



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

Civil Appeal 32 of 2008

JOSEPHINE NDANU APPELLANT

VERSUS

JOSHUA NZIVE MULWA RESPONDENT

RULING

1. On 12/2/2008, the Appellant was ordered to vacate plot No. 7 Athi-River Township and thereafter on 20/2/2008 this Appeal was preferred. The Application before me was then filed on 29/5/2008 and the orders sought are those of stay of execution pending the hearing of the Appeal. The grounds are that:-

i. THAT the appellant/applicant has filed an appeal against the judgment and decree in regard to Machakos CMCC No. 379 of 2002.

ii. THAT the applicant operated a hotel business on the suit premises being Plot No.7 ATHI/RIVER.

iii. THAT an order of stay pending appeal was issued by the subordinate court on 6th May 2005 but the same was discharged on 27th May 2008 due to conditions unagreeable to the parties concerned.

iv. THAT unless the orders sought herein are granted the appellant/applicant will suffer irreparable loss as the suit premises namely PLOT NO.7 ATHI/RIVER is her only source of income and accommodation.

2. It is urged in the Supporting Affidavit sworn on 29/5/2008 and in submissions by Mr Musila, learned advocate for the Applicant that although orders of stay of execution were sought and granted by the subordinate court, the Applicant was unable to agree with the Respondent on the conditions attached to the order of stay of execution and the order was discharged on 27/5/2008 hence the instant Application. It is deponed at paragraph 5 of the Supporting Affidavit aforesaid that the Applicant operates a “hotel business in the said premises and (will) suffer irreparable loss” if she is evicted therefrom.

3. I have perused the Replying Affidavit sworn on 17/6/2008 and having heard Mr Musyoka, learned advocate for the Respondent, I have taken the view that the Application before me has no merit. I say so because the Respondent has established that the Applicant has come to this court with unclean hands. This is so since it is not denied that the Applicant is on the suit premises, is making income out of its user but pays no rent. Judgment was passed on 12/2/2008 and the stay order against eviction was conditional upon payment of rent. Instead of at least complying with the whole or part of that order, the Applicant instead rushed to this court and wishes her illegitimate occupancy to be legitimised by grant of this

Application. That is what is called bad faith and an abuse of the process of court. Discretion is sought but discretion can only be properly exercised if good faith is shown.

4. Aside from the above finding, it is merely said that “irreparable loss” will be occasioned if the Application is not granted. Presumably this is because the Applicant runs a business on the premises. Sadly no specific loss is mentioned but again presumably it is the loss of business that is being referred to. That is all well but a party who runs a business on rented premises cannot then claim loss when she is not paying a cent for use of the same premises. There are issues of ownership of the rent premises and the exact locus of the Respondent but surely rent ought to be paid to someone or even to court if the Applicant is truly a genuinely aggrieved litigant. I doubt that she is.

5. Lastly, although the proper rules are not quoted in the Application, it is my understanding that the orders sought are under Order XLI Rule 4 and in doing so, Rule 4 (2) is pertinent. It provides as follows:-

“ Rule 4 (1).

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 as been given by the applicant.”

6. There was a specific order made on the conditions for grant of the stay order by the subordinate court and I see no reason to grant any condition now since clearly it is unlikely to be honoured.

7. Without evidence of substantial loss to be suffered if I do not grant the Application, I see nothing more to say. On all grounds, the Application fails. It is hereby dismissed with costs to the Respondent.

8. Orders accordingly.

Dated and delivered at Machakos this 23rd day of September 2008.

ISAAC LENAOLA

JUDGE

In presence of:

Mr Musyoka holding brief for Mr Mulwa for

Respondent

N/A for Applicant

ISAAC LENAOLA

JUDGE