

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA.

AT NYERI

Civil Appeal 138 of 2009

JOSEPH GATHANWA NJUNGE.....APPELLANT

Versus

DR. LAWRENCE NDEGWA GAKUU

GENERAL MARKETING SERVICES LTD -RESPONDENTS

RULING

Joseph Gathanda Njunge, the appellant herein took out the notice of motion dated 15/12/2009 in which he applied for an order of stay of execution of the decision of the rent Restriction Tribunal made on 4/12/2009 vide Nyeri R.R.T. case 25 of 2002 pending the hearing and determination of this appeal. The motion is taken out pursuant to the provisions of Order XLI rule 4 of the Civil Procedure Rules. The motion is supported by the affidavit of the appellant sworn on 15th December 2009. Dr. Lawrence Ndegwa Gakuu and General Marketing Services Ltd. being the Respondents herein, opposed the motion by filing the replying affidavit of John Karanja Ng'ang'a sworn on 29/12/2009.

It is the submission of Mr. Muhoho learned advocate for the appellant that the appeal has high chances of success and that unless the order of stay of execution is given the appellant is likely to suffer substantial loss in that he will have lost his premises which he has been in occupation since 1989. Miss Mwai, learned counsel for the Respondents opposed the motion on the ground that the appellant has not shown the substantial loss he would suffer if the order is denied. It is her submission that the appellant can as well seek for alternative premises.

I have considered the material placed before me and the oral submissions made by learned counsels from both sides. There is no dispute that the Rent Restriction Tribunal delivered its judgment on 4/12/2009 vide Nyeri R.R.T case No. 25 of 2002 in which the appellant was required inter alia to deliver vacant possession of the suit premises on or before 31st December 2009. The appellant has preferred this appeal to challenge the judgment on several grounds. One of the grounds is that the Tribunal chairman erred when he determined a dispute based on defective pleadings. It is also alleged that the appellant was ordered to vacate the premises yet he had no outstanding rent arrears. Under Order XL1 rule 4 (2) (a) and (b) of the Civil Procedure rules, the Principles to be considered before granting the order for stay of execution pending appeal are stated as follows

First, that the applicant must show the substantial loss he would suffer if the order is denied.

Secondly, that there must be evidence to show that the application for stay was made without unreasonable delay.

Thirdly, that the court must consider imposing an order against the applicant to provide security for the due performance of the decree.

Let me start with the second principle. There is no doubt that the motion was timeously filed. The applicant has stated that he would suffer substantial loss if the order is denied in that he will lose the tenancy. The premises in dispute has been occupied by the appellant since 1989. The appellant was required to show the substantial loss he would suffer if the order of stay is refused. He has not stated that

he would not get alternative premises within the same area. The fact that a tenant may lose a premise as a result of execution of a judgment does not in itself amount to a substantial loss. With respect, I agree with the submissions of Miss Mwai, that the appellant had failed to prove the substantial loss he would suffer. The third principle is dependent on the first two principles. Since the appellant has failed to satisfy the second principle, there is no need to consider the form of security. Consequently the Notice of Motion dated 15.12.2009 is ordered dismissed. The interim order is set aside. Costs of the motion is given to the Respondents.

Dated and delivered this 13th day of January 2010.

J.K. SERGON

JUDGE

In open court in the presence of Miss Mwai for Respondent and Karurwe h/b Muhoho for applicant.

J.K. SERGON

JUDGE