

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 182 of 2005

NGOTHO COMMERCIAL AGENCIES LTD.....APPELLANT

VERSUS

GEORGE WANJUKI GETHI.....RESPONDENT

RULING

This is a notice of motion brought under the provisions of **Order XLI Rule 4(1) and Order L rule 1 of the Civil Procedure Rules** by the appellant seeking the orders of this court to stay the execution of the order issued by the subordinate court on the 18th of October 2005 in **Nakuru SPM Misc. Civil Application No. 48 of 2005, Ngotho Commercial Agencies Ltd –vs- George Wanjuki Gethi** pending the hearing and determination of the appeal filed herein. The appellant contends that he would suffer irreparable loss and damage if the said order is not stayed as the same relate to rent arrears which the respondent had failed to pay and which had now accumulated to the sum of Kshs 134,000/=. The application is supported by the annexed affidavit of Thomas Njenga Ngotho, the managing director of the appellant. The application is opposed. The respondent has filed grounds of opposition and sworn a replying affidavit in opposition to the application.

At the hearing of the application I heard the submissions made by Mr Okeke, Learned Counsel for the appellant and Mr Nyagaka Learned Counsel for the respondent. I have carefully read the pleadings of the parties filed in support of their respective positions in this application. The issue for determination by this court is whether the appellant has established a case so as to enable this court grant him the order of stay of execution sought. The ruling that is sought to be stayed was issued by the Senior Resident Magistrate on the 18th of October 2005. The said ruling ordered the appellant herein to release to the respondent his goods which were attached pursuant to an order for distress for rent. Although the parties herein argued on the merits or otherwise of the appeal, at this stage of the proceedings, that is not the concern of this court.

This court is only concerned with whether the appellant has satisfied the conditions set out in **Order XLI rule 4 (2) of the Civil Procedure Rules** which require that the appellant should satisfy this court that he would suffer substantial loss unless the order of stay of execution is made. The appellant in certain circumstances is also required to provide security for costs. In **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** Madan J.A. held at page 419,

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court has a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful being nugatory, per Brett L. J. in Wilson –vs- Church (No. 2) 12 ChD (1879) 454 at p 459. In the same case Cotton L. J. said at p 458 “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

In this appeal, just as in the **Butt case** the issue in dispute relate to the Landlord and Tenant relationship. The dispute relates to the payment of rent. Whereas the appellant, as an agent of the landlord, claims that the respondent has been in rent arrears to the sum of Kshs 134,000/= the respondent on the other hand denies that he owes any money. This is an issue that would be ventilated during the hearing of the appeal. I will not address it at this stage of the proceedings. Pursuant to the order of distress issued by the subordinate court, the respondent’s properties were attached. The said properties remains attached to

date. The subordinate court ordered the release of the said attached property. The appellant complains that if the said attached goods are released to the respondent then the landlord would be prejudiced because the respondent would then remove the said goods from the leased premises and therefore make the landlord suffer loss on account of the rent arrears which he claims were not paid.

In my opinion that is a valid point. If the appellant were to be successful on this appeal the goods having been released and taken away from the leased premises the said appeal would amount to a pyrrhic victory because the appellant would then be unable to distrain for rent by attaching said goods. The appellant has established that he would suffer substantial loss. In the premises therefore I would allow the application for stay of execution pending the hearing and determination of the appeal filed herein. However to avoid hardship on the part of the respondent, I will grant the said stay on the following conditions on his part; If the respondent deposits in court or in a interest earning account in the joint names of the counsels for the appellant and the respondent the sum of Kshs 60,000/=, the said attached goods may be released to him. Further the respondent shall be required to pay all the monthly rent due without fail. The appellant shall have the costs of this application.

DATED at NAKURU this 24th day of February 2006.

L. KIMARU

JUDGE