



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**Civil Appeal 34 of 2010**

**JOSEPHINE MORAA.....APPELLANT**

**VERSUS**

**KEN SAGINI.....1<sup>ST</sup> RESPONDENT**

**ALBERT NYAMAO.....2<sup>ND</sup> RESPONDENT**

**AUGUSTINE OMWENGA.....3<sup>RD</sup> RESPONDENT**

**TOM M. MOKAYA.....4<sup>TH</sup> RESPONDENT**

**JOSEPH O. MISATI.....5<sup>TH</sup> RESPONDENT**

**SAMUEL BORURA.....6<sup>TH</sup> RESPONDENT**

**IBRAHIM OKARI MOKAYA.....7<sup>TH</sup> RESPONDENT**

**JACKSON MSSEGA.....8<sup>TH</sup> RESPONDENT**

**MICHAEL OMBONGLI.....9<sup>TH</sup> RESPONDENT**

**RULING**

On 9<sup>th</sup> March, 2010, Josephine Moraa Omanwa, “*the applicant*” through Messrs Minda & Co. Advocates filed an application by way of Notice of Motion against Ken Sagini, Albert G. Nyamao, Augustine Omwenga, Tom M. Mokaya, Joseph O. Misati, Samuel Borura,

Ibrahim Okari Mokaya, Jackson Mssega and Michael Ombongi, “*the respondents*” seeking in the main the following order; “THAT pending the hearing and determination of this appeal there be stay of execution of the court’s decree and all consequential orders made there(sic) under (sic) in KISII CM.MISCELLANEOUS APPLICATION NO. 19 OF 2010 arising from the business premises, Rent Tribunal Case No. 13 of 2009.....”. The applicant also sought a consequential order for costs.

The application was made on the grounds that the applicant had been aggrieved by the decision of the Business Premises Rent Tribunal dated 23<sup>rd</sup> February, 2010 awarding costs to the respondents and had in fact filed an appeal. The appeal was founded on the grounds that the tribunal condemned the applicant unheard and that it had no jurisdiction to order payment of costs. The said appeal had been filed within time and had overwhelming chances of success. The same would be rendered nugatory if the execution for costs is not stopped thereby exposing the applicant to substantial loss and damage. That the applicant was a person of means who could if the appeal failed pay all sums due to the respondents. She could not however say the same of the respondents.

In further support of the application, the applicant too swore an affidavit. In the main she deposed that she purchased the plot KISII TOWN BLOCK 111/165 in a dilapidated state from one, Nicholas Siro Angwenyi pursuant to a mortgage facility she had procured from National Bank of Kenya. She then caused the premises therein to be demolished and started to develop it afresh. The respondents however had been tenants therein and were evicted. In so far as the applicant was concerned, the respondents having been evicted from the suit premises as aforesaid, the Business Premises Rent Tribunal in which they filed a reference against her ceased to have any jurisdiction. On 5th March, 2010, Moco Auctioneers came to her said suit premises and proclaimed the ballast, sand, bricks and other building material on site. She immediately contacted her advocates on record who upon perusal of Kisii miscellaneous Civil application number 19 of 2010 noted that the Business premises Rent Tribunal had in case number 31 of 2009 on 23<sup>rd</sup> February, 2010 ordered the applicant to pay costs assessed at KShs.18,270/- to each of the 8 respondents though it had found that its jurisdiction had been ousted following the eviction of the respondents from the suit premises. Those orders were promptly adopted as judgments of the court and a decree was subsequently issued in Kisii miscellaneous Civil application number 19 of 2010. The respondents had since obtained warrants of attachment hence the application. She had however filed an appeal which she thought had overwhelming chances of success on the grounds that the respondents having ceased to be tenants pursuant to their eviction the Business premises tribunal’s jurisdiction was ousted and that she was condemned unheard. She further deposed that the proclaimed properties if they were to be sold, she would suffer substantial loss and damage. The appeal may also be rendered nugatory. She was a person of means if the ownership of the suit premises is anything to go by and thus she would be in a position able to repay the costs awarded as aforesaid if the appeal was to fail.

The application having been served on the respondent, they reacted through Messers Bosire Gichana & Co. Advocates by filing grounds of opposition in which they stated that the application was incompetent and premature, such application did not lie, lacked merit and was bad in law. In any event the appeal was frivolous as the matter proceeded ex-parte, the applicant having failed to attend the Business Premises Rent Tribunal though having been duly served.

