



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

CIVIL APPEAL NO. 466 OF 2009

AGRICULTURAL  
SOCIETY OF KENYA  
(NAIROBI BRANCH) .....APPEALANT

VERSUS

GEORGE MANGELI

T/A CARMAN STANDBY SYSTEM LIMITED.....1<sup>ST</sup> RESPONDENT

ROBERT MCINTYRE

T/A EAST AFRICAN CANVASS LIMITED ..... 2<sup>ND</sup> RESPONDENT

5/05/2010

Coram : Mwera J  
Nyaburi for appellant  
Gitau for respondent

**RULING**

On 1/9/2009 the appellant filed a notice of motion under Order 41 rule 4(1) Civil Procedure Rules and Section 3A, 63 (e) of Civil Procedure Act for orders:

**i) that there be a stay of proceedings in NRI BPRT CASE 285/2008 pending determination of this appeal.**

The motion was premised on a whopping 18 grounds together with a supporting affidavit. In essence it was said that when the respondents filed the above-noted reference at the Business Premises Rent Tribunal (BPRT) because of a rent dispute, the applicant filed a preliminary objection seeking to strike out the reference on the basis that the jurisdiction of the tribunal had not been invoked. That the objection was overruled and the respondents found to be protected tenants even without hearing the reference itself. The applicant was dissatisfied with that and it lodged this appeal. Then it filed another application to strike out the whole reference. That too was dismissed by the tribunal, which not only expunged the name of the applicant from an application dated 16/5/08 but that the expunged party's name had to be substituted by the correct one in 14 days.

The respondents failed to do so, and to the applicant, the reference with the application dated 28/10/08 was automatically struck out. However, on 3/6/09 the respondents applied to correct the name of the applicant and also have time enlarged to file an amended reference. The applicant filed a preliminary objection to that application on grounds **inter alia** that the firm of lawyers which had filed the respondent's application dated 1/6/09 and filed on 3/6/09 were not on record for the respondents. The

tribunal heard the parties and ruled that it was not bound by Civil Procedure Act and the preliminary objection was dismissed. The application dated 1/6/09 was fixed for hearing on 3/9/09. That decision of dismissal dissatisfied the applicant, who preferred (another) appeal hence the present prayer for a stay of proceedings. The supporting affidavit amplified the contents of the grounds.

A replying affidavit sworn by the managing director of the 1<sup>st</sup> respondent and also on behalf of the tenants in BPRT No. 285/08 was filed. It was deponed that the applicant failed to disclose proceedings in NRI (MIL) HCCC 485/09 which was consolidated with HCCC 484 and 486 both of 2009, which non-disclosure had led to a myriad of the present proceedings. Submissions and affidavits in those cases were annexed. That a prohibitory order was issued by the tribunal in BPRT Case no 285/08 to affirm that the applicant was about to unlawfully evict the respondents as tenants. Matters raised by the applicant in its application were pure law and that its application had no merit. The application was premature as no appeal had been admitted (filed?). It had not been shown that if stay is not granted the applicants' appeal "could be rendered nugatory"; no probability of suffering substantial loss was demonstrated and the respondents are paying rents. The balance of convenience tipped in favour of the respondents. If the court may be permitted to observe here, an appeal being rendered nugatory is a

term applicable in the Court of Appeal and a balance of convenience does not feature in Order 41 rule 4 Civil Procedure Rules. Each side submitted.

The applicant's side more or less went over what featured in its grounds and supporting affidavit, adding case law that the party was seeking to exercise its right of appeal in a matter. It had made out a reasonable cause and so the court's unfettered discretion stands to issue in its favour, of course with reasons. Indeed much more featured in that submission.

On their part, the respondents also appeared to repeat what they said in their replying affidavit in that the applicant had not demonstrated the substantial loss it stood to suffer in the event stay of proceedings is not ordered and it had not put forward security for due performance of a decree or order of the court. Beginning with security for due performance as a third condition set out in Order 41 rule 4 Civil Procedure Rules, the others being filing a stay application without unreasonable delay and demonstrating substantial loss likely to be suffered, security is a factor when a stay order is to issue directed to anticipated execution of a decree. Here it is a prayer for stay of proceedings and so the issue security for due performance does not really appear relevant.

The decision that appears to irk the applicant is the tribunal's ruling of 31/7/09 by which the respondents' application dated 1/6/09 was set for hearing on 3/9/10. Then this application dated 31/8/09 was filed in court on 1/9/09. For a whole month, the applicant did not move to ask to stay proceedings that were to commence or commenced on 3/9/09. No explanation or reason has been put forth. One may argue that the delay for 30 days is not inordinate but not in all circumstances. One desiring the court to grant a stay under Order 41 rule 4 Civil Procedure Rules has the duty even explain a delay of one day. It shall not be assumed to be of no consequence and therefore does not or cannot constitute an unreasonable delay in bringing the application. Here the applicant has not even attempted to explain the 30 days lapse.

As to the aspect of what substantial loss the applicant may suffer in the event the proceedings are not stayed, it can in such a case actually be in monetary terms as if it was a case of execution of a decree which is not stayed. Perhaps one can say that the applicant may feel that while it is in the process of questioning the validity of the reference, the basis of the tribunal proceedings, those proceedings are in fact going on. This cannot be said to constitute substantial loss to be computed in money terms. There is still the opportunity to

appeal the decision in the whole reference when finally determined in the event the result is not in favour of the applicant.

So all in all, with the applicant having not explained/demonstrated according to order 41 rule 4 (2) (a) Civil Procedure Rules:

**“ .....that the application has been made without unreasonable delay; .....”**  
this application fails with costs.

**Delivered on 20-5-2010**

**J. W. MWERA  
JUDGE**