



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 20 OF 2015**

**SAMUEL KURIA KAMAU.....APPELLANT/APPLICANT**

**VERSUS**

**SAMMY KANDIE.....RESPONDENT**

*(Being an Appeal from the Judgement of Hon. Mboroki, the Chairman, Business and*

*Premises Rent Tribunal in Tribunal Case No. 70 of 2012*

*delivered at Eldoret on the 8<sup>th</sup> October, 2017)*

**Coram - R. Nyakundi**

**Ms. Betty Koech Advocate for the Applicant**

**Ms. Rioba Omboto Advocate for the Respondent**

**RULING**

This is an application dated 24<sup>th</sup> September 2019 seeking that the Respondent be restrained from levying distress over rent arrears and that the court orders for rendering of accounts on the Respondents' alleged arrears. The Applicant also seeks orders that the Respondent be held in contempt of court and that the record of appeal be admitted.

The application is brought under section 1A, 1B and section 3, 3A, 63 (c) & (e) of the Civil Procedure Act and Order 51, Rule 10 of the Civil Procedure Rules.

The application is supported by an affidavit by the applicant. The Applicant also filed submissions on 3<sup>rd</sup> May 2021.

The Applicant contended that he paid the arrears in compliance with the conditional order of stay issued on 29<sup>th</sup> April 2016 pending appeal. Further, that his continued quiet occupation of the premises was disrupted by the Respondent leading to BPRT Case 81 of 2019.

He submitted that the Respondent had failed to keep the premises in a tenable state and had destroyed the repairs done by the Applicant as ordered by the tribunal.

The Applicant submitted that he had complied with conditional stay orders by paying the revised rent pending appeal and thus there is no dispute that he was upto date on the payment. Further, that the Respondent's instructions to auctioneers to levy distress for rent arrears were unfounded and unlawful.

The Applicant submitted that he had demonstrated that he complied with the court's orders by paying the revised rent effective May 2015. He prayed the orders sought be granted as prayed.

On the other hand the Respondent opposed the application and filed a replying affidavit on 30<sup>th</sup> January 2019. The Respondent also filed submissions on 27<sup>th</sup> April 2021.

He submitted that the application was res judicata as the Applicant moved the court vide an application dated 10<sup>th</sup> February 2015 seeking, in a nutshell, stay of orders by the BPRT made in cause 70 of 2012 on 23<sup>rd</sup> January 2015.

The court delivered its ruling on 29<sup>th</sup> April 2015 granting stay and ordering that the Applicant continue to pay a revised rent of kshs. 8,450/- from May 2015 until the appeal is heard. The orders sought in this application are the same as those sought in the application dated 10<sup>th</sup> February 2015. The issues were dispensed with on merit and have not been appealed or reviewed.

The Applicant failed to comply with the conditions set forward and cannot attempt to get orders again through the back door. He who comes to equity must come with clean hands.

The orders issued on 29<sup>th</sup> April 2015 were clear that the Applicant ought to pay the revised rent from May 2015. The Applicant has failed to pay arrears from 2015 to 29<sup>th</sup> April 2016. He has failed to consistently pay the revised amount of kshs. 8,450/-.

No evidence of payment has been annexed by the Applicant to confirm he has been in compliance.

The Applicant never complied with the orders and the moment he was in arrears as from May 2015, the orders he enjoyed stood dismissed.

#### **ISSUES FOR DETERMINATION: -**

1. Whether the Application is Res Judicata
2. Whether the Applicant is entitled to the orders for stay
3. Whether the Applicant is entitled to orders for rendering of the 1<sup>st</sup> Respondent's arrears
4. Whether the Applicant is entitled to orders for contempt of court
5. Whether the record of appeal should be admitted

#### **WHETHER THE APPLICATION IS RES JUDICATA: -**

The Civil Procedure Act, Section 7, states that;

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

The applicant had filed an application dated 10<sup>th</sup> February 2015 seeking stay of execution of orders of the Business Premises Tribunal in cause no. 70 of 2012 pending the hearing and determination of the appeal filed on 5<sup>th</sup> February 2015. The court granted conditional orders of stay on 29<sup>th</sup> April 2015. The orders for stay were issued on condition that the Applicant pay the revised rent of kshs. 8,450/- from May 2015 to the date the appeal is heard.

In the present application the applicant seeks to have a stay of execution on the levy for distress for rent by the respondent. The matter directly and substantially in issue in the present application is the stay of the levy for distress as a result of the applicant's failure to pay rent arrears. The same arises from the decision of the Business and Premises Rent Tribunal.

It is evident that the applicant is seeking a back door to obtain, substantially, the same orders that were granted by the court on 29<sup>th</sup> April 2015.

In the premises, the application is res judicata as far as prayer (b) is concerned.

#### **WHETHER THE APPLICANT IS ENTITLED TO THE ORDERS FOR STAY: -**

Stay is a discretionary order which requires the court, when exercising its discretion whether to grant or refuse an application for stay, to consider the special circumstances of the case and its unique requirements.

The Applicant had already sought similar stay orders which were issued on 4<sup>th</sup> August 2016. The orders for stay were issued on condition that the Applicant pay the revised rent of kshs. 8,450/- from May 2015 to the date the appeal is heard.

The Applicant annexed SKK 2, containing two cheques, as proof that he has been in compliance of the orders. The first cheque dated 10<sup>th</sup> August 2019 is for kshs. 7,450/-. From this alone it is evident that he did not comply to the orders which were clear and unambiguous. The second cheque was for payment of kshs 8,450/- on 10<sup>th</sup> September 2019. No payments were made after that despite the requirements of the order. It is trite law that he who comes to equity must come with clean hands. It would be inequitable to grant orders of stay when the Applicant has failed to comply even with orders in his favour.

**WHETHER THE APPLICANT IS ENTITLED TO ORDERS FOR RENDERING OF THE 1<sup>ST</sup> RESPONDENT'S ARREARS: -**

In *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] Eklr Justice Majanja held;

*“...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:*

*“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”*

The Applicant claimed he had paid the arrears and therefore the burden of proof is on him to prove that he did. Further, the issue of arrears was already addressed in the tribunal. The applicant cannot approach the court to obtain fresh evidence by seeking an order for the rendering of accounts.

The prayer for rendering of accounts is non-suited and cannot be granted.

**WHETHER THE APPLICANT IS ENTITLED TO ORDERS FOR CONTEMPT OF COURT: -**

The Applicant seeks orders of contempt yet he himself has not complied with the orders issued given on 19<sup>th</sup> April 2015 and issued on 4<sup>th</sup> August 2016. The Respondent cannot be held in contempt as the conditional stay orders lapsed the moment the Applicant failed to comply with the same.

The issue of admission of a record of appeal is a procedural issue therefore the prayer for admission is misplaced.

In the premises, the application fails in its entirety.

Costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY NOVEMBER, 2021.**

**R. NYAKUNDI**

**JUDGE**