



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 134 of 2003

MARY W. KARIUKI1ST PLAINTIFF

DR. CHARLES M. KARIUKI 2ND PLAINTIFF

VERSUS

VERONICA NYAMBURA KINYUNGU DEFENDANT

RULING

On 13th October 2006, I delivered a ruling in this matter and issued the following orders:

§ “An order that the defendant delivers up possession of all the premises comprised in one shop standing on NAKURU/MUNICIPALITY BLOCK 9/70 to the plaintiff.

§ *The issue of mesne profits be determined by way of oral evidence.*

§ *Costs to the plaintiff.”*

On 17th October 2006, the defendant filed a notice of motion dated the same date and she sought for the following orders:

1. That service of this application be dispensed with in the first instance and the same be certified urgent and be heard on priority basis.
2. That pending the hearing of this application *inter-partes* this honourable court be pleased to stay the execution of the orders issued on 13th October, 2006.
3. That this honourable court be pleased to review and or set aside the orders and judgment entered against the defendant/applicant on 13th October, 2006.
4. That *in the alternative*, the court be pleased to grant the applicant sufficient time to comply with the court orders issued on 13th October, 2006.
5. That the costs of this application be provided for.

The application was heard *ex parte* and the court certified the same as urgent and pending the hearing

of the same application, the court granted an interim order of stay of execution of the orders of 13th October 2006 on condition that the defendant/applicant should deposit the monthly rent payable in respect of the rented premises up to 30th October 2006 in court.

When the matter came up for hearing, Counsel for the plaintiff, **Mrs. Ndeda** urged this court to consider that the defendant failed to comply with the conditional order of stay. In particular, the defendant did not deposit the outstanding rent which amounted to **Kshs.666,227/80** but instead deposited only a sum of **Kshs.125,000/-** in court on the 13th October 2006. Counsel for the parties made arguments on 18th December 2006 in respect thereto.

Mr. Waiganjo relied on the affidavits of the applicant sworn on 17th October 2006 in support of the notice of motion and also relied on the defendant's affidavits sworn on 28th November 2006.

According to the defendant, she complied with the conditional orders of stay. *Firstly*, pursuant to the order of **Hon. Apondi J** made on 19th March 2005 whereby the applicant was ordered to pay rent arrears, Counsel for the defendant submitted that the arrears of rent was paid and so far the defendant has paid a total of **Kshs.775,700/-** which covers all the entire outstanding rent up to October 2006.

On the part of the plaintiff, **Mrs. Ndeda** relied on her client's affidavits sworn on 8th November and 5th December 2006. According to **Mrs. Ndeda**, Counsel for the plaintiff argued that as at the month of October 2005, the defendant owed arrears of **Kshs.680,000/-**. This was duly confirmed by a letter by her Advocate, **Mr. Waiganjo** dated 11th October 2005 and after paying some other monies which are stipulated in the affidavit, the balance of rent outstanding as at October 2006 which the defendant ought to have paid was **Kshs.666,227/80** and not **Kshs.125,000/-**.

Counsel submitted that the applicant is in the habit of taking the court round in circles to avoid paying the rent or complying with the court orders.

I have taken into consideration all the submissions and also the materials contained in the affidavits filed herein. *Firstly*, when I delivered the ruling of 13th October 2006, it is clear this court considered the lease agreement that the parties had entered into among other issues. I also found the conditional order of stay of proceedings made by **Hon. Apondi J** on 19th March 2005 was not satisfied. I may be wrong on that, but from the records this court took the view that the outstanding rent as the date of the ruling was not paid. *Secondly*, if the defendant is dissatisfied with the said ruling, the best option for her is to file an appeal as it is inappropriate for this court to sit on its own ruling. I see no error that is apparent on the face of the record or any other new grounds that were not available to the applicant when that application was argued.

Thirdly and perhaps more importantly, when I considered the application under certificate of urgency dated 17th October 2006, the whole dispute in this matter is about a rented premises and delivery of vacant possession of the premises and the mesne profits which obviously includes an element of rent payable. It is on that basis that I ordered the defendant/applicant to deposit the rents payable up to October 2006 as a condition for granting an order of stay. Has the applicant complied with the order upon which the stay was granted?

Upon considering the materials that were presented by the applicant, I am of the view that the applicant is less than candid in her explanation of how she paid the rent arrears. She has produced documents of deposits of certain colossal sums of money which is not clear on whose account as the said deposits were made even before this suit was filed, the purpose of which is meant to confuse this court. The reason why this court ordered a conditional stay is due to the realization that a tenant cannot continue enjoying premises without paying rent while pursuing court cases. A court of law cannot shield a tenant from the obligations and responsibility of paying rent.

The upshot of the above is that, I am not satisfied with the arguments presented on behalf of the applicant

and more so that the applicant has complied with the order of conditional stay.

As regards the application for review, I am also of the view that there is no error on the face of the record and in that case, the right forum for the applicant is the Court of Appeal.

The application dated *17th October 2006* is disallowed with costs to the respondent, and the interim order of stay is hereby discharged.

It is so ordered.

Ruling read and signed on 20th December 2006.

MARTHA KOOME

JUDGE