is due for execution and which the applicant seeks to stay. Indeed in the most, if not, all cases to arrive at a decretal sum to be executed, there must have been, not only a decree extracted but also costs ascertained by taxation or assessment. Then there must be an application to execute or actual process of execution by warrants or notice to show cause etc, should be in the offing. Anything less than this, leading to an application to stay an apprehended decree or order, is pre mature – if not a waste of court’s time. The foregoing seems to be the case here – there is no decree or order in the process of being executed.

And to get a stay order (Order 42 Rule 6 (20 Civil Procedure Rules) one will satisfy the court that:

- i) a substantial loss may befall the applicant if a stay is not granted;
- ii) the stay application has been made without unreasonable delay ie between the date of the decree to be executed and applying for stay; then
- iii) the applicant should furnish such security for due performance of the decree/order as the court may direct.

Anything else which the parties imported in their submissions is irrelevant or misconceived as regards granting/refusing a stay order under Order 42 Rule 6 Civil Procedure Rules.

After setting out the above the applicant may be said to have filed this application rather timeously after the order to pay up rent arrears and give vacant possession. But he has not demonstrated what substantial loss he will suffer if he vacates the suit premises. He has traded there for years, yes, then what? His lease expired; he owes rent arrears and now mesne profits are outstanding - all to the prejudice of the plaintiff.

In the circumstances the orders sought are refused with costs to the plaintiff.

Delivered on 7.3.11.

J. W. MWERA
JUDGE