



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 57 OF 2020

JAMES MBURU NJOROGE T/A JACTAM AGENCIES.....APPELLANT

VS.

HANBIT LIMITED.....RESPONDENT

RULING

1. **JAMES MBURU NJOROGE T/A JACTAM AGENCIES** is the appellant. By his application dated 14th May, 2020 he seeks stay of execution of the order of Kiambu Chief Magistrate's Court in Miscellaneous Application No. 37 of 2019 issued on 27th April, 2020. The appellant's said application is premised on the grounds that the trial court varied the terms of the lease between appellant and **HANBIT LIMITED**, the respondent without the parties having testified before that court; that if stay order is not granted the appellant will be evicted which would render the appeal academic exercise; and that the appeal has high chances of success.

ANALYSIS

2. I have considered both the appellant's and respondent's affidavit, the respondent's submissions and grounds of opposition.

3. The background of this appeal is that the respondent through a miscellaneous application before Kiambu Chief Magistrate's court sought orders for the appellant to vacate plot Number **KIAMBAA/THIMBUGUA/2384** (the property) and on appellant's failure to vacate the respondent be at liberty to evict the appellant.

4. Appellant raised preliminary objection to that application raising grounds that his tenancy was controlled tenancy under the **Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301**; on the ground that the Kiambu Chief Magistrate's court did not have jurisdiction to entertain the matter; and that the orders of eviction sought by the respondent could only be issued in a substantive suit.

5. The trial court dismissed appellant's preliminary objection and granted respondent orders for appellant to vacate the property and in default the respondent was granted liberty to evict appellant. It is those orders appellant has directed his present appeal.

6. Consideration of an application for stay of execution pending appeal is based on the provisions of **Order 42 Rule 6. Rule 6(2)** of that Order provides:-

“[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay;

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”

7. The appellant did not directly address himself to the above provisions other than stating that if orders of stay were not granted he would be evicted from the property. He did not elaborate how that eviction would impact his business. Although he fulfilled the second requirement under **Order 42 Rule 6(2)** that of filing the application for stay of execution without unreasonable delay I am of the view that in balancing the interests of the appellant and the respondent, I ought to order the appellant to provide security as a condition of stay. The respondent deponed through the replying affidavit of its director, **MINYOUNG CHOI**, dated 29th January, 2021 that the appellant owed rental arrears to the respondent Kshs.1 million. It is clear from the proceedings of the trial court and now before this Court that the appellant has persistently had rent arrears owed to the respondent. It is for the above reason that I grant the conditional stay. In doing so, I am persuaded by the decision of **KENYA COMMERCIAL BANK LTD VS. SUN CITY PRPERTIES LTD & 5 OTHERS (2012) eKLR** thus:-

DIPOSITION

8. I grant the following orders:-

(a) There shall be stay of execution of the order of 27th April, 2020 in Kiambu Chief Magistrate Court Misc. Application No. 37 of 2019 on condition that **James Mburu Njoroge t/a Jactam Agencies** does pay the respondent Kshs.1,500,000/- (one million five hundred thousand shillings) within five (5) days from this date hereof and does henceforth continue to pay the rent to the respondent as it falls due.

(b) In default of payment as set out in (a) above execution to proceed.

(c) The costs of the Notice of Motion dated 14th May, 2020 shall abide with the outcome of this appeal.

RULING DATED AND DELIVERED AT KIAMBU THIS 3RD DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Appellant: ...Mr. Thuku

For Respondent: Mr. Macharia

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE