REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 198 of 2005

ANDREW NGANGA NDUNGU…..…….....……APPELLANT

VERSUS

GODFREY KARURI……..….....…..……1ST RESPONDENT

NACOM AGENCIES LIMITED…….....…..2ND RESPONDENT

RULING

The applicant filed an application dated the 16th March, 2006 brought under **Order XLI Rules 4(1)** and **(6)** of the **Civil Procedure Rules**. He sought a temporary order of stay of execution of the decree issued by the Naivasha Senior Principal Magistrate's Court in SPMCC No. 946 of 2005 pending the hearing and determination of an appeal which he had filed before this court. He also sought an order of injunction to restrain the respondents from levying distress and/or interfering with his quiet enjoyment of the residential premises comprised in plot **L.R. No. 1144/XXV/2 Milimani Estate,** within Naivasha Municipality, hereinafter referred to as "**the suit premises",** pending the hearing and determination of the appeal.

The matter that gave rise to the appeal herein was filed by the appellant against the respondents. In that suit, the appellant stated that he was a tenant of the first respondent in the suit premises which were managed by the second respondent. The rent was Kshs.10,000/- per month but in June 2005, the first respondent sought to increase the monthly rent to Kshs.12,000/-. The appellant alleged that he had not been given sufficient notice of the said increment of rent. The tenancy was a monthly one and the same could be terminated by either party giving one month's notice or by payment of one month's rent in lieu of notice.

The appellant claimed that the rent increment was wrongful due to lack of adequate notice and in the suit he sought a permanent injunction to restrain the respondents from evicting him or levying distress for rent.

The respondents filed a joint statements of defence and stated that the appellant's tenancy in the suit premises had been lawfully terminated. The appellant sought interim orders to restrain the respondents from evicting him from the suit premises or levying distress for rent. The court granted an interim injunctive order as sought and the appellant served the order upon the respondents. Subsequent to the service of the said order, the first respondent gave the appellant notice to vacate the suit premises. When the application came up for ***inter partes*** hearing, the appellant through his advocate raised a preliminary objection, arguing that the respondents were, by their act of serving the appellant with the said notice of

termination of tenancy, in contempt of court as they had been restrained from interfering with the appellant's tenancy in the suit premises. He submitted that they were under a legal obligation to purge the contempt before the court could hear them.

The respondent's counsel opposed the said preliminary objection and went on to raise objections regarding the appellant's verifying affidavit that accompanied the plaint and the affidavit in support of the chamber summons. He said that it had not been shown that the affidavits were sworn by the appellant.

In its ruling, the trial court dismissed the appellant's preliminary objection and upheld the objections that were raised by the respondents with the result that the entire suit was struck out. The court further held that it had no jurisdiction to entertain the matter and stated that the suit was supposed to have been "***filed in the right tribunal"***.

The appellant moved to the High Court and filed an appeal against the aforesaid decision by the subordinate court. He stated, ***inter alia,*** that the learned magistrate erred in law and in fact by striking out the suit without any formal application to do so.

In his submissions, Mr. Kayai for the applicant/appellant stated that the appeal would be rendered nugatory if the application was not granted. He further added that the applicant risked committal to civil jail for failure to pay costs of the struck out suit which amounted to Kshs.31,235/-.

He further submitted that the applicant had an arguable appeal and that the respondents were not going to suffer any prejudice if the application was allowed as the applicant continued to pay the undisputed rent of Kshs.10,000/- per month.

Mr. Mburu for the respondents opposed the said application and submitted that an application for stay of execution pending appeal could not be filed in the appellate court straight away without having made such an application before the court which issued the order or decree appealed from.

He further submitted that the appeal was filed out of time without leave of the court and cited the provisions of **Section 79G** of the **Civil Procedure Act** which required that appeals from subordinate courts to the High Court be filed within thirty (30) days from the date of the decree or order appealed against. That section further excludes from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order. Mr. Mburu pointed out that the ruling appealed against was delivered on 10th November, 2005 and the appeal was therefore supposed to be filed by 10th December, 2005 but the same was filed on 16th December, 2005.

Lastly, Mr. Mburu urged the court not to grant the application for stay of execution because by so doing the court will be varying the terms of tenancy agreement between the applicant and the respondents.

In his response, Mr. Kayai submitted that under **Order XLI rule 4(1)** of the **Civil Procedure Rules** there was no requirement that an application for stay of execution pending appeal be made first in the court which issued the order appealed from and that a party could file such an application to the appellate court straight away.

