

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Appeal 87 of 2009

FRANCIS KABURU APPLICANT

VERSUS

MOHAMMED MUSUNGU ONGOKHO RESPONDENT

R U L I N G

The Appellant filed the application dated 15th September, 2009 seeking orders of stay of execution of the orders issued by the Business Premises Tribunal on 7th day of August, 2009 in Reference No. 48 of 2009 at Kakamega pending the hearing and determination of this Appeal.

Mr. Kundu, counsel for the appellant, relied on the Appellant's supporting affidavit sworn on 15th September, 2009 and further affidavit sworn on 2nd October, 2009. Counsel submitted that the respondent issued the appellant with a termination notice dated 18th March, 2009. This led to the filing of Tribunal Case No. 40 of 2009. The appellant was only aware of this Tribunal Case and was not aware of Tribunal Case No. 48 of 2009. The appellant contends that he was never served with a hearing notice for both Tribunal Case numbers 40 and 48 of 2009. The premises are let for residential purposes and are not for business.

The Respondent relied on his replying affidavit sworn on 6th October, 2009. He contends that he gave the appellant notice to vacate his house as he was in arrears. He referred the matter to the Tribunal and he got a notice for hearing of the case on 7th August, 2009. He attended the hearing and the appellant was absent. The respondent further contends that the appellant has accumulated rent arrears totaling Kshs.49,000/=.

From the Memorandum of Appeal, the appellant states that he was condemned unheard and that he was not a party to Reference No. Kakamega 48 of 2009. The only issue is whether the appellant should be granted stay of execution orders pending the hearing and determination of his Appeal.

From the pleadings filed herein, I am satisfied that the appellant has accumulated rent arrears. The notice issued to the appellant by the respondent indicate that the appellant was Kshs.30,000/= in arrears. In both affidavits filed by the appellant the issue of rent arrears has not been mentioned.

I do not wish to shut out the appellant from pursuing his appeal. However, in line with the provisions of Order XLI rules 4 and 5, I do grant the application dated 15th September, 2009 on condition that the applicant deposits in court Kshs.70,000/= as security within Twenty (21) days hereof. The applicant should also continue paying the monthly rent. Should the appellant fail to deposit the above amount then the Respondent shall be at liberty to execute the order of the Business Premises Tribunal. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 26th day of November, 2009

SAID J. CHITEMBWE

J U D G E