



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC NO.EA085 OF 2021

JUSTUS GITUMA MUGUNA.....APPLICANT

=VERSUS=

MUHU HOLDINGS CO.LTD.....DEFENDANT

RULING

(Notice of Motion dated 8th November 2021)

Background

1. The Notice of Motion before me was filed by the seven applicants on 8th November 2021 under certificate of urgency. At the first instance, the Court granted an order restraining the Respondent who is the landlord from evicting the Applicants from their Business premises pending the inter partes hearing of the said application.
2. The Application came up for inter partes hearing this morning. The Advocate for the Applicants informed the court that he had served the Respondent through his Advocates but the Respondent had not filed any response. He too did not appear in court either in person or through his Advocates. The Applicants' Advocate Mr. Ngoge then invited the court to treat his application as unopposed and grant the Applicants the orders sought.
3. However, this court reserved the Ruling for this afternoon to enable it consider the application in detail.
4. It is not obvious or automatic that where an application is not opposed that the Applicant will get the orders sought. The court has an obligation to consider the Application and only grant the orders once convinced that the Applicant is deserving of those orders.
5. I agree with the observation of the court in the case of **Gichinga Kibutha Vs Caroline Nduku (2018) eKLR** where the court held that:-

“It is not automatic that instances where the evidence is not controverted the claimant shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest”.

Analysis of the Appellants' Application

6. The Applicants in this case have brought their application under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. They have included Sections 1A, 1B and 3A of the Civil Procedure Act to back up their application.
7. The Applicants pray for an order of stay of execution of the Ruling and orders issued by the Chairman of the Business Premises Tribunal on the 5th November 2021. Further or in the Alternative, the Applicants seek a mandatory injunction to compel the Respondent to unconditionally restore the Appellants back to their respective Business Premises on LR 209/681/2 which were not the subject matter of the Respondents/Landlord Termination Notices of 20th February 2017.
8. The basis of the application is that the Applicants who are tenants of the Respondent were not subject to the Landlord's Termination Notices issued on 20th February 2017. However, the Chairman of the Business Premises Rent Tribunal went ahead and issued orders of eviction against the Applicants on 5th November 2021. The Applicants have filed an appeal against the said Ruling by way of a Memorandum of Appeal dated 6th November 2021.

9. In the supporting affidavit sworn by Justus Gituma Muguna, the Applicants have expounded on the happenings leading to the issuance of the Ruling and orders of 5th November 2021. It is their case that having not been issued with the Landlord's Termination Notices under the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya, the Tribunal did not have the jurisdiction or justification whatsoever to issue an eviction notice against them.

10. The Applicants argue that they have an arguable appeal against the said Ruling and orders of the Business Premises Tribunal. They seek the urgent intervention of the Court to save them from the imminent eviction in execution of the orders of the Tribunal. The eviction would be unlawful and cause substantial loss on the Applicants.

Court's Determination

11. The principles guiding the grant of an order of stay of execution pending appeal are well settled. Order 42 Rule 6 (2) of the Civil Procedure Rule is clear on the issue.

12. A court of law shall only grant the order of stay of execution pending appeal if satisfied that substantial loss may result to the Applicant and that the Application has been made without unreasonable delay and such security as the court orders for the due performance of such decree of order as may ultimately be binding has been given by the Applicant.

13. In this case, the court is satisfied that substantial loss would result to the Applicants unless the order of stay of execution is granted. The Applicants would not only be inconvenienced but are bound to suffer financial and business loss should they be evicted from their business premises before their appeal is heard and determined on its merit.

14. Secondly, the Applicants have speedily moved to this court without unreasonable delay.

15. This Court will not impose any order on security. In that regard, I am guided by the sentiments of the court in **John Gachanja Mundia Vs Francis Muriira alias Francis Muthika & Another (2016) eKLR** where the court stated that:-

“Courts of law have said that with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief”.

16. Accordingly, I allow the Applicants application dated 8th November 2021 in terms of prayer number 2 thereof.

17. No evidence has been presented before me to the effect that the Applicants have been evicted from their premises. I therefore will not grant the further or alternative prayer sought in the application.

18. Costs of this application will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Ngoge for the Applicants

None appearance for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE