



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC APPEAL NO. 23 OF 2021**

**ABDULAH I ISMAEL NUROW.....APPELLANT**

**VERSUS**

**STANLEY OKIOGA MICHIEKA.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellant/Applicant approached this court by way of Notice of Motion dated 12<sup>th</sup> November 2021 seeking an order of stay of execution of the ruling of the Business Rent Tribunal delivered on 2<sup>nd</sup> November 2021 pending appeal. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 12<sup>th</sup> November 2021 together with the Supplementary Affidavit sworn on the 30<sup>th</sup> November 2021.

2. In the said affidavit the Applicant gives the background of this matter which is as follows. The Applicant is a sub-tenant of the Respondent in the premises on land parcel No. Kisii Town Block 111/130. The Applicant filed suit in the Chief Magistrate's Court vide Kisii CMCC No. 59 of 2021 seeking to restrain the Respondent from levying distress against him for rent arrears. The Respondent raised a Preliminary Objection that the court had no jurisdiction. The court upheld the Preliminary Objection and stated that power to determine whether the tenancy was controlled or not lay with the Business Premises Rent Tribunal.

3. Following the dismissal of the suit in the lower court, the Applicant filed suit in the Tribunal and obtained an order for the unconditional release of his goods. The Tribunal also restrained the Respondent from interfering with the Applicant's occupation of the demised premises and directed that the Applicant continues paying rent as per the lease agreement. However, after the inter partes hearing of the application, the Tribunal held that it had no jurisdiction as the tenancy between the parties was for a period of more than five years. The Tribunal therefore dismissed the application and proceeded to vacate the orders that it had earlier issued in favour of the Applicant thus prompting the appeal herein as well as the application for stay of execution.

4. The Applicant has deponed that if a stay of execution is not granted, his appeal shall be rendered nugatory. He further depones that he is likely to be evicted from his place of business and he stands to suffer irreparable loss and damage. He adds that the application has been made without unreasonable delay.

5. The application was opposed by the Respondent who filed a Replying Affidavit sworn on the 19<sup>th</sup> November 2021. In the said affidavit, he deponed that the Applicant forcefully gained access to the demised premises after his lease had terminated. He deponed that the Applicant's case in the lower court was struck out for want of jurisdiction as he had relied on a forged lease agreement. He later moved to the Tribunal where he filed the correct lease agreement indicating that the lease agreement had ended on 31<sup>st</sup> May 2021 and therefore there was no Landlord/tenancy relationship between him and the Respondent.

6. It is the Respondent's contention that by the time the Applicant filed this application, he had already been evicted from the demised premises and there is therefore nothing to be stayed. He further argues that this application is against a negative order which is not capable of being stayed.

7. The Respondent avers that the Applicant has not demonstrated that he stands to suffer substantial loss nor has he averred in his affidavit that he is willing to provide security to safeguard the interests of the Respondent. He is of the view that if the court is inclined to grant a stay of execution then the Applicant should be ordered to deposit Kshs. 1,000,000/= as security for costs which is equivalent to the outstanding rent.

8. The court directed that the application be canvassed by way of written submissions. Both parties filed their submissions and they were given an opportunity to briefly highlight them.

9. In his submissions counsel for the Applicant emphasized that the Applicant was facing imminent eviction as both the lower court and the Tribunal had downed their tools citing lack of jurisdiction. He conceded that two lease agreements starting on 1<sup>st</sup> April 2016 were presented to the court. The first one indicates that the lease was to end on 31<sup>st</sup> May 2021 while the second one indicates that the lease was to end on 15<sup>th</sup> June 2021. It was his submission that even though he obtained interim orders of stay from the Tribunal, the Respondent did not comply with the said orders as he refused to reopen the premises and allow him to occupy the premises while paying rent as per the lease agreement. He faults the Tribunal for holding that it had no jurisdiction as this resulted in the Applicant being exposed.

10. Regarding the application for stay execution, he holds the view that the Applicant has met the conditions under Order 42 Rule 6 of the Civil Procedure Rules by demonstrating that he shall suffer substantial loss, filing the application without delay and agreeing to abide by any condition that the court may impose. He submitted that the Applicant had cleared the rent arrears that were outstanding at the time the Respondent levied distress and he was willing to continue paying the monthly rent as per the lease agreement. It was his contention that if the application was not granted, the appeal would be rendered nugatory.

11. On the other hand, counsel for the Respondent submitted that the relationship between the Applicant and the Respondent was governed by the lease agreement which ended on 31<sup>st</sup> May 2021 and the Tribunal was therefore right to down its tools as there was no Landlord/Tenant relationship between the parties. He faulted the Applicant for presenting what he termed as a forged lease agreement before the lower court. It was his further submission that even though the Applicant was in possession of the demised premises, he was not carrying on any business as the premises were locked. He refuted the assertion that the Applicant had met the conditions for stay of execution and argued that in any event the court could not stay a negative order dismissing the applicant's suit. He submitted that if the court was inclined to grant the application for stay then the Applicant should be ordered to pay security for costs in the sum of KShs. 1,000,000/= being the equivalent of the outstanding rent.

### ISSUES FOR DETERMINATION

12. Having considered the background of this case, the Notice of Motion, rival affidavits and submissions, the only issue for determination is whether execution should be stayed pending appeal.

### ANALYSIS AND DETERMINATION

13. The principles that guide the courts while considering an application for stay pending appeal are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part as follows: -

*6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub-rule (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.*

*(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

14. The first question I must answer is whether the Applicant has demonstrated that he will suffer substantial loss.

15. In the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** the court considered the question of what constitutes substantial loss. Mativo J stated as follows:-

**“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto where it was held inter alia that:-**

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**. .....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”*

**16.** In the instant case the Applicant has deponed that he stands to suffer substantial loss as he has heavily invested in his business. He also paid a deposit of Kshs. 850, 000/= as goodwill in addition to the monthly rent. This assertion has not been controverted by the Respondent. It is therefore my finding that the Applicant has demonstrated that if execution is not stayed, he will suffer substantial loss.

**17.** The second question is whether the application has been filed without unreasonable delay. The Applicant has also demonstrated that he filed his application only ten days after the ruling was delivered hence there was no delay.

**18.** The last condition is the issue of security for costs.

With regard to security for costs, counsel for the Applicant submitted that the Applicant is willing to abide by any conditions that the court may impose.

There is no doubt that if a stay is not granted, the appeal will be reduced to an academic exercise. However, I must point out that the Applicant should not cry foul as he is the one who created confusion both in the lower court and at the Tribunal by presenting two different lease agreements.

**19.** Be that as it may, I am of the view that the Applicant should not be prevented from exercising his cherished right of appeal which is guaranteed by the constitution.

**20.** In the premises, and in the interest of justice, I grant the application on condition that the Applicant furnishes security for costs by depositing the sum of Kshs. 800,000 in an interest bearing account in the joint names of the advocates for the Applicant and the Respondent on or before the 31<sup>st</sup> December 2021, failing which the order of stay shall automatically lapse. The Applicant shall also file his Record of Appeal within 30 days from the date hereof.

**DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF DECEMBER, 2021.**

**J.M ONYANGO**

**JUDGE**