



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 18 OF 2016**

**(formerly HCCA NO. 56 of 2016)**

**KOSGEY & MESESE ADVOCATES.....APPELLANT**

**VERSUS**

**THE BOARD OF TRUSTEES**

**NATIONAL SOCIAL SECURITY FUND (LANDLORD)....1<sup>ST</sup> RESPONDENT**

**REGENT AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the ruling and order of the honourable Business Premises Rent Tribunal dated 12<sup>th</sup> February 2016 The Honourable Mr. Mbichi Mboroki Chairman in BPRT Case No. 355 of 2015)***

**RULING**

1.This is the notice of motion dated 22<sup>nd</sup> February 2016 brought under order 42 rule 6 of the Civil P rocedure Rules 2010.

2. It seeks orders:-

***1.Spent.***

***2. An order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent by themselves, their servants and/or agents or anybody claiming under them from conducting distress for rent, evicting, harassing, altering the tenancy terms or in any way interfering with the applicant's quiet use, occupation and/or enjoyment of its office premises situated on the 19<sup>th</sup> floor, Hazina Towers Monrovia Street/Utalii Lane Nairobi pending the full hearing and determination of the Intended Appeal.***

***3. The costs of this application do abide the outcome of the intended appeal.***

3. The grounds are on the face of the application and are:-

***a. The applicant's reference dated 2<sup>nd</sup> June 2015 and filed before the Business Premises Rent Tribunal for was dismissed with costs to the respondent by the Honourable Mr. Mbichi Mboroki by a ruling delivered on 12<sup>th</sup> February 2016.***

***b. The applicant being aggrieved by the said decision has filed and served a memorandum of appeal.***

***c. The applicant has requested for typed copies of the proceedings and ruling and intends to file the record of appeal expeditiously as soon as the proceedings are ready.***

***d. The applicant has an arguable appeal and if an injunction or order of stay is not granted, the intended appeal would be rendered nugatory.***

4.The application is supported by the affidavit of Allan Kosgey, managing partner of the plaintiff/applicant sworn on the 22<sup>nd</sup> February 2016.

5. The application is opposed. There is a replying affidavit sworn by Arnold Muturi, property manager of the suit premises sworn on the 26<sup>th</sup> April 2016.

6. On the 27<sup>th</sup> April 2016, the court with the consent of parties directed that the application be canvassed by way of written submissions.

### **The Appellant's/Applicant's submissions**

7. From the provisions of order 42 rule 6 of the Civil Procedure rules the applicant must demonstrate that he has filed the application without unreasonable delay, that the applicant will suffer substantial loss and that there is an offer of security.

The tribunal delivered a ruling against the applicant on 12<sup>th</sup> February 2016. Consequently the applicant filed a memorandum of appeal on 19<sup>th</sup> February 2016 together with the notice of motion herein. The application has been brought without unreasonable delay. The applicant stands to suffer financial loss occasioned by the loss of its clientele as a result of a possible eviction by the respondent from its office premises. The applicant has satisfied the conditions set out in order 42 rule 6 of the Civil Procedure Rules. It has put forward the cases of **Peter Samoei vs Isaac K Ruto ELC Case No. 10 f 2012; Africa Management Communication International Limited vs Joseph Mathenge Mugo & Another Civil Case No. 242 of 2013.**

8. The applicant has an intended appeal which raises substantial issues of law and of general public importance that need to be tabled before this honourable court. The applicant is a law firm and one of reputable standing in its business hence consequently in harm's way in as far as its reputation is concerned in the event that the respondents are allowed to distress for rent against the applicant. The applicant will suffer irreparable harm not compensable in damages. Failure to grant the orders sought will result in the appeal being rendered nugatory as the respondents will be at liberty to distress for rent against the applicant thus occasioning it irreparable harm. It has also put forward the case of **National Bank of Kenya Limited & Another vs Geoffrey Wahome Muotia Civil Application No. Nairobi 283 of 2015 (UR 241 of 2015); Beatrice Mumbie Ndigwa vs David Muimi Mwinzi, Machakos High Court No. 203 of 2007.** It prays that the application be allowed.

