

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 135 of 2005

PETER ONDANDE t/a SPREAWETT CHEMIST.....APPLICANT

VERSUS

JOSEPHINE WANGARI KARANJA.....RESPONDENT

RULING

The applicant, Peter Ondande t/a Spreawett Chemist, has made an application pursuant to the provisions of **Section 15 of the Landlord and Tenant Act, Order XLI rule 4 of the Civil Procedure Rules** and **Sections 3A and 63(c) of the Civil Procedure Act** seeking the order of this court to stay the execution of the judgment of the Business Premises Rent Tribunal in tribunal Case No. 2 of 2004 delivered on the 29th of June 2005 pending the hearing and determination of this appeal. The grounds in support of the application are that the appellant, who has appealed against the said decision of the tribunal, states that he would suffer irreparably if stay is not granted. The application is supported by the annexed affidavit of the applicant. The applicant swore a supplementary affidavit in further support of his application.

The respondent Josephine Wangari Karanja swore a replying affidavit opposing the said application. She deponed that the applicant had not demonstrated that he would suffer substantial loss in the event that stay is not granted. She furthermore deponed that, although the applicant was paying rent, he had not been operating any business from the said premises and had in fact closed the said demised premises for over a year. She deponed that she would suffer loss if she is not allowed to occupy the said premises to enable her conduct a business and support herself and her daughter. She urged the court to disallow the application.

At the hearing of the application, I heard the submissions made by Mr. Ndubi Learned Counsel for the applicant. He submitted that the applicant had filed an appeal against the decision of the Business Premises Tribunal to this court which appeal raises weighty legal issues and is not frivolous. He submitted that if stay is not granted, the appeal filed would be rendered nugatory because the possession of the premises which is the subject matter of the appeal would have been given to the respondent. He argued that this court ought to grant stay so as to preserve the *status quo* pending the hearing of the said appeal. He submitted that the applicant had continued paying rent to the respondent without fail. He took issue with the manner in which the respondent had filed her replying affidavit. In his view, the said affidavit was unprocedurally filed and should be struck out. He urged the court to allow the application.

Mr. Ikua, Learned Counsel for the respondent opposed the application. He submitted that the applicant had not established what irreparable damage he would suffer in the event that stay would not be granted. He submitted that the applicant had not disputed the averment made by the respondent that the said premises were locked and that the applicant was currently not using the premises, although he was paying rent. He further submitted that the application for stay was meant to frustrate the respondent from taking possession. It was his further submission that the applicant had not established that he was deserving of the orders of stay of execution sought. The applicant had further not made an offer for security of costs. He urged this court to disallow the application.

I have carefully read the pleadings filed by the parties in support of their rival positions in this application. I have also considered the arguments that were made before me by the counsel for the applicant and counsel for the respondent. The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if

stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him. (See **Order XLI rule 4(2) of the Civil Procedure Rules**).

In the instant application, the Business Premises Tribunal allowed the reference filed by the respondent to take possession of the Business Premises currently occupied by the applicant, her tenant, to enable her conduct business in the said premises. At page 5 of her judgment, the Chairman of the Tribunal observed that:

“I do note too, that the Chemist allegedly operated by Peter Ondande is not operating as of now for lack of a professional chemist. It would therefore not be so injurious for the same to be taken away at this stage. When the tenant wants to continue his business he can as well get other premises then.”

The respondent in her replying affidavit annexed photographs of the suit premises. The photographs show that the said premises, although currently in possession of the applicant, are not being used. She deponed that the applicant had locked up the said premises for a period of over a year. The applicant does not deny this fact. It is not disputed that the applicant has not defaulted in paying the rent for the said premises. What is in issue, is whether the applicant would suffer substantial loss if stay is not granted for him to continue having possession of the suit premises which he is actually not using. The respondent made a case before the tribunal for her to be allowed to take possession of the said premises. This court would not deny her the fruits of her judgment unless the applicant establishes that if stay is not granted he would be prejudiced.

From my evaluation of the facts of this case, it is clear that the applicant would not suffer any loss if stay is not granted. If the applicant was using the suit premises for business, I would not have hesitated in granting him stay of execution pending the hearing of the appeal. The three decisions referred to this court by the applicant *i.e.* **Patani –vs- Patani [2003] KLR 518, Butt –vs- Rent Restriction Tribunal [1982] KLR 417** and **Amin Ladak –vs- Rothman’s Holding Limited & Anor Mombasa HCCC No. 458 of 2000 (unreported)** would have applied if the applicant was in active occupation of the said premises. I agree with the submission made by the respondent that the applicant has not proved that he would suffer substantial loss if this court does not grant him the orders of stay of execution sought. I therefore find no merit in this application for stay of execution and dismiss the same with costs to the respondent.

DATED at NAKURU this 19th day of May 2006.

L. KIMARU

JUDGE