When the application came up for inter partes hearing before me on 16<sup>th</sup> April, 2010, parties agreed to canvass the same by way of written submissions. Subsequently both parties filed and exchanged written submissions together with relevant authorities which I have carefully read and considered.

It is settled law that for an applicant to succeed on application for stay of execution pending appeal under order XL1 rule 4(1) and

(2) of the civil procedure rules he has to satisfy the court to which the application has been made that:-

- i) *Sufficient cause for the grant of the order exists.*
- ii) *Substantial loss that he is likely to suffer unless the order sought is granted.*
- iii) *The application has been made without undue delay.*
- iv) *Such security as the court may order for the due performance of the decree or order is given.*

The above notwithstanding, the court of appeal in the case of *Butt V Rent Restriction Tribunal (1982) KLR 417* considered at length grounds for granting stay of execution and or factors to be taken into consideration when granting stay of execution. It held that the power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised not capriciously but in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges' discretion. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements and finally that the court in exercising its powers under order XLI rule (2)(b) of the civil procedure rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

It has also been held severally that a money decree cannot be the subject of a stay of execution order. For instance, in the case of *Ujagar Singh V Runda Coffee Estates Ltd(1960) E.A. 263*, the court observed that “...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in event that its appeal is successful...”. This position was reinforced by the court of appeal in the case of *Kenya Shell Ltd V Benjamin Karuga 1KAR 1018* when it boldly stated that “...It is not normal for an appeal to be rendered nugatory in monetary decree if payment is made.”

Finally it has also been held that a stay order cannot be granted in respect of costs. In the case of *Francis Kabaa V Nancy Wambui and another, Civil application number Nai 298 of 1996(UR)*, the court of appeal stated “...where what is sought to be stayed is the order of costs, the same cannot be granted as the appellant, if he succeeds in his appeal would be refunded his costs...” It is also necessary to bear in mind that it is not in the interest of justice to deny a successful litigant the fruits of his litigation.

From all the foregoing the law on stay of execution pending appeal may be summarized as follows; In order for the court to issue an order of stay of execution, there must be

- a) (i) *Sufficient cause*
- (ii) *Substantial loss*
- (iii) *No unreasonable delay in filing the application; and*
- (iv) *Security*

(b) *The grant of stay of discretionary*

(c) *It is not just to deny a successful party the benefit of judgment and or fruits of his litigation*

(d) *Money decree cannot be the subject of stay and finally,*

(e) *Stay cannot be granted in respect of costs.*

Applying all the above considerations in the circumstances of this case, I would say that the applicant has filed an appeal, which appeal is not frivolous but arguable. She has raised substantial ground of appeal, to wit, the jurisdiction of Business Premises Tribunal and being condemned unheard. The applicant too is being asked to pay to the respondents a total sum of kshs.164,430/-. This is by no means a small amount. The orders of the tribunal that are subject of this appeal were made on 23<sup>rd</sup> February, 2010. The appeal was filed on 9<sup>th</sup> march, 2010. The instant application was filed on the same date. It is apparent therefore that the application was made without undue delay. As for security, the applicant has indicated her willingness to abide by any terms that this court may impose as security whilst granting the order. The grant of stay being discretionary I would have had no difficulties exercising it in favour of the applicant. However I am also well aware that it not just to deny a successful litigant the benefits and fruits of his judgment and or litigation.

The respondents apart from filing the grounds of opposition, never went further to counter the averments of the applicant that she was a person of means and that if stay was granted and she was unsuccessful in her appeal should would still be able to pay easily the amount to the respondents. She also deponed that she was not sure whether if stay was refused and she was compelled to pay the amount, if in the end she was successful in her appeal, the respondents will be able to refund her the amount.

However, what is sought to be stayed is not a money decree perse but an order for costs. On the authorities set out hereinabove and which are binding on me, an order for costs as sought herein cannot be the subject of stay. The applicant may or may not succeed in the appeal. However, I am not satisfied that the appeal will most likely be rendered nugatory if stay is not granted and the applicant is called upon to satisfy the order for costs.

For all the foregoing reasons, I find the application unmerited and accordingly dismiss the same with costs to the respondents.

JUDGMENT DATED, SIGNED, and DELIVERED at KISII this 14<sup>th</sup> day of May, 2010.

**ASIKE - MAKHANDIA**

**JUDGE.**