



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ELC APPEAL NO. E056 OF 2020

CALEB RADIDO.....APPELLANT

-VERSUS-

SAMUEL ODHIAMBO OWUOR.....RESPONDENT

RULING

INTRODUCTION

1. Vide the Notice of Motion Application dated the 9th of December 2020, the Appellant herein has sought for the following Reliefs;

i.(Spent)

ii. *The Orders issued by the Rent Restriction Tribunal on the 17th September 2020 and the subsequent orders for their enforcement issued on the 11th November 2020, in the Rent Restriction Case No. 1240 of 2020 be and are hereby stayed pending hearing and determination of this Application.*

iii. *The orders issued by the Rent Restriction Tribunal on the 17th September 2020 and the subsequent orders for their enforcement issued on the 11th November 2020, in the Rent Restriction Case No. 1240 of 2020 be and are hereby stayed pending hearing and determination of this Appeal.*

iv. *Cost of this Application be borne by the Respondent.*

2. The subject Application is premised and/or anchored on the grounds enumerated at the foot thereof and same is further supported by the Affidavit of the Applicant herein sworn on the 9th of December 2020, to which the Applicant has annexed 5 documents.

3. Following the filing and service, the Respondent herein filed a Replying affidavit whereby same opposed and/or contested the claim by and/or on behalf of the Appellant and essentially sought for the court to dismiss the subject Application.

DepositionS by the parties

4. Vide the Supporting affidavit sworn on the 9th December 2020, the Appellant herein has averred that he is the Proprietor of the suit property, namely House No. B6, in Saika area, within the City of Nairobi.

5. The Appellant has further averred that on or about the 8th June 2019, the Respondent herein, approached same seeking to rent the suit premises and that pursuant to the approach, the Appellant agreed and/or accepted and thereafter the Respondent entered upon and took possession of the suit premises. For clarity, the Appellant has further averred that the Rent of the suit premises was agreed at kes.10, 000/= only per month.

6. It is further averred that on or about April 2020, the Respondent herein fell into rent arrears and thus same violated and/or breached the terms of the tenancy.

7. The Appellant has further averred that between April and August 2020, the Respondent disappeared and same would only sneak back to

pick cloths at night, so as to evade the Appellant's attempt to force same to pay rents.

8. Owing to the failure by the Respondent to pay the accrued rents, the Appellant has averred that same requested the Respondent vide short message text, [SMS] to vacate the suit premises and relocate to a cheaper house.

9. Nevertheless, the Appellant has further averred that the Respondent failed to comply with the request and as a result, the Appellant was constrained to report the matter to the local chief, Njiru Location, for purposes of arbitration.

10. Be that as it may, the Appellant has further averred that following to the report to the local chief, Njiru location, that the Appellant and the Respondent attended the meeting whereupon it is reported that the chief directed the Respondent to vacate the suit premises, but to leave a few items as security for the outstanding rent arrears.

11. The Appellant has further averred that despite the intervention by the chief, Njiru location, the Respondent herein failed to comply and instead placed his padlock on the suit premises. In this regard, the Appellant avers that same was therefore constrained to also place his own padlock, to prevent the Respondent from accessing the suit premises and/or otherwise removing the items therefrom.

12. The Appellant further avers that owing to the continued intransigence exhibited and/or showed by the Respondent herein and based on the continued accumulation of rent arrears, same reported back to the chief, Njiru Location, who advised him(Appellant) to remove own padlock on the premises and thereafter break the padlock of the tenant and upon doing so, to remove the Respondent's/Tenant's items and place them somewhere pending collection by the Respondent.

13. The Appellant has further averred that based on the advise from the area chief, same proceeded to and indeed removed the Respondent's items from the room and placed same under safe custody pending collection by the Respondent, albeit after payment of the outstanding of the rent arrears.

14. It is further averred by the Appellant that shortly after removing the Respondent's goods/items from the suit premises, same was served by court process and an order issued by the Rent Restriction Tribunal, whereby same was directed to release the Respondent's confiscated items.

15. Nevertheless, the Appellant has further averred that upon receipt of the court process and particularly the court order, same sought legal advise from his advocate on record and thereafter an Application dated the 2nd October 2020, was crafted on his behalf, which sought to vacate and/or set aside the orders directing unconditional release of the confiscated items.

