



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO 552 OF 2013**

**DAVE KIPKORIR LANGAT.....APPELLANT**

**V E R S U S**

**CHRISTOPHER NDIMBEI.....DEFENDANT**

**R U L I N G**

1. In this application (**notice of motion dated 31<sup>st</sup> October 2013**) the Appellant seeks the main order that pending hearing and determination of the appeal herein there be stay of execution of orders of the **Rent Restriction Tribunal** (the **Tribunal**) made on 3<sup>rd</sup> September 2013. The appeal is against those orders by which the Appellant's (tenant's) application before the Tribunal was dismissed and the Respondent (landlord) permitted to levy distress for rent against the Appellant. That application by the Appellant was for an order to review and set aside an earlier order of the Tribunal made on 30<sup>th</sup> May 2013. The order was -

**“The tenant is granted the last chance to pay the outstanding rent of KShs 52,000/00 by 1<sup>st</sup> June 2013 through the firm of Musyoka Kimeu & Co Advocates (who) shall issue receipts. He is to pay the rent for June on or before 10<sup>th</sup> June 2013.**

**In default the landlord to have leave to levy distress in order to recover the outstanding arrears.”**

2. The Appellant's case before the Tribunal was that the Respondent had agreed that the Appellant do carry out repairs to the premises and recover the same from future rents; that indeed he carried out repairs for KShs 167,000/00; and that therefore he had not refused to pay rent and was only off-setting the said sum of KShs 167,000/00 from the rents due.

3. The Respondent's case on the other hand was that he had agreed for the Appellant to spend only KShs 20,000/00 to paint the premises; that the Appellant exceeded that amount in unauthorised repairs; and that in any event the Appellant had disobeyed an express order of the Tribunal to pay the outstanding arrears of rent, or even deposit the same in court.

4. The grounds for the application appearing on the face thereof include –

(i) That on the face of it the Appellant has an arguable appeal which may be rendered nugatory unless stay of execution is granted.

(ii) That the Tribunal ruled on matters that were never canvassed before it.

(iii) That any levy of distress against the Appellant will lead to the Appellant losing his household goods as well as the funds he spent on repairs to the premises, in which case the Appellant will have suffered “irreparable loss”.

(iv) That “overall” the Appellant stands to suffer substantial loss unless the stay sought is granted.

(v) That it is just, expeditious and proportionate that the application be granted.

5. The Respondent opposed the application by his replying affidavit sworn on 26<sup>th</sup> and filed on 27<sup>th</sup> November 2013. Grounds of opposition emerging therefrom include –

(i) That the Appellant has been abusing the court process to evade his primary obligation to pay rent.

(ii) That the Appellant has been in disobedience of the orders of the Tribunal of 28<sup>th</sup> March 2013 to deposit the rents with it, and subsequent orders made on 30<sup>th</sup> May 2013 to pay arrears of rent.

(iii) That the Appellant has not demonstrated that he stands to suffer substantial loss.

6. In response to the replying affidavit the Appellant filed a supplementary affidavit on 11<sup>th</sup> December 2013. The same raised no new issues.

7. I have considered the submissions of the learned counsels appearing. I have also perused the court record.

8. Under **Order 42, rule 6(2)** of the **Civil Procedure Rules (the Rules)** no order for stay of execution shall be made under sub-rule (1) (under which the Appellant’s application is made) unless –

(a) the application for stay has been made without unreasonable delay;

(b) the court is satisfied that substantial loss may result to the applicant unless the order for stay is made; and

(c) the applicant gives such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him.

9. Regarding unreasonable delay, the issue did not arise and was never canvassed. I find that in the circumstances of this case there was no unreasonable delay in applying.

10. What substantial loss would the Appellant suffer by paying the rents? Should there be a finding eventually that he was entitled to off-set the funds he claims to have expended with the Respondent’s consent on repairs against future rents, appropriate orders can be made for recovery of such funds. I do not find that the Appellant will suffer substantial loss unless the order sought is granted.

11. What is more, on 28<sup>th</sup> march 2013 the Tribunal ordered that the Appellant deposit with the Tribunal the disputed rent. He made no deposit. On 30<sup>th</sup> May 2013 the Tribunal ordered that the Appellant do pay outstanding arrears of rent of KShs 52,000/00 by 1<sup>st</sup> June 2013, and the rent for June 2013 on or before 10<sup>th</sup> June 2013. He did not.

12. On 17<sup>th</sup> December 2013 this court (Onyancha, J) directed that the Appellant shall deposit in

court all outstanding rents up to and inclusive of December 2013 within 30 days of that date, and in default the Respondent to be at liberty to levy distress. By 22<sup>nd</sup> January 2014 the Appellant had not deposited a single cent in court.

13. I note that no reasons were preferred either before the Tribunal or before this court why the orders for deposit/payment of the arrears of rent were not complied with.

14. Stay of execution is a discretionary relief. The court will be loath to exercise its discretion in favour of a litigant who does not appear to have any respect for court orders.

15. I will in the event refuse the application. It is dismissed with costs to the Respondent. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JANUARY, 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 7<sup>TH</sup> DAY OF FEBRUARY 2014.**