9. I have gone through the court record. On the 26<sup>th</sup> October 2016 the respondents were granted leave to file their written submissions. It appears they did not as there are no submissions on record filed on behalf of the respondents.

10. I have considered the application, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions made on behalf of the appellant and the authorities cited.

11. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

*“No order for stay of execution shall be made under subrule (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.*

*Sub rule 6 provides that:-*

*“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”*

12. It is not in doubt that the honourable chairman of the tribunal delivered a ruling against the applicant on 12<sup>th</sup> February 2016. This application was filed on 19<sup>th</sup> February 2016 together with a memorandum of appeal. I am satisfied that this application was filed without unreasonable delay.

13. The second issue I need to consider is that of substantial loss. It is the appellant's/applicant's case that on 3<sup>rd</sup> June 2015 it obtained a temporary injunction restraining the respondent from conducting distress for rent, evicting, harassing, altering the tenancy terms or in any way interfering with the applicant's quiet use, occupation and/or enjoyment of its office premises. That the order was rendered null and void by a ruling against the applicant dated 12<sup>th</sup> February 2016. It is the applicant's submissions that it stands to suffer financial loss occasioned by the loss of its clientele base as a result of a possible eviction by the respondent from its office premises. In the case of **Peter Samoei vs Isaac K Ruto [2012] Eklr Munyao Sila J** states thus

*“It will be discerned that for an application of stay of execution pending appeal in the court of appeal, one has to first demonstrate that he has a good appeal with chances of success and secondly that the appeal may be rendered nugatory if the stay is not granted. These are not the same considerations under order 42 rule 6 which as I had set out earlier, only require that the applicant demonstrate that he has filed the application without unreasonable delay, that the applicant will suffer substantial loss, and an offer of security. Strictly, in determining an application under order 42 rule 6, one need not be satisfied that the appeal is not frivolous. My concern is that there is a danger that a wholly unmeritorious appeal may end up satisfying the provisions of order 42 rule 6 thereby causing unnecessary hardship and delay to the successful litigant. I do not see the rationale for a different test to be applied in the court of appeal and a different one to the high court or courts of the status of the high court. It*

*is my considered view that the test for stay pending appeal ought to be the same for all courts”.*

I am guided by the above authority.

14. I note that the applicant is a law firm of reputable standing. Its reputation will be injured if the respondents are allowed to conduct the distress. I find that it has demonstrated that it will suffer irreparable harm not compensable in damages.

15. I am also satisfied that the appeal will be rendered nugatory if the orders sought are not granted as the respondents will be at liberty to conduct distress for rent against the applicant. I am guided by the case of **National Bank of Kenya Ltd & Another vs Geoffrey Wahome Muotia Civil Application No. Nairobi 283 of 2015 (UR) 241/2015** where the Court of Appeal judges in their determination reiterated the decision of the court on **Ishmael Kagunyi Thande vs Housing Finance of Kenya Limited [2006] eKLR (Civil Application No. Nai 157 of 2006)** in line with the jurisdiction of the court when faced with cases under Rule 5(2) (b) that stated:-

*“The jurisdiction of the court under rule 5(2)(b) is only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory”*

16. I am satisfied that the application herein has satisfied the conditions set out under **order 42 rule 6(2) (6)** of the Civil Procedure Rules. I hereby allow the application in the following terms:-

*a. That an order of injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents by themselves, their servants and/or agents or anybody claiming under them from conduction distress for rent, evicting, harassing, altering the tenancy terms or in any way interfering with the applicant’s quiet occupation and/or enjoyment of its office premises situated on the 19<sup>th</sup> floor, Hazina towers, Monrovia street/Utalii land Nairobi pending the hearing and determination of the appeal on condition that the applicant do deposit Kshs.800,000/- being part of the service charge owing in court within ninety (90) days from the date of this ruling. In default, the order of injunction shall stand discharged.*

*b. That costs of this application do abide the outcome of the appeal.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of MAY 2020.

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Tabut for the Applicant

No appearance for the Respondents

Kajuju - Court Assistant