



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.76 OF 2012

JANE WATIRI THUOAPPELLANT/APPLICANT

VERSUS

NAZIR SHAH MOHAMMED RESPONDENT

RULING

The application dated 11th April 2012 is a Notice of Motion made pursuant to **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** and **Section 10 of the Judicature Act Cap 8 and Rule 3 (ii) of the High Court Practice and Procedure Rules**. The application seeks that pending the hearing and determination of the Appeal, orders of stay of execution do issue in relation to the ruling which was delivered on 3rd April 2012.

It also prays for costs of the application.

The application is premised on grounds that the applicant had sought orders of injunction before the lower court in Nakuru CMCC No.268 of 2012, but the prayer was dismissed with costs to the respondent. Being dissatisfied with the ruling, the appellant preferred an appeal to the High Court and on 3rd April 2012, made an oral application for stay of execution. This was declined; and it is the applicant's contention that the ruling was arbitrary and capricious taking into account that the respondent still retains the full tenancy deposited on account of the subject matter of the suit while the appellant remains disposed of the suit.

The respondent intends to transfer possession of shops No.2 and 3 (Ground Floor) measuring 3.5 meters each comprised in **Nakuru Municipality Block 5/293** situated along Zum Zum Building, (Pandit Nehru Road) and there is imminent danger of the plaintiff/appellant being dispossessed of the suit premises which is her lawful agreement between herself and the respondent. She fears that she will suffer injustice if the orders sought are not granted.

In the supporting affidavit sworn by **JANE WATIRI THUO**, she deposes that stay of execution would have preserved the status quo while she pursued the pending appeal, and without such orders then the appeal shall be rendered nugatory.

It is applicant's belief that the respondent intends to apply and proceed to execute the order emanating from the ruling delivered on 3rd April 2012. The application emanated from a Tenancy agreement between herself and the respondent and she had paid a total of Kshs.750,000/= through a loan facility. The respondent holds the money (which she has to service with interest), while at the same time he denies her possession of the premises (which would have given her the means to service the loan). The respondent was supposed to complete construction within three months and give applicant possession of

the premises by 19/07/2010. Instead he has entered into another tenancy agreement with a Third Party without notice to her as envisaged under Clause 6 of the agreement or rescinding the contract and reimbursing her the full deposit.

Eventually she instructed her advocate to send a demand note to the respondent, that he honours his part of the agreement. The respondent acknowledged breach of the contract and sought indulgence so as to perform his part – this is contained in a letter dated 2nd March 2012. She is willing to abide by any terms the court may impose for the due performance of the order and says the respondent will not suffer any prejudice.

In a replying affidavit sworn by the respondent, the application is opposed on grounds that it is mischievous, frivolous and vexatious. This is because the order sought to be stayed is a dismissal and cannot be stayed. Further that the trial magistrate's refusal to grant stay was based on the law, and the applicant has failed to disclose to the court that she never honoured her part of the bargain, because the payments were not made within the time that had been set in the agreement, thus frustrating the contract.

Due to this breach, he sought more serious tenants so as to find financial resources to enable her complete construction.

The applicant in a supporting affidavit contends that failure to disclose late payment on her part is not fatal because the essence of time on her part was not expressed in the agreement, and in any event, the respondent acquiesced to it. She insists that she had taken possession of the premises and the new found tenant does not have rights superior to hers.

The applicant maintains that she paid the entire outstanding balance and the respondent breached their agreement by entering into another tenancy agreement. This prompted her to file **Nakuru CMCC No.268 of 2012**, and she simultaneously filed an application for interim injunctive orders pending the hearing and determination of the suit. This is the application which was heard and dismissed on 3rd April, 2012. The lower court also declined to grant stay of its ruling.

The applicant's counsel submitted that the subject property is about to be transferred to a 3rd party – which will result in the applicant being disposed of the property yet she is the lawful tenant. Basically the applicant and respondent's counsel reiterates the contents of their respective clients.

The grant of stay of execution pending appeal before the High Court is governed by **Order 42 Rule 6** of the **Civil Procedure Rules**. The applicant is required to demonstrate that:

- a. Substantial loss may result unless the order is made.
- b. The application has been made without unreasonable delay.
- c. Such security as the court orders for the due performance of the decree, has been given before the applicant.

Although what was sought in the application was stay of the ruling of 3rd April 2012, what has been argued by the application is for this court to grant restraining orders against the respondent. Of course the order that dismissed the application had not only previously preserved the status of the property pending interpartes hearing. This would mean that even if those orders were stayed, there would be nothing to take care of the applicant's concern. My understanding is that if there were any temporary restraining order (which hasn't been stated) then that existed, and lapsed upon the hearing and determination of the application. Therefore stay orders would serve no useful purpose.

Even if for the sake of indulging the applicant's counsel due to the arguments so laboriously presented to this court, then the issue to address is whether the applicant has demonstrated that she will suffer substantial loss if the orders are not granted. If I were to delve into this then I will in effect have heard and determined the appeal prematurely

The upshot is that the application has no merit and is dismissed with costs to the respondent.

Delivered and dated this 26th day of April, 2013 at Nakuru.

H.A. OMONDI

JUDGE