



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 888 of 2006

MUNYUA KAGENDO & ANOTHER.....PLAINTIFF

VERSUS

KAMAU GAKERE THUKU & 5 OTHERS.....DEFENDANT

RULING

The Respondents have a judgment in their favour granted by the lower court in the Chief Magistrate's Court Milimani commercial courts civil suit No.529 of 2004. The Respondents were the Plaintiffs. The orders of the decree are to the effect that the defendants do vacate the premises within 30 days of the said judgment, that the Defendants also pay the sum of Kshs 113,500/= still owing to the Plaintiffs as rent and that the defendants to bear the costs of the suit.

The lower court proceedings annexed as MKI to the supporting affidavit to this application do not show that stay was applied for in the said court and either granted or refused. Judgment was granted on 1.12.2006. The memo of appeal was filed on 19.12.2006. Order 1 rule 41 of Civil Procedure Rules allows an aggrieved party to either seek stay from the court appealed from first or even without seeking stay from the court appealed from, seek stay from the court appealed to. The relevant portion of order 41 rule 4(1) entitling the applicant seeking stay from the court appealed to before seeking stay from the court appealed from is found at line 5 from the top and it reads "*and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made to consider such application and to make such order there on as may to it seem just.....*"

The applicant is therefore properly before this court. Prayer 3 of the application dated 10.12.2006 and filed on 19.12.2006 is what they seek. It is in respect of stay pending determination of the current appeal. The grounds in support both oral in their submissions in court, supporting affidavit are a reiteration of the grounds in their memo of appeal namely:-

- The existence of a controlled tenancy. If a controlled tenancy existed then the lower court had no jurisdiction to hear the matter as that falls within the jurisdiction of the Business Premises Tribunal.
- That the second appellant was sued when he had already died and the validity of both the proceeding and decree against him will be called into question at the time of the hearing of the appeal. His inclusion in the appeal is just a formality because he was sued as such in the lower court.
- There is also an issue as to whether the 2nd to 6th Respondents had any right to sue.

- That the Defendants never gave evidence and the question arises as to whether an agent could give evidence on which the court could base an order for eviction.
- No prejudice will be suffered by the Respondent as the applicants have complied with the temporary conditional stay in the first instance by depositing 100,000.00 ordered to be deposited by the court.

The Respondents have countered the application with their grounds of opposition, grounds in the replying affidavit and oral submissions in court which is a reiteration of the grounds and contents of the replying affidavit. The major ones are that it is on record in the lower court that those running the business are not the really tenants and the current proceedings are just proxy proceedings for those who are running the business. They are in place to serve the interests of 3rd parties who are not party to the current proceedings.

- That the grounds of appeal cannot hold because by the applicant's own admission they are incapable of being evicted.
- That the issue of a deceased tenant was not brought to the attention of the landlord at the time of filing of the suit, neither was it raised before the lower court magistrate.
- That they were sued because the lease had expired and one of them had ceased to occupy the premises while another one was deceased.
- They content the application is not in good faith and the same should be dismissed with costs.

On the courts assessment of the facts herein it is clear that this court is properly seized of the application. It is an application for stay pending appeal. Though no legal authorities were referred to the court by both Counsels this court is to take judicial notice of the guiding principles governing such applications and these are:-

- That if stay is not granted the appeal will be rendered nugatory
- There is an arguable appeal.
- No prejudice will be suffered by the Respondent.
- Conditions for stay have been met.
- The appeal will be prosecuted speedily
- The stay order will not be used both as a shield and sword by the beneficiary against the respondent to unreasonably withhold him from the enjoyment of the fruits of his judgment.

Applying the above principles to the facts of this application this court makes findings that.

- There is already in place a temporary conditional stay of execution which has been complied with by the applicant depositing the amount ordered by the court.
- From the reading of the grounds of appeal and hearing of submission of both Counsels here there is apparent on record serious issues of law to be raised on appeal.

The first one is the issue of tenancy between the disputants. This goes to the root of jurisdiction of the lower court. If the dispute was in a wrong forum namely a civil court, instead of the business premises tribunal then the question of nullity of the lower courts' proceedings will be a matter to be gone into on appeal. If at the end of the trial of the appeal it turns out that the lower Court had no jurisdiction and the appellants, happen to have been evicted from the suit premises then their rights would have been taken away through a wrong process.

The second one is the issue of *locus standi* of the agent. It is the agent who gave evidence in the lower court as opposed to the owners of the premises. It is the agent who has sworn the replying affidavit. He has deponed in paragraph 1 of the replying affidavit that he is the managing agent of the property, the subject of the case and has authority of the Respondents to swear this affidavit. The authority has not been annexed. Annexure of the authorities would have shown whether it includes the power to prosecute and defend this case on behalf of the Respondents. Should that authority be faulted on appeal when the lower court judgment shall already have been executed, then the applicants would have been denied their rights wrongfully by a busy body.

The 3rd aspect of law is that one of the applicants was sued while already dead. Should this be found to have been true on appeal after the judgment would have already been executed upon a dead person then the law would have aided and abetted an illegality. This would be an abuse of the due process of the court. It matters not that the applicants never brought it to the attention of the lower court. The first duty lay with the person suing who had to make sure that the person he was suing was alive.

For the reasons given above the court is of the view that this is a proper case for granting of stay of execution pending appeal. The Respondent will not be inconvenienced or prejudiced in any way as he still has recourse to court to have stay orders discharged should the appellant drag his feet in moving to set down the appeal for hearing and disposal.

The application dated 19.12.006 and filed the same date be and is hereby allowed with costs to the applicant.

DATED READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2007.

R. NAMBUYE

JUDGE