



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 112 OF 2002

M/S KERIHO NURSING HOME LTD. & OTHERS.....APPELLANTS

VERSUS

**RAEL
LANGAT.....RESPONDENT**

RULING

The application has been brought through chamber summons under Order XLI R.4 of the Civil Procedure Rules as read with Legal Notice No. 36 of 2000. The application seeks the following order:

“There be stay of execution of the Tribunal Rent Assessment Order dated 14th June, 2002 until this appeal is heard and decided.”

The application is supported by the following grounds:

(a) The applicant has already filed the present appeal against the said assessment. (b) That unless stay is granted, the respondent will enforce the newly assessed rent to the prejudice of the appellant.

Besides the above, the application is also supported by the affidavit of Dr. M. V. Patel. Basically, the gist of the said affidavit is that the applicant has appealed against the Rent Assessment by the chairman of the Rent Restriction Tribunal. He has also deposed that the new rent constitutes a 100% increase.

Apart from the above, the applicants also deposed that should execution take place then they will have difficulties in recovering the rents paid should the appeal succeed since the respondent is not financially stable. On the other hand, the respondent has opposed the application through her replying affidavit. In the same, she denies that the rent increment is 100% as claimed.

In addition to the above, the respondent has also stated the applicants are very old tenants who have stayed on the suit premises for over 20 years without the rents being assessed by the Tribunal. Of significance is that the respondent has stated that she is financially stable and she has also agreed that should the appeal succeed – then the applicants can recover the new rents payable by way of future rents.

This Court has carefully perused the above submissions and wishes to make the following observations: Though the applicants claimed that the respondent was not financially stable – no evidence was adduced to prove the above. It is a basic principle of law that whoever alleges a fact – must prove the same. In this case, the applicant left his assertion hanging in the air – without producing any bank statement of the respondent nor any bankruptcy proceedings against her.

In the case of Kenya Shell Ltd. Vs Benjamin Karuga & Ruth Wairimu Karuga

Kenya Appeal Reports 1982 – 88 at Page 1018 It was held:

- There was no evidence on record to justify a finding that the respondents were not likely to repay the decretal sum if the appeal was successful. - Per Platt Ag. J. A. It is not normal in money decrees for the appeal to be rendered nugatory if payment is made.

Secondly, the fact that a litigant has lodged an appeal – cannot act as an automatic grant for stay. In the case of **Butt V. Rent Restriction Tribunal - Civil App. No. NAI 6 of 1979**. It was held that the power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

Thirdly, the Court hereby concurs with the respondent that should the appeal succeed then the applicants can recover the new rents payable by way of future rents.

In view of the above, the application is hereby dismissed since the above has no merits at all.

Costs to the respondent in any event.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mr. Oyoo for respondent.

MUGA APONDI

JUDGE

12TH MARCH, 2004