



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL APPEAL NO. 16 OF 2017**

**TEBERNACLE INTERNATIONAL HOSPITAL.....APPELLANT**

**VERSUS**

**WINFRED KARIUKI.....1<sup>ST</sup> RESPONDENT**

**PURPLE ROYAL AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

Before me the applicant filed two applications one dated 1<sup>st</sup> November 2017 and the second one dated 4<sup>th</sup> June, 2018 pursuant to the provisions of order 41 part 4(1) (2) order 50 Rule (1) of the court procedure rules and Section 3A of the court procedure Act.

Both applications substantially seek the following orders:

**(1) That this honourable court do issue an order of stay of execution against the respondent, agents, servants from proclaiming levying distress, attaching and or interfering with the applicant's business pending the hearing and determination of the appeal.**

**(2) That this honourable court be pleased to issue an order of injunction restricting the 2<sup>nd</sup> respondent either by themselves, servants and or agents from attaching and or disposing of the goods proclaimed pending the hearing and determination of this application.**

The application is supported by an affidavit sworn by one Pius Opendi Ochola. The gist of the disposition in the affidavit comprise of the dispute over rent claimed by the 1<sup>st</sup> respondent.

According to the applicant he has filed an appeal arising out of the decision made by the Chairman Business Rent Tribunal which is yet to be determined by the appellate court. The following annexure being the public auction notice marked Pool and were attached as evidence in support of the motions. The respondent filed grounds of opposition dated 21<sup>st</sup> November, 2017 and 11<sup>th</sup> June, 2018. The respondents in objection to the prayers sought state that the application dated 4<sup>th</sup> June, 2018 is fatally defective and an abuse of the court process. With regard to the motion dated 21<sup>st</sup> November, 2017 the respondent contended that the application is in breach of order 42 Rule 6 of the Civil Procedure Rules.

The background of both applications is discernable from the affidavits and proceedings determined by the Business Premises Rent Tribunal in TC No. 2 of 2017. The tribunal decided the dispute on rent arrears in favour of the respondents.

Being aggrieved with the order the applicant/appellant was propelled to file an appeal. The need for the present orders is to preserve the substratum of the appeal. The respondent counsel also filed brief submissions on the matter.

The submissions by learned counsel highlighted that the applicant has not brought himself within the provisions of order 42 Rule 6 that he will suffer irreparable loss which cannot be compensated by way of damages. Learned counsel submitted that all the conditions precedent required to be satisfied before stay of execution pending appeal can be allowed have not been satisfied in this case.

In respect of the legal proposition counsel referred to the following authorities:

***Equity Bank Ltd v Taiga Adams Company Ltd, Masis Moita v Damaris Wanjiku 2016 2016 eKLR, Machira T/A Machira & Co. Advocates v East African Standard No. 2 of 2002 eKLR.***

I have considered both application, the affidavits filed in support and the replying affidavit together with grounds challenging grant of orders in both notice of motions.

### **The law and discussion**

The jurisdiction and powers of this court to consider the application and deal with the issues raised is provided for order 42 Rule 6 of the civil procedure Rules.

From the outset under Sub-Rule (1) the filing of an appeal shall not 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. The provisions went on to state that no order for stay of execution shall be made under sub rule (1) unless the court is satisfied that substantial loss may result to the applicant. Secondly, the application is made without a reasonable delay. Thirdly, that an order for grant of security as the court may for due performance of such decree.

The court has addressed the principles to be considered before granting stay of execution. In the case of *Charles N Bichage v Richard Nyagaka Tongi & 2 others eKLR*, the court held:

***“The law as regards applications for stay of execution, stay of proceedings or injunctions is well settled. The applicant who would succeed upon such an application must persuade the court on two limits, which are fits, that is appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal were it to succeed, would be rendered nugatory” – these two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”***

Order 42 rule 6 provides that the applicant demonstrates expressly that he will suffer substantial loss in the event the order for stay of execution is not granted.

In the case of *Kenya Shell Ltd v Kibiri & another civil appeal No. 97 of 1986* the court held inter alia:

***“The application for stay made before the High Court failed because the 1<sup>st</sup> conditions was not met. There was evidence of substantial loss to the applicant either in the matter of paying damages awarded which would cause difficulty to the application itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money”***

In this application it has been submitted that if execution proceeds as per the proclamation the applicant would suffer irreparable harm and or substantive loss. It is no doubt that under order 42 Rule 6 of the Civil Procedure Rules this is one of the key conditions to be fulfilled by the applicant.

