REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 97 OF 2015

SAMUEL WAWERU NDIRANGU *trading as* ZAWEDI ENTERPRISES…….....APPELLANT

VERSUS

PATRICK NDING'ORI MURITHI……..…….…….…..…..…….RESPONDENT

(Being an application for stay of the decree and order of T. Cherere, Chief

Magistrate in Eldoret CMCC No. 541 of 2015 delivered on 31st August 2015)

RULING

1. The appellant is aggrieved by the ruling of the lower court delivered on 31st August 2015. The dispute in the lower court was over the lease for premises known as Eldoret Municipality Block 15 (Huruma) 43. The respondent had leased the premises from the appellant in which he operated a liquor business styled Oxygen Bar (hereafter *the suit premises*). The respondent claimed that he was unlawfully evicted from the suit premises under the guise of distress for rent. He filed a suit for recovery of the premises.

2. The impugned ruling required the appellant to open the premises to the respondent. In default, the respondent was at liberty to break into the premises. There were three further orders: that the appellant be restrained from leasing or parting with possession; an injunction restraining the appellant from interfering with the respondent's quiet possession of the premises; and, that the respondent do return some attached goods and render a just and true account.

3. The appellant filed a memorandum of appeal on 1st September 2015. Pending the hearing of the appeal, the appellant has presented a notice of motion dated 5th October 2015 praying for stay of execution of the orders of the lower court. It is expressed to be brought under sections 1A, 3, 3A and 63 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules 2010.

4. The appellant avers that his appeal has high chances of success; that the appeal will be rendered nugatory; and, that he stands to suffer substantial loss. He avers that the lower court declined to stay its ruling necessitating the present motion. He claims that the respondent is in arrears of rent of Kshs 90,000; and, that he owes the auctioneers Kshs 177,000 as detailed in annextures *SWN 7* and *8* of the affidavit of sworn on 5th October 2015. The appellant avers that he is servicing a mortgage with Kenya Commercial Bank. He states that the respondent on the other hand stands to suffer no prejudice if the order is granted. There are also filed further affidavits sworn by the appellant on 27th October 2015 and 16th November 2015. I will deal with them shortly.

5. The motion is contested. The respondent filed a replying affidavit on 14th October 2015 and a further

affidavit sworn on 16th November 2015. He contends that the appeal is hopeless; and, that the present motion is an abuse of court process. He avers that the appellant has made material non-disclosure. This is because he evicted the respondent under the guise of distressing for non-existent rent. He refers for example to a letter dated 24th July 2015 from the appellant stating that the respondent had cleared the rent; and, should collect his goods from Igare Auctioneers. He states the alleged new tenant is fictional. The respondent denies owing any rent or dealing with the landlord's agent, Majuwa Agencies. He contends that he used a substantial sum to put up the suit premises. The respondent avers that no security for due performance of the decree has been offered. Lastly, he contends that his business has been disrupted; and, that granting a stay would validate the illegal conduct of the appellant.

6. The appellant has replied to the respondent by further affidavits sworn on 27th October 2015 and 16th November 2015. It is deposed that one George Muiruri Kamau has taken over the suit premises. It is averred that the new lease was executed before an advocate, Charles Okara. The latter has also filed an affidavit sworn on 27th October 2015 to confirm that an advocate in his firm attested to the lease.

7. The appellant contends that the lower court fell into error by ordering reinstatement of the original tenant (the respondent). The new tenant has also filed two affidavits dated 28th October 2015 and 16th November 2015. In a nutshell, he confirms that he is *in situ*. The appellant's case is that the lower court lacked jurisdiction to deal with the dispute. The appellant reiterates the respondent was in arrears of rent which entitled the landlord to execute. At paragraph 23, he avers that he *"do[es] not need to offer security but in the event the same is required [he] will provide the same"*. Lastly, the appellant states that he *"is not in a position to return the goods to the respondent and the auctioneers who levied distress were not parties to the suit"*.

8. In the affidavit of 16th November 2015, the appellant states he has received unspecified threats from the respondent. He also states that the new tenant has paid rents for July to November 2015; and, obtained local licences to trade from the suit premises.

9. On 15th March 2016, learned counsels made oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, and the numerous depositions.

10. Although a tome of materials have been placed before the court, the only live issue is whether the appellant is deserving of a stay of execution pending appeal. From the plentiful contested affidavits, the parties are trying to regurgitate the arguments before the lower court; or, to ventilate some grounds in the main appeal. I refuse to be drawn into the merits of the appeal at this stage. That will be the true province of the appellate court.