16. On the other hand, the Appellant has further averred that during the pendency of the Application dated 2nd October 2020, the Respondent herein filed another Application dated the 9th November 2020, and which Application was heard by the tribunal, culminating into the issuance of orders of warrants of arrest against him on the 11th November 2020.

17. As a result of the issuance of the warrant of arrest, the Appellant felt aggrieved and thus filed the subject appeal, as well as the Notice of Motion Application herein.

18. It is the Appellants' plea that unless the orders sought are granted, same shall be committed to civil jail for a duration not exceeding six months and as a result of such imminent committal, he shall thus be deprived of his liberty.

Response by the respondent

19. On his part, the Respondent has contended that the Appellant herein, illegally and unlawfully broke the padlock to the suit premises and thereafter confiscated and/or carted away all his personal belongings and household goods, which were in the rented premises.

20. It is further averred by the Respondent that various attempts to persuade the Appellant to release the confiscated items were met by a refusal on the part of the Appellant and in this regard, same was constrained to move to the Rent Restriction Tribunal for purposes of intervention.

21. It is further averred that pursuant to the foregoing, civil proceedings were lodged before the Rent Restriction Tribunal and thereafter the tribunal issued the orders dated 17th September 2020, directed to and/or against the Appellant to release the household goods.

22. It is further averred that despite being served with the court process and the order issued on the 17th September 2020, the Appellant/Applicant remained adamant and this forced the Respondent to revert back to the Tribunal for further orders and/or direction.

23. The Respondent has further averred that upon return to the tribunal, the tribunal issued and/or granted orders of warrant of arrest against the Appellant, whereby the Appellant was to be arrested and be brought before the tribunal for committal proceedings.

24. It is the Respondent's further averment that by failing to comply with the orders of the tribunal, the Appellant herein was showing utter contempt to the process of the court and therefore the Appellant, should not be allowed to continue with such disregard and disobedience of lawful court orders.

25. In the premises, the Respondent have averred that the grant of a stay order herein shall not only allow the Appellant herein the latitude to continuing abusing the due process of the court, but, shall be tantamount to perpetuating the Contempt.

26. Owing to the foregoing, the Respondent has thus pleaded with the court to dismiss the Application herein, which the Respondent has termed to be Misconceived and an abuse of the Due process of the court.

Submission

27. On the 21st September 2021, the subject Application came up for hearing and on which date the court gave directions pertaining to and/or concerning the disposal of the Application. For clarity, the court directed that the said Application was to be disposed of by way of written submissions, which were to be filed within the set timelines.

28. On the other hand, the court also ordered and/or directed that the matter shall be mentioned on the 11th November 2021, to ascertain compliance and thereafter to set a date for ruling.

29. Suffice it to say, that on the 11th November 2021, the parties herein confirmed that same had filed their respective submissions and in this regard, the court was implored to set a date for ruling.

30. It is imperative to note that the Appellant herein filed his submissions on the 13th October 2021, whereas the Respondent herein, filed his set of 'undated' submissions on the 25th October 2021. For clarity, the two sets of submissions are on record and have been duly considered.

Issues for determination

31. Having reviewed the Notice of Motion Application dated the 9th December 2020, the supporting affidavit thereto and the written submissions dated the 13th October 2021, filed by and/or on behalf of the Appellant and having similarly considered the Replying Affidavit in opposition to the subject Application, as well as the written submissions, lodged on the 12th October 2021, the following issues are germane for determination;

I. Whether there exists a sufficient cause

II. Whether the Appellant is disposed to suffer Substantial loss, if the orders sought are not granted.

III. What kind of security should the Appellant provide for the Due performance of the decree that may be ultimately be binding upon him.

Analysis and determination

Issue number 1

32. Being an Application for stay of execution of the decree and/or order, issued by the tribunal, pending the hearing and determination of an appeal to this honourable court, the Appellant is enjoined to show and/or established a sufficient basis, as the starting point to accessing and/or partaking of the discretion of the court.

33. Towards showing and/or proving a sufficient cause, the Appellant must show that same has filed and/or lodged an appeal in the prescribed way before this honourable court and which appeal, should espouse at least a single bonafide arguable issue, for purposes of ventilation before and adjudication by the court.

34. Suffice it to say, that the bonafide arguable issue, which establishes a sufficient cause, must not be one that will ultimately succeed. For clarity, it is sufficient that the single bonafide triable issue[s] is one which is arguable and therefore worthy of interrogation by this honourable court.

35. As concerns proof and/or establishment of sufficient cause, I must point out that the Appellant/Applicant has contended that the monthly rent in respect of the suit premises was kes.10, 000/= only per month and in this regard, the dispute between the Appellant and the Respondent, based on the non-payment of the rent and/or otherwise breach of the terms of the tenancy, were outside the jurisdiction of the Rent Restriction Tribunal.

36. In this regard, it is my humble observation that there exists germane points for determination inter alia, which concerns the issue of jurisdiction of the Rent restriction Tribunal, to entertain and/or otherwise issue orders in a matter that appears to be outside her jurisdiction.

37. On the other hand, there is also the claim by the Appellant herein that though same filed the Application dated 2nd October 2020, same was skirted by the chair person of the tribunal, who proceeded to and dealt with a subsequent Application, dated the 9th November 2020, culminating into the issuance of the warrants of arrest.

38. Clearly, where an Interlocutory Application seeking to set aside orders of the court and in this regard orders of the tribunal, is filed, such an Application should be heard and disposed of before Execution proceeding, based on the impugned order are carried out and/or undertaken.

39. However, in respect of the subject matter, it appears that the Application for committal proceedings, leading to the issuance of the warrants of arrest, was attended to, heard and disposed of, leading to the issuance of the warrants of arrest, albeit, during the pendency of the

interlocutory Application.

40. If the foregoing position is correct, which will be interrogated during the hearing of the appeal, then another arguable point becomes apparent and/ or evident. Consequently, such a point shall have to await the deliberations during the plenary hearing of the Appeal.

41. Suffice it to say, that the Appellant has established and/ or proven a sufficient cause and/or basis, which is essential and / or paramount, in discerning, whether or not to grant an order of Stay of Execution of the Orders of the Rent Restriction Tribunal or otherwise.

Issue number 2

42. As pertains to the second issue herein, it is worthy to note that Substantial loss is the cornerstone to an Application for stay of execution, pending the hearing and determination of an Appeal.

43. For clarity, substantial loss connotes and/or means such a loss that would irreparably affect the status of the suit premises and/or issue, which is the subject of appeal and thus one which must be prevented from accruing and/or occurring. However, such substantial loss must be pleaded and/or alluded to by the appellant and must thereafter be established by credible evidence contained in the supporting affidavit of the applicant.

44. Concerning the place and importance of the concept of substantial loss, it is imperative to take cognizance of the decision in the case of **Kenya Shell Limited v Benjamin Karuga & Another (1986) eKLR**, where the honourable court of appeal stated as hereunder;

‘It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.’

45. In respect of the subject matter, the Appellant has contended that unless the orders of stay of execution herein are granted, the committal proceedings based and/or founded on the warrants of arrest which were issued on the 11th November 2020, shall be proceeded with and same shall be committed to civil jail, for such duration as the tribunal may determine.

46. It is the Appellant’s further contention that the duration of committal, which by law does not exceed six months, would have been served and/or substantially served , by the time the subject appeal is confirmed ready for hearing, heard and determined.

47. I am in complete agreement. Clearly, the Appellant herein would be required to procure and obtained the typed and certified copies of the proceedings and ruling of the tribunal and thereafter compile the Record of Appeal, in line with the Civil Procedure Rules, 2010.

48. On the other hand, once the Record of Appeal is compiled and filed, the Record shall have to be placed before this court for purposes of admission of the appeal in line with the provisions **of Section 79 (B) of Civil Procedure Act, Chapter 21 Laws of Kenya, as read together with Order 42 Rule 13 of the Civil Procedure Rules 2010**, before the appeal can be fixed for hearing.

49. Besides, after the admission of the appeal, same will have to Que in the line for hearing and subsequent determination thereof and there is no likelihood, that the Appeal herein, which has not been certified ready for hearing, shall be heard and disposed off earlier than June 2022. For clarity, the Diary of this Honourable Court as pertains to Hearings, has reached the Third week of March 2022.

50. Consequently, it is evident, that by the time the subject appeal is heard and determined, the Appellant would have served the jail term. In this regard, the Appellant shall have been deprived of his liberty, which is incapable of restoration, should the appeal be successful.

51. In my humble view, such kind of a loss, is Substantial and is one that ought to be averted by the court, so as to ensure that the substratum of the appeal, is not defeated and/or otherwise destroyed.

