



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

Civil Appeal 22 of 2007

MALICELLA MUTHONI A PPELLANT

VERSUS

JEREMY KINYUA EMILIO RESPONDENT

RULING

This is an application for stay of execution of the decree of the Business Premises Rent Tribunal in Tribunal Case No.11B/2006.

In that decree the applicant was ordered to open the premises in question to the respondent and further not to interfere with the respondent's quiet enjoyment of the premises. The orders were to be executed under the supervision of the O.C.S of the nearest Police Station.

The applicant being aggrieved with that decree filed a memorandum of Appeal in this court and at the same time brought this application. The applicant argues that the case before the Tribunal was heard *ex parte* as no hearing notice was served upon her. That the respondent is a stranger to her, the premises in question having been leased to one Teresia Nkatha who vacated the same. That the applicant is now in occupation and the order, if enforced, would have the effect of evicting her and imposing a stranger as her tenant without her consent.

The respondent in his replying affidavit has dismissed these averments maintaining that he has always been a tenant to the applicant. That his stock in trade and documents relating to the business are locked in the premises by the applicant. That the applicant was duly notified of the hearing date. The respondent further argues that the applicant has not demonstrated the loss she is likely to suffer should the court not grant the order sought.

Besides, the respondent states, there is no offer of security. That the applicant ought to have sought to set aside the decree. In seeking stay of execution of the decree, the applicant is expected to demonstrate that if the order of stay is not granted she stands to suffer substantial loss.

She has also to show that she is ready to provide security and finally the court must be satisfied that the application has been brought without unreasonable delay.

The applicant argues that he has taken possession of the premises after her tenant, Teresia Nkatha vacated the same. That the tribunal in ordering the respondent, who is Teresia Nkatha's husband, to re-enter the premises, was in effect evicting her and imposing a stranger on her.

That, as I understand it, is the loss the applicant fears should the court not grant stay of execution. Without going into the merit of the appeal, it has been deposed by the respondent that his stock in trade as

well as documents relating to his business at the premises have been locked up by the applicant. That in fact he has been the applicant's tenant- and not his wife, Teresia Nkatha.

He has annexed to his replying affidavit a receipt issued by the County Council of Meru dated 20th March, 2007 confirming that business permit for the year 2006 was obtained in respect of a Small Retail Shop Code 115.

Annexed also is a letter addressed to the parties by the Chief of Igoji summoning them over the same matter which had already been referred to the Tribunal. The question is whether the order in question will cause substantial loss to the applicant.

The applicant has annexed what is alleged to be an agreement between herself and Teresia Nkatha in a language other than English which has been translated into English. That transaction has no certificate. Furthermore Section 112(1) (e) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap 301) provides that the Tribunal has powers to make orders upon such terms and conditions as it thinks fit for the recovery of possession whether or not the person to whom it is directed is a tenant so long as he is in possession of the premises.

The applicant has not satisfied me that she has taken possession. She has not controverted the respondent's assertion that his stock in trade are in the premises.

Secondly the applicant has not given any undertaking to comply with any orders as to security. The order in question was issued on 22nd February, 2007 and this application brought on 1st March, 2007 – about one week later. I find that the application was brought timeously.

Having found that there will be no substantial loss, this application must fail. The applicant instead of filing this application should have sought before the Tribunal the setting aside of its order.

Learned counsel for the applicant submitted that there is no provision for setting aside of Tribunal orders under the Landlord and Tenant (shops, Hotels, and Catering Establishments) Act. With respect to counsel, that is not correct. Section 12(1) (i) of the Act provides that the tribunal has the power;

“(i) to vary or rescind any order made by the Tribunal under this Act”.

However, the applicant is entitled to appeal against any order of the Tribunal to this court – see Section 15 of the Act.

For the reasons stated this application is dismissed with costs to the respondent. The interim orders of stay are hereby vacated.

DATED AND DELIVERED AT MERU THIS 28TH DAY OF MAY 2007

W. OUKO

JUDGE