



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 136 of 2007

1. CHARLES OMWONDO SUJI

2. MARY WAVINYA MWANGE

T/A ONE PALM RESORT AND/OR MACHAS WINES.....APPELLANTS

VERSUS

1. REBECA KAMBU GITAU

2. GEORGE DIYA

3. AMINA POJO- OFFICIAL OF PAJI

MUNGU SELF HELP GROUP.....RESPONDEENTS

RULING

This Notice of Motion has been brought under the provisions of Order XLI Rules 4 and 6 of the Civil Procedure Rules. It is by the appellants and they mainly seek stay of execution of the Ruling of the Chairman of the Business Premises Rent Tribunal given on 14th August 2007 pending the determination of this appeal. The application is supported by an affidavit sworn by Charles Omwondo Suji, the 1st appellant on his own behalf and on the authority and permission of the 2nd appellant. The affidavit elaborates the grounds in the body of the Motion on Notice which grounds are as follows:-

- a) That the Chairman of the Business Premises Rent Tribunal has made an order on 14th August 2007 to evict the appellants.
- b) That the Respondents are in the process of evicting the appellants and if not stopped will make good their move and the process of this appeal will be rendered nugatory.
- c) That the appellants stand to suffer substantial and irreparable loss if the intended execution is effected.

d) That the appeal herein has high chances of success.

The bases upon which an Order of Stay of execution of a decree can be sought are stated in Order XLI Rule 4 of the Civil Procedure Rules. They are as follows:

- 1) Demonstration of sufficient cause.**
- 2) Establishment by the applicants that substantial loss may result if the order of stay is not granted.**
- 3) Evidence that the application has been made without unreasonable delay.**
- 4) Demonstration by the applicants that they can furnish security as may ultimately be binding upon them.**

Regarding delay it is stated that the order appealed from was given on 14th August 2007 and it is noted that this application was lodged on 4th September 2007. The delay involved in of just over two weeks. In my view that delay is not unreasonable.

How about demonstration of sufficient cause? The appellants in their Memorandum of Appeal allege, among other matters, that the tribunal erred in Law and fact in proceeding to hear the preliminary objection without affording the appellant an opportunity to be heard which preliminary objection was in any event based on facts yet to be adduced. Those grounds in my view cannot be said to be frivolous. In other words the appellants' appeal is arguable. In the premises, I am of the view that the appellants have demonstrated sufficient cause.

The appellants stand to be evicted unless stay is granted. If indeed they are evicted, there is no gainsaying that they will suffer substantial loss. In that event even if their appeal eventually succeeds the same may be rendered nugatory.

With regard to security the appellants have made no offer at all in their affidavits. However, their counsel stated from the bar that the respondents right to receive mesne profits can be maintained. Failure to make an offer of security is not a bar to making an order in that regard.

In the end I make the following orders:-

- 1) That the appellants do pay to the respondents Kshs. 100,000/= within seven days from the date hereof and thereafter Kshs. 9,000/= per month with effect from the 30th day of October 2008 and on the 30th of each succeeding month until the determination of the appeal.**
- 2) Execution be and is hereby stayed pending the hearing and determination of the appeal.**
- 3) The applicant shall pay the Respondents' costs of this application.**
- 4) In default of compliance with (1) above the order of stay of execution hereby granted to stand discharged and the Respondent be at liberty to execute.**
- 5) Each party has liberty to apply.**

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of Anyanzwa for the Respondent and Buti for the Applicant.

F. AZANGALALA

JUDGE

24TH SEPTEMBER 2008