



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 89 OF 2014

TITUS KIEMA.....APPELLANT

VERSUS

NORTH EASTERN WELFARE SOCIETY.....RESPONDENT

RULING

Background:

1. Way back in the year 1992 the Appellant herein sued that Respondent seeking orders for injunction against the Respondent and restraining it from levying distress, an order for set off on account monies allegedly incurred by him as well as damages for unlawful distress and eviction.
2. That matter was in court till the 11.6.2014 when the trial court determined it by a finding that the court had no jurisdiction on the matter and discharged the *ex parte* orders that had subsisted for more than 22 years. That decision did not go down well with the Appellant who then lodged this appeal together with a Notice of Motion both dated 30.6.2014. It appears the appeal has not been admitted but the bundle of the application filed has handwritten Ruling in which the trial court gave its reasons.
3. It is that application dated 30.6.2014 which is before the court for consideration. It seeks an order that pending the hearing and determination of the appeal the Appellant be granted stay of execution of the ruling dated 11.6.2014.
4. On 14/7/2014 the court directed that the application be canvassed by each party filling written submissions. The parties did comply with the directions and the Appellant and Respondent filed submissions on 8.8.2014 and 3.11.2014 respectively.

Parties submissions

5. For the Appellant it was submitted that they had met the prerequisites of grant of an order of stay pending appeal because the application was file expeditiously; that the appeal is arguable and that the appellant stands to suffer substantial loss unless the stay is granted in that he shall be evicted from the suit house which he occupies with his family. It was submitted in addition that there was always an order in the court file granted on 19.8.1992 by one J.M.Mahindu (SRM) which restrained the defendant from demolishing the suit house and an order that the appellant offsets repair costs from rent payment. Premium was placed on the fact that the appellant will be exposed to distress of when there is no arrears as the repair costs have exhausted the arrears if any.

6. On behalf of the Respondent it was submitted that for the last 24 years the appellant has paid no penny for rent; that prior to coming to court it had recognised the Respondent has his tenant and paid rent for January 1992 together with a portion of undisclosed but acknowledged arrears of rent and that the rent reserved as at 1992 in the sum of Kshs.750 has with passage of time become is too low. Premium was placed on the averment by the Appellant at paragraph 15(a) of the affidavit that only some of his children live on the premises subject of the appeal and not himself. That position has not been controverted.

Analysis and determination:

7. Whether or not a court grants to an applicant order of stay of execution pending appeal is now a well beaten path. The applicant must demonstrate that there is pending an appeal which is arguable that the application is presented without undue delay that he stands to suffer substantial loss and that he has offered security for the due performance of the decree that may ultimately be binding upon him. I may add that by dint of order 42 Rule 6(1) an applicant equally needs to show that an application has been dealt with by the court appealed from.

8. However before proceedings to the merits, there are two matters that I consider are due for consideration in advance. The issues are:

i) Does this court have the powers to consider an application for stay before the trial court considers and determines same?

ii) Is there jurisdiction to grant a stay where the order sought to be challenged on appeal is a negative one simply dismissing the suit?

9. Order 42 Rule 6(1) provides

No appeal or second appeal shall 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 but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.(emphasis added)

10. My understanding of the rule as highlighted is that an application, formal, need to be made in the first instance to the court from whose order or judgment the appeal is made before the same is made to the court to which an appeal is preferred. Infact whether or not that court grants or declines the application the court appealed to is still clothed with jurisdiction to hear and determine the application including making an order for stay. My humble view is that an applicant is obliged to first approach the trial court before going before the appellate court.

11. At page 26 of the Record of Application, I find the following words by the trial court to be of importance to me in deciding of this matter. The court said

“For the above stated reasons I allow the application dated 27/1/2014, set aside the orders of 11/5/1992 and strike out the entire case on the basis of absence of jurisdiction.”

12. I appreciate the order to be a negative one authorising no action nor placing any obligation upon the Appellant to be performed. In that event therefore one would pose the question; what execution is threatened and that need to be stayed? I have been unable to see any such threat.

13. The applicant has stated that unless stay is granted he stands to be levied distress against. My understanding is that since the court has not ordered distress to be undertaken it shall be superfluous to order stay of distress in this case. In any event, my view is that if the Applicant was to have a real and

imminent peril of distress or eviction being taken against him, stay pending appeal would not suffice but an injunction pending appeal under order 42 Rule 6(6) Civil Procedure Rules may.

14. The question of an executable order is in my view tied to the question of substantial loss. An applicant need to approach court and demonstrate in word a kin to the following:

“This is the order against me. It command me to do a,b & c within this time and if I fail to do so as I await outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been academic sojourn.”

15. This to me is the obligation on every applicant in an application for stay of execution pending appeal. I have demonstrated above that there is no order of the trial court compelling or expecting an action or obligation upon the Applicant to merit an order for stay pending appeal and I hold that the application does not lie and cannot succeed.

16. I would have stopped there but I noted that the only peril the applicant may be exposed to is to be called upon to meet payment of rent as a tenant. He resist that obligation on the basis that he has a claim for set off. To me that claim has not been proved neither has it been ascertain to be due and it remains just a claim. Infact, the suit having been struck out the claim went with it. As things stand today the applicant is a tenant of the Respondent with an obligation to pay rent and this obligation is the only and very basis of the tenancy between the parties. To me it presents no threat to warrants an order for stay pending appeal. In any event even if the appeal succeeds and the court grants him orders for set off that will be quantifiable in monetary terms and is recoverable.

17. Ultimately the application dated 30.6.2015 as drafted presented and argued lack merits and is thus dismissed with costs to be paid by the Applicant to the Respondent.

Dated, signed and delivered at Mombasa this 11th day of March 2016.

In the presence of:-

Mr.Omondi for Muthara for Appellant.

No appearance for Respondent.

P.J.O.OTIENO

JUDGE