



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 75 OF 2019

PALAZZO RESTAURANT LIMITED.....APPELLANT

=VERSUS=

ROSCA VENTURES LIMITED.....1ST RESPONDENT

OKUKU AGENCIES AUCTIONEERS.....2ND RESPONDENT

(Being an appeal from the Judgement of the Honorable Chairman delivered on the 4th October 2019 in the Business Premises Rent Tribunal)

RULING

1. This is the Notice of Motion dated 11th October 2019 brought under Section 1A, 1B 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, order 40 (1) of the Civil Procedure Rules, 2010, and all other enabling laws).

2. It seeks orders:-

1. Spent.

2. Spent.

3. That there be a stay of execution of the judgment and orders of the Chairman of the Tribunal delivered on 4th October 2019 pending the final determination of this Appeal.

4. That the costs of this application be in the cause.

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

1. By a ruling, order or judgment delivered by the honourable chairman of the Business Premises Rent Tribunal on 4th October 2019 the applicant was ordered to pay a sum of Kshs.1,600,000/- to the Respondent.

2. The applicant being distressed by the Auctioneers on 4th October 2019 delivered the sum of Kshs.1,600,000/- by two (2) cheques number 000006 and 000007.

3. That though the auctioneers received the cheques, they continued to harass the applicant demanding spurious, unverified claims of the costs and security.

4. That the attempts by the auctioneers to demand payment of this unverified claims is a ploy to create a reason of evicting the applicant.

5. That the applicant has invest a colossal sum of money approximately Kshs.8,000,000/- and any attempt to evict the applicant will lead to serious loss.

6. That due to the continual harassment the premises have been locked and the applicant is suffering loss since some of the perishable goods are likely to go bad.

4. The application is supported by the affidavit of Jeremiah Kilonzo Wambua, a director of the appellant/applicant sworn on the 9th October

2019.

5. The application is opposed. There are grounds of opposition filed by the respondents dated 16th October 2019. There is also a replying affidavit sworn by Rosemary Mutheu Muathe the director of the 1st respondent sworn on the 29th October 2019 and that of Humphrey Okuku sworn on 31st October 2019.

6. The application proceeded by way of oral submissions.

7. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the grounds of opposition and the replying affidavits together with the annexures. I have also considered the oral submissions by counsel. The issue for determination is whether this application is merited.

8. It is the appellant's/applicant's case that he has already paid Kshs.1.6 million which was ordered by the Business Premises Rent Tribunal. That two cheques were delivered to the 1st respondent on the date of judgment.

9. The respondents on the other hand contend that the said amount has never been paid. In paragraph 19 of the affidavit of Rosemary Mutheu Muathe she depones:

“That we have never evicted the tenant as he alleges but after the distress in shame, he has abandoned the premises and never to be seen again a fact which is causing anxiety to the other premise users as the private and kitchen part of the premises is untidy and our effort to get the applicant clean the place has gotten no response”.

I find that this averment has not been challenged.

10. On the issue of payment of Kshs.1.6 Million in compliance of the order by the Business Premises Rent Tribunal, the applicant has annexed a copy of a cheque dated 4th October 2019 for Kshs.800,000 drawn in favour of Rasco Ventures Limited. The respondents have disputed that any amounts were paid. It was incumbent upon the appellant to demonstrate that it had complied with the order by the tribunal to pay Kshs. 1.6 Million. In any event the 1st respondent claim that the cheque is not drawn in the name of Rosca Ventures Limited.

11. The applicant also failed to challenge the averments of Humphrey Okuku, the Auctioneer. The appellant/applicant does not deserve the orders sought as it failed to comply with the orders of the tribunal. All in all I find that the application herein has failed to satisfy the conditions set out under order 42 rule 6 of the Civil Procedure Rules. I find no merit in this application and the same is dismissed with costs to the respondents.

It is so ordered.

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

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Appellant

Mr. Pala for the Respondents

Kajuju-Court Assistant