11. Section 63 of the Civil Procedure Code gives the court wide discretion to grant interlocutory orders to prevent the ends of justice from being defeated. By dint of Order 42 of the Civil Procedure Rules 2010, the court also has power to grant a stay of execution pending appeal. Order 42 Rule 6 provides-

> *"6.(1) 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.*
>
> *(2) 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."

12. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, the learned Judge, Madan JA (as he then was), quoted with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459-

> *"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory"*

13. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

> *"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"*

14. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General v Emerson and others* 24 QBD [1889] 56 at page 59. Those general principles were restated in *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.

15. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

16. The present motion was only presented to court on 5th October 2015. The impugned ruling was delivered on 31st August 2015. Although there was a delay of a month and some days, I have considered that the appellant had presented a similar motion to the subordinate court dated 2nd September 2015. That application was dismissed on 5th October 2015. I thus find the present motion was brought without delay.

17. The key question is whether the appellant has demonstrated substantial loss; or, whether the intended appeal will be rendered nugatory. The impugned orders required the appellant to open the premises to the respondent. In default, the respondent was at liberty to break into the premises. There were three further orders: that the appellant be restrained from leasing or parting with possession; an injunction restraining the appellant from interfering with the respondent's quiet possession of the premises; and, that the respondent do return some attached goods and render a just and true account.

18. One of the grounds of appeal is that the lower court lacked *jurisdiction* to hear a dispute between a landlord and tenant. I accept that that ground is *arguable*. The question is whether the appeal will be rendered nugatory or whether the appellant has demonstrated substantial loss. I am not persuaded that execution of any of the orders of the lower court will lead to substantial loss. In the same breath, it would be a misnomer to say that the appeal will be rendered nugatory. If it turns out that the respondent is not entitled to the premises, the appellant can still be compensated in *damages*.

19. I am alive that the appellant has taken out a mortgage facility. Doubt is removed completely by the letter of offer dated 22nd December 2014 from Kenya Commercial Bank (exhibit *SWN9*) and the mortgage statement (exhibit *SWN10*). But quite frankly, the respondent has nothing to do with the mortgage. It is the appellant who evicted him precipitating the suit. In a sense, the appellant shot himself in the foot. I am also alive that it remains contested whether there were rent arrears; the amount of such arrears; or, whether the appellant was entitled to distress for rent. But from the materials before me, there was *no* order to *evict* the tenant; and, it would *seem* that the distress for rent was a stratagem contrived to

dislodge the tenant from the premises.

20. The appellant claims there is a new tenant in the premises. The respondent states that the alleged tenant is invented. The lease agreement annexed (exhibit *SWN2*) is challenged by the respondent. But from the affidavit of Charles Kinara sworn on 27th October 2015; and, the two further affidavits of George Muiruri Kamau sworn on 28th October 2015 and 16th November 2015, I am prepared to accept that George Muiruri is in occupation and trading as Pacis Bar. The problem of his lease is two-fold. First, the lease was made on 14th July 2015 during the *pendency* of the litigation in the subordinate court; and, secondly, the process employed to remove the respondent and to install the new tenant was tainted with *procedural impropriety*. I have stated there was no *eviction* order; that the rent arrears were in dispute; and, the distress for rent became an avenue to eject the respondent. I say that very *carefully* and without making a final *finding* as the appeal is pending. If the process of eviction was unlawful, it follows as a corollary that George Muiruri should *not* benefit from the illegality. Fundamentally, I am not satisfied that the appellant has come to court with clean hands.

21. The appellant has not offered any security for due performance of the decree. He says he does not need to provide such security. He has thus made a very reluctant and vague offer. At paragraph 23 of the supporting affidavit sworn on 5th October 2015, he deposes that *"I do not need to offer security but in the event the same is required I will provide the same"*. Order 42 Rule 6(2)(b) provides that no order for stay of execution shall be made unless 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. In the absence of an offer, the motion for stay is on a legal quicksand.

22. For all those reasons, the notice of motion dated 5th October 2015 is devoid of merit. It is hereby dismissed. Costs shall abide the main appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 12th day of April 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Okara for the appellant instructed by Mburu Okara & Company Advocates.

No appearance by counsel for the respondent.

Mr. J. Kemboi, Court clerk.