



CIVIL PRACTICE AND PROCEDURE

- *Stay of execution pending appeal.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 39A OF 2011

KENYA CREDIT TRADERS

LTD.....APPELLANT

VERSUS

MUTIIRA M'RINTARI

MBUI.....RESPONDENT

RULING

Kenya Credit Traders have appealed against a ruling of Chief Magistrate Court Meru of 30th March 2011. The appellant has moved this court by way of Notice of Motion dated 10th June 2011. By that Notice of Motion brought under order 42 Rule 6 of the Civil Procedure Rules 2010, the appellant seeks to stay its eviction from the suit property pending the hearing and the determination of this appeal. The appellants are tenants of the respondents on parcel number *Meru Municipality Block II/45*. The appellant is a protected tenant under the terms of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301. The respondent gave the appellant notice to terminate that tenancy as provided under section 4 (2) of Cap 301. The appellant on being served failed to refer the notice to the Business Premises Rent Tribunal as per section 6 of Cap 301. Having failed to refer the matter to the said Tribunal, and having not vacated the respondent's premises, the respondent filed a suit before the Chief Magistrate Court Meru in Civil Case No. 178 of 2009. In that suit, the respondent sought vacant possession of his premises. The Chief Magistrate court entered judgment for the respondent as prayed in his plaint. It is not clear whether that judgment was entered on 29th or on 30th March 2011. Both the appellant and the respondents refer to those two dates as the date of that judgment but the actual ruling of the court was not annexed. The respondent has deponed that the appellant was granted temporary stay of eviction of 60 days by the Chief Magistrate Court. Further, he deponed that just when the 60 days were about to expire the appellant filed an application of stay of execution pending appeal before the Chief

Magistrate Court. On being dismissed, the appellant filed the present application. The appellant through its operations manager in support of its application deponed as follows:-

“7. That we are in the hire purchase business handling over 1000 accounts for different persons.

8. That any eviction would really cripple our business.

9. That we are ready to offer security for the same.

10. That we are up to date with our payment of rent.”

The appellant in its supplementary affidavit dated 17th June 2011 deponed that if evicted it would suffer substantial and irreparable loss including loss of goodwill. To prove that loss, the appellant annexed its profit and loss accounts. What is interesting from those accounts is that Meru branch of the appellant company in the year 2010 made a profit of Kshs. 47,745/=. The respondent in his replying affidavit deponed that the notice to terminate the appellant’s tenancy took effect from 1st October 2008 as per section 10 of Cap 301. As stated before, the appellant was granted 60 days stay of execution by the Chief Magistrate Court Meru and waited just when those 60 days were about to expire then filed an application for stay pending appeal. That application was dismissed. The respondent was therefore of the view that the appellant should have used the period of the 60 days stay to look for alternative premises for its business. The respondent stated that the reason he sought to terminate the tenancy was because he wanted to use those premises for his own business. The learned counsel for the respondent argued that if stay is granted, the respondent too will suffer because he will not be able to start his business. Order 42 rule 6 (2) of the Civil Procedure Rules 2010 provides that:-

“(2) No order for stay of execution shall be made under sub rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such a decree or orders as may ultimately be binding on him has been given by the applicant.”

Has the appellant shown it will suffer substantial loss? I answer that question in the negative. The appellant is a tenant at the respondent’s premises. The appellant carries out the business of hire purchase in those premises. The order of eviction was made on 29th March 2011. There is no evidence to show that the appellant has attempted to get alternative premises and that such attempts have been unsuccessful. Although the appellants have argued that if they moved out they would loose “goodwill”, this is not demonstrated by the evidence that alternative premises are not available within reach of its present premises. It does seem that the appellant even though they did not refer the respondent’s notice to the Business Premises Rent Tribunal as per law required they have failed to make arrangements for vacating the respondent’s premises. Justice is even handed. The respondent requires the premises to run his business. That was why he gave notice to terminate the appellant’s tenancy in July 2008. Since October 2008 when the notice of termination took effect, the respondent has been denied the right to run his intended business. The appellant’s counsel argued hat the respondent has not proved that he would be able to reimburse the appellant the loss it will incur in case the appeal does succeed. Firstly, the appellant did not counterclaim in the lower court for such loss. It therefore follows that the alleged loss at this state is unknown. As stated before, the Meru branch of the appellant company according to its profit and loss account only made Kshs. 47,743/= as profit in the year 2010. The respondent is the owner of the suit property. If the loss that the appellant is likely to incur is the profit it made in the year 2010, that loss

would undoubtedly be cleared from the proceeds of the suit property. On the whole, the appellant's application fails because the appellant failed to show it would suffer substantial loss. The court also finds that since the respondent business he intended to carry out at the suit property is presently unknown and unquantifiable it will not be possible to ascertain the amount of security that the court should order the appellant to deposit. The Notice of Motion dated 10th June 2011 is dismissed with costs to the respondent. The order of stay of execution previously granted to the appellant in this matter is hereby discharged.

Dated, signed and delivered at Meru this 30th June 2011.

MARY KASANGO
JUDGE