



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC MISC APPLICATION NO. 27 OF 2020

JAMES MWAURA KAROBIA T/A DAYLIGHT GENERAL CANTEEN.....APPLICANT

VERSUS

JULIUS MWANGI KURIA T/A NATIONWIDE DISTRIBUTORS.....RESPONDENT

THE POST MASTER GENERAL POSTAL CORPORATION OF KENYA...INTERESTED PARTY

RULING

The matter for determination is the **Notice of Motion Application** dated **24th August 2020**, by the Applicant seeking for orders that;

- 1. That the Applicant be granted leave to appeal out of time against the Ruling of the Chairman, Business Premises Rent Tribunal, Mbichi Mboroki, in Tribunal case Number 73 of 2016 (Kiambu) delivered on 12th June 2020, without Notice to the Applicant herein.**
- 2. That a Stay of Execution in Tribunal Case No. 73 of 2016 (Kiambu) be granted pending the hearing and determination of this intended Appeal if leave is so granted by the Honourable Court.**
- 3. That the Costs of this Application be provided for.**

The Application is premised on the grounds that on **12th June 2020**, the Chairman delivered a Ruling on the Applicant's **Notice of Motion Application** dated **29th March 2019**, without Notice to the Applicant. That the Ruling was initially set to be delivered on **14th February 2020**, but was adjourned to **6th March 2020**, but the same was not delivered. Further that a Notice was later issued for **27th March 2020**, but it was not delivered and the Applicant was informed that it would be delivered after consent was issued by the parties. That subsequent follow ups to get a consent from the Respondent's Advocate were futile. That the Applicant learnt that the Ruling was delivered when the Respondent served him on **18th August 2020**, with a letter dated **17th August 2020** informing him that the Ruling had been delivered on **12th June 2020**, and he was to pay a monthly rent of **Kshs.1116,000/=** to the Respondent.

That the Applicant received certified copies of the Ruling and Order on **20th August 2020**, after doing a protest letter to the tribunal. That the Applicant is likely to suffer substantial loss as the effects of the orders issued are that the Respondent is allowed to distress for rent and costs against the Applicant for rent arrears, yet the Applicant had been paying rent as he is in possession of the receipts.

Further that the time for filing an appeal lapsed on **12th July 2020**, and the instant Application has been filed without any delay as it was filed within **7 days** of the discovery of the delivery of the Judgment. That the intended Appeal has high chances of success as the Chairperson erred in finding that there is no proof that the Interested Party terminated the tenancy. Further in finding that the Interested Party had no capacity to enter into a tenancy Agreement with the Applicant as the same is rebutted. Further that the Chairperson erred in finding that the Interested Party sought for rent from both the Respondent and the Applicant at the same time, while the Respondent has not submitted any document to show that it has been paying rent. That no prejudice will be suffered by the Respondent if the orders of stay are granted as the Respondent occupies a section of the suit property, but has not paid any rent to the Interested Party for more than 5 years.

In his Supporting Affidavit **James Mwaura Karobi** averred that he is the registered Lessee of **L.R Thika Municipality Block 2/840**, and the Interested Party is the registered owner of the suit property. That he had sublet the suit premises from the Respondent from the year **2013 to June 2016**, where he paid monthly rent of **Kshs. 40,000/=** and in **January 2015**, he commenced payment of **kshs . 50,000/=** per month to the Respondent till **June 2016**, when he became the Lessee. That the Respondent started facing financial issues and the Land Lord / Interested Party terminated the tenancy agreement between itself and the Respondent. That he requested for a letter of offer to take over the premises when he realized that the Respondent had been issued with an **Eviction Notice** and upon issuance of the **Eviction Notice**, the Respondent offered to sell to him some of the businesses within the property.

That he was shocked when the Auctioneers in the name of **Zack Mack Enterprises Limited** being instructed by the Respondent made a demand for payment for **kshs. 2,370,000/=** claiming rent arrears while he had paid the rent and all other charges to the Respondent. That on **29th March 2020**, he filed an Application for temporary injunctive orders against the Respondent in **Tribunal Case No. 73 of 2016**. He contended that he has never entered into an agreement with the Respondent for monthly rent of **Kshs. 116,000/=** as ordered by the tribunal. Further that he forwarded the letter from the Respondent to his Advocates and the Advocates made follow ups and were furnished with a Ruling in which the Application was dismissed with costs and it allowed the Respondent to levy distress for rent from him among other orders. That he is informed by his Advocates that the time for appeal lapsed on **12th July 2020**, and the instant Application has been brought timeously.