Secondly, he said that the appeal was filed in time because **Order XLIX rule 3** of the **Civil Procedure Rules** stated that where time for doing any act or taking any proceedings expires on a Sunday or other days on which offices are closed, time does not expire until the next working day. He said that the 10th December 2005, (the last day for filing of the appeal) was a Saturday and the following day was a Sunday and the 12th of December was a public holiday. He further submitted that when the applicant filed the appeal on 16th December 2005 he also filed a letter written to the Senior Principal Magistrate Naivasha Law Courts requesting for a certificate of delay and the certificate was available on the 20th December 2006.

Lastly, he responded by saying that the dispute that was before the court at Naivasha was whether the increment of rent by Kshs.2000 per month was justified. In his view, this court would not be varying any terms of the contract between the appellant the respondents by granting the orders sought.

I have considered all the affidavits on record as well as the submissions that were made by counsel. **Order XLI 4(2**) of the **Civil Procedure Rules** is clear that an order for stay of execution cannot be made unless:-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made.

(b) The application had been made without unreasonable delay.

(c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Counsel for the applicant did not satisfy the court that his client was likely to suffer substantial loss unless the order for stay was granted. In ***MUKUMA VS ABUOGA [1988] KLR 645*** it was held that the issue of substantial loss was the cornerstone upon which an application for stay of execution pending appeal stands and unless that cornerstone is shown to exist, the application cannot hold. The dispute that was before the subordinate court was about increment of rent by a sum of Kshs.2,000/- per month. The applicant could continue to occupy the suit premises and pay the new rent on a without prejudice basis as he continued to pursue the matter in court and if eventually the court decided the matter in his favour the respondents would have refunded the additional rent collected. In the alternative, the applicant could recover any amounts found to have been unlawfully paid by occupying the suit premises without paying rent for such period as would be commensurate to the amount found to have been unlawfully paid.

A close reading of the provisions of **Order XLI Rule 4(1)** indicates that it is desirable that an application for stay of execution pending appeal be made first to the court from which the appeal is preferred. The same is as follows:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, 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 thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside".

Mr. Mburu for the respondents submitted that it was unprocedural for the applicant to file his application directly before this court without first having made the application to the court from which the appeal is preferred. He urged the court to dismiss the application for that omission.

While I agree that the application should have been made first to the court from which the appeal is preferred, I do not think that failure to do so automatically renders the application incompetent because the mandatory requirement for such an application to be made in the first instance to the court from which the appeal is preferred was removed by **Legal Notice No. 36** of **2000**.

In ***KWA HOLA PHARMACY V COPY CAT COAST LTD [2002]KLR 269*** it was held that a person may for good reasons, which should be brought to the attention of the appellate court, make an application for stay of execution directly to the appellate court without first making the application to the court appealed from. It was further held that applications for stay of execution directly to the appellate court should be done only on special circumstances which should be explained to the satisfaction of the court during the prosecution of such an application.

In this matter, Mr. Kayai did not give any explanation as to why the applicant did not make an application

for stay before the subordinate court which should have been done ordinarily before an application was made to this court. However, I cannot dismiss the applicant's application for that reason alone in view of what I have stated herein above regarding **Legal Notice No. 36** of **2000**.

Turning to the provisions of **Section 79G** of the **Civil Procedure Act,** the appeal herein should have been filed within 30 days from the date when the ruling was delivered by the subordinate court. The ruling was delivered on 10th November 2005 and the decree was signed on 29th November 2005. The certificate of delay that was filed by the applicant states as follows:-

"***This is to certify that the period requisite for the preparation and delivery of a copy of a decree to the plaintiff herein was between 24th November 2005 when it was applied and paid for and the 29th November 2005 when it was issued and ready for delivery to the plaintiff."***

From the foregoing, there was no reason why the appeal was not filed within the required period of 30 days. The explanation for the delay given by Mr. Kayai is not sufficient. The time for filing appeals is prescribed by **Section 79G** of the **Civil Procedure Act** and not by the **Civil Procedure Rules** and therefore the provisions of **Order XLIX** of the **Civil Procedure Rules** cannot be invoked in computation of time for purposes of filing an appeal. Even if the provisions of **Order XLIX** were applicable, the last day for filing the appeal would have been 13th December 2005 and not 16th December 2005 when the appeal was filed. The proviso to **Section 79G** of the **Civil Procedure Act** allows the court to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. No such leave was sought and the appeal filed herein is therefore incompetent and does not lie. The court cannot grant any orders sought pursuant to an incompetent appeal and the application for stay of execution must therefore fail. Having found that the appeal was filed out of time and without leave for so doing, I strike it out all together. The respondents will have the costs of this application and of the appeal.

DATED, SIGNED and DELIVERED this 28th day of June, 2006.

D. MUSINGA

JUDGE

28/6/2006

Ruling delivered in open court in the presence of Mr. Kayai for the appellant and Mr. Murimi holding brief for Mr. Mburu for the respondent.

D. MUSINGA

JUDGE

28/6/2006