52. In support of the foregoing position, I adopt and apply the holding of the Court of Appeal in the case of **R. W. W v E. K W (2019) eKLR**, where the honourable court of appeal observed as hereunder;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

53. In the premises, my short answer to the issue as to whether or not the Appellant shall suffer Substantial loss, is in the affirmative.

Issue number 3

54. Even though the Appellant herein, has established a sufficient cause and also proved that substantial loss shall arise, it is still imperative to note that the Respondent herein has an order in his favor and to this extent the Respondent should be afforded the avenue to realize and thereby benefit from the fruit of the litigation thus fur.

55. On the other hand, the Appellant herein is also exercising an undoubted Right of appeal, and in this regard, unless there is overwhelming

hindrance on appeal, the honourable court is called upon to ensure that the exercise of the undoubted Right of appeal, is realized and/or actualized. **See Article 48 of the constitution 2010.**

56. Owing to the foregoing, the court is thus called upon to exercise a delicate balance between the Appellant's rights to pursue the appeal, versus the Respondent's rights to partake of the fruits of the subject litigation.

57. In the premises, the court is thus called upon to strike a balance and to protect the interest of both parties, without flirting with the Appellant's right of appeal, to the detriment of the successful litigants' rights to benefit from and/or actualize the fruits of the litigation.

58. In view of the foregoing, it is imperative to consider and decree the provision of security, for the Due performance of the decree that may ultimately be binding on the Appellant.

59. It is also worthy to note, that the determination of the nature, kind and quantum of security to be provided for, falls at the discretion and within the mandate of the court. Consequently, it is thus irrelevant, whether the Applicant has offered to provide security or otherwise.

60. Nevertheless, where an Applicant offers to provide security, such an offer is an indicator of good faith on the part of the Applicant and the Honourable Court would take same into consideration.

61. In support of the foregoing observation, I beg to adopt and subscribe to the holding in the case of **Focin Motorcycle Company Ltd v Anne Wambui Wangoi & Another (2018) eKLR**, where the court observed *inter-alia*;

'Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.'

62. In respect to the subject matter, it is worthy to note that the Appeal does not relate to any monetary decree and neither was there a claim for payment of any monies in the proceedings before the tribunal.

63. What is at play however, is the unlawful action by the Appellant/Applicant, who decided to take law into his own hands and to seize the Respondent's household items, which were thereafter carted away and kept by the Appellant. Indeed, to date the Appellant continues to detain the goods.

64. I am not sure, whether there exists a law which allows the landlord to unilaterally break open the door of the premises under occupation by a tenant and to confiscate and cart away the household goods, without a court order, allegedly as *lien* for rent arrears.

65. Such kind of conduct and/ or action, in my humble view amounts to the application of the Laws of the jungle and same is a recipe for anarchy and constitutes flagrant disregard of the Rule Of Law. Consequently, such conduct must not be allowed to take root and/ or sprout, whatsoever in our Jurisprudence.

66. Suffice it to say, that the Respondent may very well be in rent arrears, but the Appellant/Applicant, if properly advised, should proceed to file Civil proceedings for the recovery of rent arrears, which in any event, are recoverable as a Civil debt.

67. Clearly, carting away the Respondent's household goods and detaining same, amounts to breach of the Respondent's rights to privacy.

68. Owing to the foregoing, I am constrained to and do hereby decree that the Appellant/Applicant, shall forthwith and in any event, **within the next 14 days henceforth**, return and/or restore unto the Respondent all the household items, which were confiscated and/or carted away and which have remained under the possession and custody of the Appellant herein to date.

69. The return of the said household goods, shall constitute and/or operate as the security for the grant of the orders of stay of execution herein, pending the hearing and determination of the Appeal herein.

Final disposition

70. Having addressed and/or dealt with the various issues enumerated for determination, I am minded to make the following Dispositive orders;

I. *The Notice of Motion Application dated the 9th December 2020, be and is hereby allowed in terms of prayer 3 thereof.*

II. *The Appellant/Applicant shall forthwith and in any event, within 14 days from the orders hereof, release the Respondent's household items and/or goods, which were confiscated and/or carted away, albeit without a court order.*

III. *In default of compliance with limb two hereof, that is release of the Respondent's household items/goods, which were confiscated by the Appellant, within the stated timeline, the orders of stay herein granted shall lapse without further reference of the court.*

IV. *The orders herein shall be extracted and served by the Respondent's advocate, before the default clause can be invoked and/or operationalized.*

V. Costs of the application shall abide the appeal.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant