



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 3 OF 2016 (JR)

REPUBLIC.....APPLICANT

VERSUS

THE HONOURABLE CHAIRMAN, BUSINESS

PREMISES RENT TRIBUNAL, EMBU..... RESPONDENT

AND

THE ATTORNEY GENERAL.....1ST INTERESTED PARTIES

EVANS MATHERI.....2ND INTERESTED PARTIES

MUGO HOLDINGS LIMITED.....EX-PARTE

RULING

1. The applicant/2nd interested party in his application dated 26/9/2016 seeks for orders for stay of execution of the judgment and decree of this honourable court made on 21/9/2016. It is based on the affidavit of Evans Matheri sworn on 26/09/2016. The grounds relied on are that the court erred in its judgment by declaring that the tenancy between the parties was not controlled and as such the Business Premises Tribunal has no jurisdiction to determine any disputes arising thereof. For this reason, the applicant argues that his appeal has high chances of success.

2. The applicant is also apprehensive that the respondent is likely to execute the orders issued by the court which will result in his eviction from the premises. On the same note, the applicant's appeal is likely to be rendered nugatory. It is also argued that the applicant has been paying the rent and that he is ready and willing to continue making rent payments regularly.

3. The respondent/exparte applicant opposed the application based on the replying affidavit of Njue Mugo sworn on 3/10/2016. He states that the applicant occupies eight (8) different premises on plot No. Gaturi/Githimu/7576 situated within Embu town. The premises were leased to the applicant on a lease of six years.

4. On expiry of the lease, the respondent gave notice to renew the lease because the applicant had defaulted severally on payment of rent and was not co-operative in regard to levying of distress for rent in arrears. The tenancy lapsed on 28/2/2016 but the applicant continues in occupation of the premises and in defaulting in payment of rent. The applicant has sub-let the premises without the consent of the respondent.

5. It is further argued that the applicant has not even offered any security for the performance of the decree or order that may be ultimately be granted. Further that the applicant has failed to show that if evicted, he will suffer any loss.

6. The respondent further states that the applicant has no competent appeal and the proceedings are incapable of being executed due to the nature of the case. As such, it is argued that the application is incompetent and the orders ought not to be granted.

7. This application is brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The provisions of Order 42 require that the applicant establishes the following:-

- (i) whether there is sufficient cause to order for stay pending appeal;
- (ii) whether substantial loss may result to the applicant if the order is denied;
- (iii) whether there is security offered for the due performance of the decree.

8. The applicant argues that this court did not apply Section 2(ii) of the Land Lord and Tenant (Shops, Hotels and Catering Establishment) Act in the ruling resulting in the order complained of. If the court of appeal addresses the issue, the applicant submits that his appeal would be successful. I do agree that the issues raised, herein, and towards which the appeal is directed are not frivolous and amounts to sufficient cause.

9. On substantial loss, the applicant submits that if stay is not granted he risks to be evicted from the premises by the respondent and his business would suffer great loss.

10. As regards security, the applicant argues that his pledge to continue paying rent regularly is sufficient security for the due performance of the decree. It is his submission that he does not require to give Any further officer of security.

11. The respondent cited two decided cases which were not attached on its argument at the orders given by the court were negative and that no stay may be granted in such a matter. It was contended that the applicant was not directed to do or not to do anything and as such there is nothing to be stayed.

12. In regard to what is meant by negative orders, I rely on the case of **JOHNSON NDUYA MUTHAMA VS DIRECTOR OF PUBLIC PROSECUTIONS & 4 OTHERS [2015] eKLR, Nairobi Misc. Civil Application No. JR 424 of 2014** the court referred to negative orders as orders that result from dismissal of an application whether judicial review or otherwise.

13. In that application the court had dismissed a judicial review application and the orders given thereon were therefore negative. This distinguishes that application from the one before me in that this court allowed the application of the respondent/ex-parte applicant. The orders in that application were positive orders.

14. The respondent argued that the appeal notice is invalid because it violates the provisions of Rule 74 of the Court of Appeal Rules. The notice is addressed to the High Court of Nyeri instead of the Court of Appeal Nyeri.

15. Rule 74 provides:-

Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

16. Its not a mean mistake for the applicant to address the notice to the wrong court. However, the respondent did not raise any issues with the contents of the notice save for the addressee. Article 159 2(d) of the Constitution lays emphasis on the “content” and not the “form” by calling upon courts to disregard

technicalities. The applicant's notice is not correct but the mistake may be rectified. I find that the error is not sufficient for the court to dismiss the application as incompetent.

17. Although the orders given by this court do not direct any of the parties to do or not to do anything, there is a likelihood that the respondent may proceed to evict the applicant from the premises. It would follow that that the applicant's business would suffer substantial loss as has been shown.

18. The applicant has a right to appeal so long as his appeal is not frivolous so as to result in wasting of precious judicial time. If the orders sought are not granted and the appeal becomes successful, it may be rendered nugatory. It is therefore appropriate to allow the applicant to ventilate his appeal.

19. The most contentious issue is that of security for the ruling which was in favour of the respondent. The payment of rent for the occupied premises cannot be regarded as security for the interests of the respondent. It is an obligation for the applicant to pay rent for the premises he is using for his business.

20. The act of payment does not give the respondent any additional value and cannot be offered as security. The applicant does not deny that he requires to offer security but his offer portrays lack of seriousness and commitment to his cause.

21. The applicant has a history of defaulting in payment of rent which he has not seriously denied. The same has been documented in the numerous applications for distress of rent where the law enforcers had to be involved. If the orders for stay are to be granted, the applicant will continue occupying the respondent's premises until the appeal is heard and determined.

22. After the expiry of the lease, the parties have agreed on any rent increase due to numerous litigation by the applicant to protect himself from eviction for rent default. This scenario demands that the respondent be accorded security for the orders in his favour pending hearing and determination of this appeal.

23. In conclusion, I allow the application on the following conditions:-

- (i) That the applicant deposits Kshs.1,000,000/= in court as security within sixty (60) days.
- (ii) That he pays the monthly rent without default.
- (iii) That he clears any rent currently owing to the respondent within 30 days.
- (iv) That in default of any of the conditions, the orders for stay to be vacated forthwith.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED THIS 23RD DAY OF JANUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mrs. Kibe for Respondent/Ex-parte Applicant

Ms. Muthoni for Njenga for Applicant