



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.152 OF 2015

JOHN CHORE.....APPELLANT

VERSUS

NYANSERA JAMES MOMANYI.....RESPONDENT

RULING

Introduction

1. By an application dated 13th August, 2015, brought by way of Notice of Motion pursuant to **Sections 3, 3A, 63(e) of the Civil Procedure Act, Order 19 Rule 2, Order 42 Rule 6 (1) (2) (a), (3), (5) and 6** of the Civil Procedure Rules the applicant/Appellant seeks the following orders:
 1. “Spent
 2. **That pending the hearing and final determination of the appeal, the honorable court be pleased to grant stay of execution and or further execution of the Kisii CM’ court order dated 31st July 2015 partially effected at 6 p.m. on 11.8.2015 and allow order the respondent and his agents moco auctioneers to return all the goods they unlawfully took away.**
 3. **That pending the hearing and final determination of this appeal, the honorable court be pleased to order MOCO Auctioneers to deposit in court all Kshs. 170,000 they fraudulently received from the appellant on 11/8/2015 by pretending that they had been authorized to attach the appellant’s and the other sub tenants’ goods without decree or lawful order and further be ordered together with the respondent to deposit in court the sum of Kshs. 3 million security to cater for the goods stolen, damaged and or taken away by the illegal auctioneers who were not authorized by any court to evict, loot, steal.**
 4. **That MOCO Auctioneers and Nyansera James Momanyi, Paul Nyansera Momanyi, Jackson Nyansera Momanyi, Emily Wandia Miuru and be Mogaka & Co advocates, Nairobi be summoned by the court to appear before the honorable court and cross-examined on their role in the illegal eviction of the appellant and if found wanting recommended prosecution and withdrawal of license to MOCO Auctioneers who is acting contrary to the Auctioneers act.**
 5. **That the respondent Nyasera James Momanyi be summoned to appear before the honorable judge and be cross examined on the authority of the lease agreement dated 30/12/2012 ending on 31/12/2014 and if found wanting, be recommended for criminal prosecution on forgery and uttering false documents.**
 6. **That the process server one Emily Wandia Muiru be summoned to appear before the honorable judge for cross examination on the role and service on the appellant and the advocate Mogaka & Co. Advocates of P. O. Box 300241 NAIROBI who allegedly signed the lease agreement by a dead person be summoned to appear before the Hon.**

Judge to be cross examined on the authenticity of the lease agreement dated 30/12/2012 by someone who is already deceased and which is basis of the illegal orders and illegal actions.

- 7. That pending the hearing and final determination of the appeal, the honorable court be pleased to grant a temporary injunction against the respondent by himself, his agents, servants and or assigns from entering, or re-entering, closing, or denying the appellant or his sub tenants access to their business rooms and or interfere with the appellant's, his agents, assigns and workers quiet enjoyment of their premises and businesses.**
 - 8. That the OCS Kisii Police Station be commanded to ensure safe entry of the appellant and his agents into the premises otherwise known as KISII MUNICIPALITY BLOCK III/99 as occupied by the appellant and his agents before the illegal attachment.**
 - 9. That costs of the application be paid for by the respondent.**
2. The application is premised on the grounds that the appellant/Applicant was not served with a notice to terminate the tenancy or alter terms of the tenancy by the landlord and that a copy of the notice to terminate the tenancy was illegal, unlawful and unenforceable. The applicant states that the lease agreement that the respondent filed in court was illegal and the certificate of death of **Stephen Nyansera Omwoma** filed in court was a forgery. The applicant further states that the auctioneers who evicted him acted illegally and fraudulently took away his shop goods worth millions of shillings apart from receiving Kshs. 170,000/= by false pretence and issuing a receipt for Kshs. 70,000/= only. The applicant states that he had no rent arrears and that the letter that precipitated his eviction was improperly used. The applicant's case is that the proceedings before the Business Premises Rent Tribunal were flawed and therefore it was only fair and just for an order of stay of execution to be granted together with an order of injunction to restrain the respondent and his agents from carrying out illegal activities. The appellant also seeks an order to allow him go back to the business premises, to wit, shop so that he can begin trading as before.
 3. The application is supported by the applicant's affidavit sworn on 13th August, 2015 in which he has expounded on the grounds stated in the application and attached receipts to prove that he had paid rent in full and was not in any arrears. The applicant states that there was no decree or any proceedings at the Business Premises Rent Tribunal and therefore the whole process was flawed from the start.
 4. The applicant contends that the goods taken away from his shop were worth over Kshs. 1,000,000/= but that some goods were left in the shop whereupon he locked the shop with the goods inside in order to protect them and to stay further execution pending the outcome of the appeal.
 5. The applicant further deposed that the notice to terminate his tenancy was illegal, unlawful, and unenforceable in law. He has further deposed that the lease agreement filed in court was a forgery as it was purportedly signed by a landlord who was long deceased at the time it is alleged to have been executed.
 6. The applicant further took issue with the manner in which M/s MOCO Auctioneers conducted the execution and eviction which he stated was fraudulent and illegal.
 7. The applicant also complained that the trial magistrate colluded with the respondent and inefficiently handled the case without due regard to the law. The applicant stated that he has given notice to the Attorney General of his intention to institute legal proceedings against him in regard to the conduct of a particular magistrate.
 8. The applicant's application was also supported by the affidavits of persons who are not parties to this suit namely: **HESBON MOMANYI MEKENYE, PETER MWENDA KAMAU, MARGARET WANGECHI** and **FLORIDA NGENO**.