On the first test there is evidence that various attempts by the respondent have been made to enforce the decree by way of attachment of goods of the applicant. The applicant in this case has deponed in his affidavit that on 4<sup>th</sup> April, 2018 the respondent through the 2<sup>nd</sup> respondent issued instructions for a notice of public caution in respect of the attached goods marked as annexure P001. Then there was a further proclamation dated 22<sup>nd</sup> May, 2018. In order to forestall any further action the application filed this notice of motion in court on 5<sup>th</sup> June, 2018.

It is trite law that stay order does not lie as a matter of course or for reasons that an aggrieved party has filed an appeal. The applicant has to show likelihood of suffering substantial loss in case stay of execution is refused. This was clearly dealt with in the cases of *James Wangalwa & another v Agness Naliaka Cheseto 2012 eKLR* where the court held thus:

***“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 Civil Procedure Rules. 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”***

This was further re-emphasized more recently in the case of *Masisi Mwita v Damaris Wanjiku Njeri 2016 eKLR* the court stated as follows:

***“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent – that I execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse – as/he is a person of no means. Here, no such allegation is established by the appellant”***

It has been demonstrated that the amount at stake and disputed totals over Kshs 581,000. There is a contention that the decision of the tribunal did resolve the claim as between the appellant and the respondent. There is need to preserve the subject matter of the appeal to await the outcome of the merits of the appeal. There is also considerable number of properties which are under threat of attachment and sale by the respondent. While the appeal is pending determination the attached property may be sold and title passed to third parties who have no connection with the instant dispute.

On my part I see serious difficulties in having the proclamation and attachment stayed on grounds that the appellant is dissatisfied with the

decision of the tribunal. The reason why this is important is this, the issue of the tenancy agreement has been decided by the tribunal and it cannot be allowed to be raised again on appeal.

It is trite an appeal has been filed before the High Court but the appellant must provide cogent evidence that he will suffer substantial loss or irreparable harm if the orders prayed for are not granted. In these circumstances I am unable to see any indicators that the appellant has a prima facie case with a probability of success.

Last there is the question of stay of execution under order 42 Rule 6. The remedy is not available to the applicant for failure to bring its application within the scope of the Civil Procedure Rules.

The requirements for stay and injunction are somewhat similar but what is notable about an application for a stay of execution is that it must be done in the context of an appeal. The court must also be satisfied that besides the applicant fulfilling the test under order 42 Rule 6 of Civil Procedure Rules the intended appeal must not be frivolous meaning that it is arguable.

In my judgement the application for an injunction or stay being equitable remedies should not be seen to defeat the ends of justice. The circumstances in which this court will exercise such discretion was stated and affirmed *in Global Tours & Travels Ltd Nairobi High Court winding up Cause No. 43 of 2000*– where the court Held:

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... The sole question in whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted, in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order”***

In light of the above, the court must look at the provisions of the law and decisions of courts in case law to make a decision as to whether he has demonstrated with sufficient evidence that an order for stay can be granted in the interest of justice. When I focus on the application and the facts in the instant case it can be described as one aimed at frustrating the pursuit of justice in enforcing the tenancy agreement to recover the money owed to the 1<sup>st</sup> respondent. In this case I consider tenancy disputes as matters of a special nature which should only find their way to the appellate court where the applicant has shown a prima facie appeal to be heard on the merits. I do concur with the submissions of counsel for the respondents that the applicant’s motion on the intended appeal is merely a delaying tactic to defeat execution of the decree issued by the tribunal. This will further place the 1<sup>st</sup> respondent out of its legitimate rental income clearly provided for in the tenancy agreement.

Having said that, I find that the applicant has failed to satisfy this court that there is substantial loss that may otherwise result. Secondly, that the appeal would be rendered nugatory if stay of execution of the tribunal order is not granted. In the event the applicant feels strongly about the issue of lodging an appeal I order that furnishing security in the quantum of the disputed debt owing and due be deposited with the Deputy Registrar of the High Court at Kajiado within 30 days from today’s date pending the hearing and determination of the intended appeal. On this basis the notice of motion is hereby dismissed with costs.

**Dated, signed and delivered in open court at Kajiado this 17<sup>th</sup> day of September, 2018.**

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**R. NYAKUNDI**

**JUDGE**

In the presence of:

Mr. Maina for the respondents

Mr. Mwenda for the applicant