The Application is opposed and the Respondent through his Advocates **Dola Indidis** swore a Replying Affidavit on **8th September 2020**, and averred that the Applicant is a stranger to the Respondent. Further that the Application dated **24th August 2020**, is incompetent and an abuse of the Court process as the Supporting Affidavit is incompetent and proper cause of action is not disclosed on the face of it. That a similar effort was dismissed on **25th February 2019**, by **Hon. V. Kachuodho SRM** Thika, in **CMCC No. 866 of 2018**. The Court was urged to dismiss the Application.

The Interested Party through **Horace Avedi**, its Property Officer swore a Replying Affidavit on **17th September 2020**, and averred that the Interested Party is the registered owner of the suit property. That on **1st August 2012**, the Interested Party entered into a license with the Respondent for a period of 5 years. Further that during the pendency of the license, the Respondent neglected to pay the agreed rent and remained in arrears to a tune of **Kshs. 2,199,440.00** and on **16th November 2015**, the Interested Party issued the Respondent with a demand letter requesting him to settle the arrears. That the Respondent continued in arrears and on **5th January 2016**, the Interested Party terminated the License. That on **29th May 2019**, the Respondent filed an Application seeking temporary injunction to prevent it from being evicted and when it filed the said Application, it was no longer a tenant neither was it in possession of the suit property. Further that pursuant to termination of the license, four acres of the suit property was acquired by the County Government of Kiambu, a dispute which is still pending before Court.

That on **17th May 2016**, the Interested Party issued the Applicant with a letter of offer in respect of another portion for a period of **5 years 3 months** from **1st July 2016**, and the Applicant accepted the offer and subsequently the parties entered into a lease agreement dated **8th September 2016**. He confirmed that the Applicant has been dutifully paying rent.

He contended that the chairperson erred in his Ruling in finding that there was no evidence to show that the landlord terminated the tenancy while the termination letter dated **5th February 2016**, was produced by the Applicant. Further that the Ruling was erroneous for various reasons. He urged the Court to allow the Application.

The Applicant **James Mwaura Karobia** swore a Supplementary Affidavit on **5th October 2020**, and averred that the Court dismissed his Application in **Thika CMCC 866 of 2019**, vide a Ruling dated **25th February 2019**, since the Respondent had filed the **BPRT Case No. 73 of 2016**, and thus the Court found that it would amount to subjudice. That he is informed by his Advocate that the Court in the said case did not determine the Application on its merits, but only found that **BPRT** was seized of the matter. Further that the decision to file the Application in Thika Law Courts was informed by the fact that documents from **BPRT** were mixed up with documents excluding him as a party, while other had his name as a party to the proceedings.

He averred that since the filing of the current Application, on **26th August 2020**, the Respondent ought to attach his property for purported rent arrears of **Kshs 2,370,000/=** contrary to the order of the tribunal which directed that the Interested Party do credit the rent that he had paid them into the Respondent's rent account. That it is in the interest of Justice that the Application be allowed.

The Respondent through his Advocate **Dola Indidis** swore a Further Affidavit on **5th October 2020**, and averred that the Supplementary Affidavit dated **5th October 2020**, and Interested Party's Affidavit are merely divisionary and raise no new issues outside the substantive orders and ruling of a competent court and tribunal and if the orders are not clear to them, they can seek clarification from them.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the Affidavits by the parties and the annexures thereto. The Court finds that the issue for determination are;

- a. Whether the Applicant has met the legal threshold for granting leave to appeal out of time?**
- b. Whether the Applicant has met the threshold for Grant of Stay of Execution orders.**

a. Whether the Applicant has met the legal threshold for granting leave to appeal out of time?

This Court has jurisdiction to allow an Applicant to file an appeal out of time, but in doing so, the Court is to use its discretion and be satisfied that the Applicant has given sufficient reason to warrant the grant of the said leave. **Section 79G** of the **Civil Procedure Act**, provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

In the case of Nicholas Kiptoo Arap Korir Salat...Vs....The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR, the Court held that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

In line with the foregoing case, it is this Court’s opinion that the question that must then be answered is whether the Applicant has explained the reason for the delay to the satisfaction of this Court.

