



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC APPEAL NO. 44 OF 2019

TANGA AUTO LIMITED & ANOTHER.....APPLICANT

=VERSUS=

MARY NYOKABI GAKURU.....RESPONDENT

JUDGEMENT

1. The Applicants filed a Notice of Motion dated 13th June 2019 in which they seek to file appeal out of time in respect of Judgement in Business Premises Rent Tribunal case No.826 of 2012 and 827 of 2012 which was delivered on 12th April 2019. The Applicants also seek stay of execution arising from the said Judgement.
2. The Applicants are tenants of the Respondent in her premises which is along Kirinyanga Road in Nairobi. In August 2012 the Respondent issued notices pursuant to the provisions of Landlord and Tenant (*Shops, Hotels and Catering Establishments*) Act Cap 301 for increase of rent for 1st Applicant from Kshs.35,000/= to kshs.118,800/= and for the 2nd Applicant from Kshs.35,000/= to 120,510 per month with effect from 1st November 2012.
3. The Applicants were dissatisfied with the proposed increment and they filed separate references to the Tribunal in 2012. This then prompted the Tribunal to assess rent. In a judgement delivered on 12th April 2019, the Tribunal Chairman assessed rent for 1st Applicant at Kshs.86,869 with effect from 1st November 2012 and for 2nd Applicant at Kshs.81,680/= with effect from 1st November 2012. The Chairman ordered costs to be paid by the Applicants to be agreed or taxed by the Tribunal. The Chairman further directed that the Respondent do serve fresh notices to the new rent after expiry of six months from the date of Judgement.
4. The Applicants have now come to court seeking stay of execution. The Applicants contend that the delay in filing the appeal was as a result of a mistake which was committed by their former Advocates who never filed the appeal within the time prescribed. The Applicants also argue that it took time to retrieve their files from their former Advocates where the files were said to have been misplaced.
5. The Applicants also argue that they have an arguable appeal with high chances of success and that there should be a stay of execution to ensure that they do not suffer prejudice should execution be carried out.
6. The Applicants' application is opposed by the Respondent through a replying affidavit sworn on 5th July 2019. The Respondent argues that the Applicants have not explained the delay in filing the appeal and that if stay of execution is granted, it will prejudice the Respondent in that rent will continue accumulating and in case the Applicants lose the intended appeal, they will simply run away from the premises leaving behind huge arrears.
7. The Respondent also argues that the applicants have no arguable appeal and as such there is no need of granting leave to appeal out of time.
8. I have considered the Applicants' application and the opposition to the same by the Respondent. I have also considered the submissions filed by the parties. There are only two issues for determination. The first is whether the applicants have demonstrated that they should have leave to appeal out of time. The other issue is whether there should be stay of execution of the Tribunal judgement.
9. The Proviso to Section 79 G of the Civil Procedure Act states that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. In the instant case, the judgement of the Tribunal was delivered on 12th April 2019. The Appeal was expected to have been filed within 30 days from that date excluding any period which the Tribunal may, certify as having been requisite for the preparation and delivery of a copy of decree or order to the appellant.

10. This application was filed on 13th June 2019. This is a period of more than three months from the expiry of the period for appeal. The reason given is that the Applicants' previous lawyers failed to file an appeal due to an inadvertent mistake and that when the Applicants went for their files; they were told to wait as the files had been misplaced. It is not until June 2019 that the files were traced and availed to them.

11. The factors to be considered in whether to grant leave to appeal out of time or not have been stated in numerous cases and the reasons are

(i) the explanation if any for the delay;(ii) the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii) whether or not the Respondent can adequately be compensated in costs for any prejudice he may suffer as a result of a favourable exercise of the discretion in favour of the Applicant.

12. I am not convinced that the delay in filing the Appeal was as a result of an inadvertent mistake on the part of the applicants' previous lawyers. The Applicants' previous lawyers were in court during the delivery of Judgement. If a decision to appeal would have been made, then an appeal would have been filed. The other reason that files were misplaced appears to contradict the first reason. I do not think that a file can go missing in an advocate's office for months. There is no reason given why the file was misplaced for instance movement of office or such like thing. The Applicant would have even obtained an affidavit from their previous lawyers to support their claim for delay in filing the appeal.

13. I have looked at the draft memorandum of appeal as against the Judgement which is impugned. With due respect there is no single ground which raises any arguable appeal. It has been said that an arguable appeal is not one which will necessarily succeed. However in the instant case there is absolutely no ground which is arguable. For instance in ground one, the Applicants argue that the Chairman did not consider the valuation report by Interlink Real Estate Ltd. A look at the judgement shows that the Chairman considered the report by the Applicant's valuer and that of the Respondent's valuer.

14. The law is clear that where new rent is assessed, it takes effect from the effective date of the Notice. See the case of **Sadhu Vs Vagdam a Garage & another (1975) EA 31** where it was held that delay in hearing a reference is not sufficient ground for altering the effective date of the notice which should normally be the date in the notice . There is therefore no basis for any argument in ground two, three and four.

15. It is said that in considering whether to grant leave or not the court should not address the merits of the grounds of appeal as if it were hearing the appeal itself. It is however inevitable that in trying to show that the appeal is not arguable, reasons thereof have to be stated albeit not in detail.

16. It will be superfluous to deal with whether there should be stay of execution granted. This is because there are no grounds shown for grant of leave to file the appeal out of time. I therefore find that the Applicants' application lacks merit. The same is hereby dismissed with costs to the Respondent.

Dated, Signed and delivered at Nairobi on this 13th day of February 2020.

E.O.OBAGA

JUDGE

In the presence of:

Mr Kefah for Mr Kangata for Respondent

Court Assistant: Hilda

E.O. OBAGA

JUDG