



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 90 OF 2010

ALI MOHAMMED NOOR APPELLANT

VERSUS

JOSEPHINE M. MUDANYI RESPONDENT

RULING

1. The Applicant seeks orders that the execution of the Orders by the Business Premises Rent Tribunal and the Principal Magistrate's Court on 23.7.2010 and 27.10.10 respectively be stayed pending the hearing and determination of the Appeal herein.

2. I have read the grounds in support and I also note that the Application is premised on the provisions of **Order XLI Rule 4** and **Order XXI Rule 22** of the Civil Procedure Rules. Further, in the supporting sworn on 28.7.2010, it is the Applicant's case that on 23.7.2010, the Business Premises Rent Tribunal ordered him to vacate the premises which I gather, belong to the Defendant/Respondent. That subsequently, the Respondent filed CM's Court Miscellaneous Application No. 28 of 2010 for orders that the Applicant should be evicted and that upon being served with the Application, he filed a Replying Affidavit to it but the matter was never heard and determined.

3. The Applicant contends that the orders issued in CM's Court Misc. Application No. 28/2010 were unknown to him and he was surprised when on 28.7.2010 M/S Nyuki Auctioneers purported to execute orders of eviction issued in that case. That the Auctioneers only stopped the alleged eviction when his lawyer intervened and it is his case that unless the stay orders are granted, his appeal would be rendered nugatory and/or otiose.

4. In her Replying Affidavit sworn on 2.8.2010, it is the Respondent's case that execution has already taken place and so there is nothing to stay. Further, that the Applicant had been party to a consent order recorded on 2.3.2010 and in that order, it was agreed that he would vacate the premises by 1.6.2010 and when he sought to set aside and/or review the Consent order, his Application in that regard was dismissed and thereafter the Respondent filed CM's Misc. Application No. 38/2010 for eviction of the Applicant. That the Application for the above reasons has no merit and should be dismissed with costs.

5. I have taken note of the fact that the Appeal herein was filed on 28.7.2010 and it is against the decision dated 23.7.2010 and I deem it fit to reproduce that order. It reads as follows;

"ORDER

THIS SUIT coming up for Ruling on 23rd July, 2010 before Mochache D. (Chairman) in the presence of Mr. Odeny Counsel for the Landlord and absence of Wafula for the tenant AND UPON RULING DATED 23.07.2010 – IT IS HEREBY ORDERED THAT:

1. The tenants' application is dismissed with costs.

2. Since the tenants were to vacate the premises on 1st June, 2010, they are ordered to vacate the premises immediately.

GIVEN UNDER my hand and seal of the Tribunal Court this 23rd July, 2010.

ISSUED this 23rd day of July, 2010.

MOCHACHE D.

CHAIRMAN
BUSINESS PRESIMSES RENT TRIBUNSL
23.07.2010”

6. The Application that was dismissed was one in which the Applicant sought to set aside a Consent Order dated 2.3.2010 by which he was to vacate the Respondent’s premises on 1.6.2010. Neither that Application nor the Ruling dated 23.7.2010 dismissing it has been placed before me but the Consent order reads as follows;

“CONSENT ORDER

THIS SUIT coming up for hearing on the 2nd March, 2010 before Mochache D. (Chairman) in the presence of Counsels for both parties

AND UPON HEARING – IT IS HEREBY CONSENTED THAT:

1. ***By Consent the tenants to vacate the landlord’s premises Kakamega Municipality Block 1/52 on or before 1.6.2010.***
2. ***The Landlord to immediately commence demolition and reconstruction.***
3. ***The landlord is given 8 months from the date the tenants vacate to complete construction to estate when the tenants’ can occupy.***
4. ***Rent stands suspended from the date the tenants move out and shall resume upon the tenants going back.***
5. ***Each party to bear their own costs.***
6. ***Order to apply in Case No. 70/2009.***

GIVEN UNDER my hand and the seal of this Tribunal this 2nd March, 2010.

ISSUED this 2nd day of March, 2010.

MOCHACHE D.
CHAIRMAN
BUSINESS PRESIMSES RENT TRIBUNSL
23.07.2010”

7. Because the Consent Order is challenged at ground 3 of the Memorandum of Appeal, my views on the matter would be premature. However, I am of the mind that for the Applicant to succeed, he must be reminded that the discretion to grant a stay of execution under **Order XLI Rule 4 (2)** is a fettered one because the rule provides as follows;

“Rule 4 (2) – No order for stay of execution shall be made under subrule (1) unless –

- (a) ***the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- (b) ***such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

8. It is instructive that substantial loss must be proved as the cornerstone of any application for stay of execution and sadly, the Applicant has failed to show such loss. Granted, the appeal may be rendered nugatory if he is evicted but what would his loss be? At paragraphs 14, 15 and 16 of his Supporting Affidavit, he has urged the point that when Auctioneers evicted him, his **“business stock”** was destroyed, but what does that mean and what was the nature of his business? And if the **“stock”** was destroyed, what is there to be saved? If the Auctioneers as stated at paragraph 18 of the Supporting Affidavit offloaded the **“stock”** from their lorry, was the same returned to the premises or as stated by the Respondent, eviction has in fact already taken place and the stay order may be used to return the Applicant to the premises? What I am saying is that although the Appeal was indeed filed timeously, I have no evidence before me that would lead me to conclude that substantial loss may otherwise be caused and the Applicant has failed to demonstrate that there is in fact anything to stay.

9. Further, the Consent order elsewhere above reproduced is still in force. The Applicant failed in a bid to challenge it has failed. In ***Munjiri vs R. [1985] KLR 370***, it was held as follows;

“1. The parties had entered into what amounted to a consent order from which no appeal is allowed by section 67(2) of the Civil Procedure Act (Cap 21).

2. The remedy that was open to the parties was to set aside the consent order either by review or by the bringing of a fresh suit as a court can only interfere with a consent judgment in such circumstances as would afford a good ground for varying or rescinding a contract between parties.

3. (Obiter) It would be wiser to obtain the signatures of the advocates or the parties to the consent

judgments and orders.”

10. I wholly agree and it seems to me that the Applicant has reached the end of the road and is best advised to seek alternative premises for rent.

11. In dismissing the Application as lacking in merit, I should add that the Application before me was framed without a clear appreciation of the applicable principles and the law and sadly, he will have to suffer the consequences thereof.

12. The Application dated 28.7.2010 has no merit whatsoever and is dismissed with costs to the Respondent.

13. Orders accordingly.

Delivered, dated and signed at Kakamega this 16th day of November, 2010.

**ISAAC LENAOLA
J U D G E**