Respondent's case

9. In opposition to the application, the Respondent filed a replying affidavit dated 18th August, 2015 in which he stated that he had grant of letters of administration in respect to the estate of his father one **STEPHEN NYANSERA MWOMA** (deceased) who had entered into a tenancy agreement with the applicant on 30th December, 2011 which tenancy was to be terminated on 31st December, 2014 and that one of the conditions of the said tenancy agreement was that the tenant would not sublet the demised premises.
10. The Respondent depones that the suit premises have already been leased out to a different person by the name Geoffrey Marube and as such the orders sought by the applicant that he be allowed to go back to the premises have been overtaken by events. He depones that the application offends the provisions of the law under which it has been made and ought to be dismissed with costs.
11. The Respondent states that he had lawful orders, from the subordinate court, to evict the applicant from the suit premises which eviction had already been executed.
12. The respondent depones that the applicant should direct his complaints against the auctioneers who conducted the eviction to the right forum and not in this application where he seeks orders for stay of execution. He states that the affidavits of persons who are not parties to this suit should be struck off.
13. When this application came up for hearing on 11th November, 2015, parties agreed to canvass their arguments by way of written submissions. I have perused the submissions filed by the parties and noted that the arguments raised therein are a replica of what they had already stated in their respective affidavits to the application.

Analysis and Determination:

14. The instant application is primarily one seeking for orders of stay of execution pending appeal under **order 42 Rule 6 (1) (2) (a) (3) (5) and (6) of the Civil Procedure Rules. Order 42 Rule 6 (2)** provides as follows:

“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.**

15. In the instant case, I find that the judgment/decision appealed from was entered on 31st July, 2015 and the instant application filed on 14th August, 2015. Clearly therefore, this application was filed without unreasonable delay within the meaning of **Order 42 Rule 6 (1)**.
16. I am however not satisfied that the applicant has demonstrated, in his application, that he will suffer substantial loss unless the orders sought are granted. All that the appellant/applicant has done in his application is to attack the procedure adopted by the landlord when issuing him notice to terminate his tenancy and thereafter the action taken by the auctioneers in executing the lower court's decision.
17. It is my finding that the mere fact that the applicant may be having a formidable appeal against the respondent with high chances of success is not a sufficient ground for granting him orders for stay of execution pending the said appeal.

Order 42 Rule 6 (2) of the Civil Procedure Rules is couched in mandatory terms and

therefore failure by the applicant to demonstrate that he would suffer substantial loss if the orders sought are not granted disqualifies him from obtaining the orders of stay of execution. Under **Order 42 Rule 6 (2)**, the applicant must also show that he is willing to offer such security as may be ordered by the court.

18. Having perused the motion, the supporting affidavit and the applicant's written submissions, it is clear to me that the applicant has not demonstrated that he will suffer substantial loss or his appeal will be rendered nugatory if the stay of execution orders sought is not granted.

An arguable appeal alone does not of itself unlock this court's discretion to grant a stay. An applicant is under an obligation to establish that his appeal will be rendered nugatory if stay is not granted. (*See Githunguri vs Jimba Credit Corp Ltd and Another. [198] KLR 388*).

19. The stay of execution jurisdiction of the court is meant to avoid a scenario where a successful appeal is rendered an academic exercise because the loss or prejudice sought to be cured by the appeal had come to pass or better still, the orders sought on appeal have been overtaken by the execution of the decree.

20. A perusal of the applicant's affidavit in support of the application and the respondent's replying affidavit reveals that the execution that the applicant seeks to stay may have already taken place and therefore it is apparent to me that there would really be no action pending that can be stayed through this application.

21. The applicant states as follows at paragraphs 6 and 7 of his affidavit in support of the application:

"6. That after receiving the money the auctioneers went ahead descended on my dukas and took away goods worth over Kshs. 1,000,000 and left behind other properties in the duka.

7. That I then locked the dukas with other properties inside and I need the protection of this court to stay further execution of the eviction pending the hearing and determination of the appeal I have lodged in this court."

22. The respondent, on the other hand, states as follows in his replying affidavit at paragraph 7:

"That orders were obtained from the subordinate court and the tenant was evicted from the said premises known as KISII MUNICIPALITY BLOCK III/99 lawfully."

23. At paragraphs 22 and 23 of the replying affidavit, the respondent states that the premises, the subject matter of the application have already been leased out to a new tenant.

24. From the above foregoing contents of affidavits, it is clear to me that what the applicant seeks to stay through this instant application has already happened. In the circumstances, I find that making an order of stay of execution would not be tenable.

25. I also find that the applicant's other prayers against M/s MOCO Auctioneers for their role in the alleged illegal eviction/execution are equally not tenable since the said MOCO Auctioneers are not parties to this suit and moreover, if indeed they acted arbitrarily and illegally, then the applicant would be entitled to take up proceedings against them in a different forum.

26. I similarly find that the issues of the authority of the lease agreement dated 30th December, 2012 are issues to be determined during the hearing of the appeal or in a separate suit, but not within this application for stay of execution pending appeal.

27. In a nutshell I find and hold that the applicant's application herein lacks merit and the same is hereby dismissed. The costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered this 6th day of June at Kisii.

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Sagwe for the Appellant
- Mr. Nyagwencha for the Respondent
- Omwoyo Court clerk