It is the Applicant’s contention that the Ruling of the Chairman was not delivered on the date that it was set to be delivered and that the parties had been given various dates within which the Ruling was set to be delivered. The Applicant’s contention that the Ruling was delivered in their absence and without Notice to them has not been rebutted. The Court therefore has no reason to doubt the same as the Court has seen the letter dated **18th August 2020**, in which the Applicant through his Advocate raised the said concerns.

Further the Applicant has contended that he only learnt of the delivery of the Ruling on **18th August 2020**, and the instant Application was filed on **24th of August 2020**. Therefore the Court is satisfied that there was no inordinate delay in bringing the Application, and coupled by the fact that the Ruling was delivered on **12th June 2020**, there was indeed no inordinate delay.

The Applicant having given a satisfactory explanation as to why he did not file the Appeal on time, this Court finds that the Applicant has met the threshold for grant of leave to Appeal out of time thereby persuading the Court to exercise its discretion and allow him to file his appeal out of time it. See the case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR, where the court held that;

“The principles guiding the court on an application for extension of time premised upon *Rule 4 of the Rules* are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

b. Whether the Applicant has met the threshold for Grant of Stay of Execution orders

The Powers of a Court to grant stay of Execution pending appeal are discretionary in nature, **Order 42 Rule 6(2)** of the Civil Procedure Rules provides that:

“No order for stay of execution shall be made under subrule (1) unless-

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b) 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.**

In the case of **JMM...Vs....PM [2018] e KLR** it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See **Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo ... Vs ... Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

It is not in doubt that the decision on whether or not grant stay of execution is discretionary and the Court must exercise the same judiciously. See the case of Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised.”

Order 42 Rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. This Court has granted the Applicant **Leave to Appeal out of time**. The Court has also held that there was no inordinate delay in filing the Appeal. Therefore, the Applicant has satisfied one condition.

On whether there will be substantial loss; having gone through the Ruling of the tribunal, the Court notes that amongst the orders granted were those that allowed the Respondent to recover its costs by levying distress for rent. The Court has gone through the Memorandum of Appeal and the Appellant/ Applicant is challenging the said decision. It is the Court's considered view that if the Respondent was allowed to levy distress for rent and it turns out that the Appellant/ Applicant is a successfully party, then he will have suffered substantial loss and the same would render the Appeal nugatory.

The Applicant has in his submissions agreed to deposit the security for costs of **Kshs. 30,000/=**. The Respondent has not rebutted this and has not given any reasons that he would suffer any prejudice if the Application is allowed. The Court is alive to the fact that it ought not to protect the Appellant at the expense of the successful party, but balancing the interest of justice at this juncture, the Court is satisfied that it would be in the interested of justice to allow the Application so that the Appeal is not rendered nugatory.

The Upshot of the above therefore is that the Court finds that the Notice of Motion Application dated **24th August 2020**, is merited and is allowed on the following terms:-

- 1. That the Applicant be and is hereby granted leave to appeal out of time against the Ruling of the Chairman , Business Premises Rent Tribunal, Mbichi Mboroki, in Tribunal case Number 73 of 2016 (Kiambu) delivered on 12th June 2020 without Notice to the Applicant herein.**
- 2. That a Stay of Execution in Tribunal Case No. 73 of 2016 (Kiambu) be and is hereby granted pending the hearing and determination of this intended Appeal.**
- 3. The Applicant to deposit Kshs. 30,000/= as security for costs within 30 days from the date hereof.**
- 4. The Applicant to file his Memorandum of Appeal within 14 days and the Record of Appeal within 30 days from the date hereof.**
- 5. That the Costs of this Application to abide by the outcome of the appeal.**
- 6. In the event of any default, the Orders issued will lapse automatically.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS **8TH** DAY OF APRIL 2021

L. GACHERU

JUDGE

8/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open

Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Dollo holding brief for Mr. Orende for the Applicant

Mr. Dola for the Respondent

M/s Mwaura holding brief for Mr Wathuta for the Interested Party

L. GACHERU

JUDGE

8/4/2021