



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 122 OF 2012

COAST BRAKES & CLUTCH LTD PLAINTIFF

V E R S U S

1. MUSLIM ASSOCIATION MOMBASA 1ST DEFENDANT

2. MURPHY MERCHANTS 2ND DEFENDANT

RULING

BACKGROUND

1. Plaintiff filed this case alleging that it is a protected tenant within the meaning of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301.
2. According to the Plaintiff the Defendant, contrary to provisions of Cap 301 and to the Plaintiff's detriment sought to increase Plaintiff's rent. The Plaintiff disputed the said increase and filed before the Business Premises Rent Tribunal (BPRT) an application for leave to file a reference out of time. At the time of filing this suit that application was pending before Court.
3. Simultaneously with the plaint in this action the Plaintiff filed a Notice of Motion dated 22nd June 2012 seeking interlocutory injunction to restrain the Defendant from unlawfully terminating the tenancy or evicting the Plaintiff.
4. That application was dismissed on 8th November 2012. Plaintiff filed a Notice of Appeal on 13th November 2012 against that dismissal.

PLAINTIFF APPLICATION

5. Plaintiff has now filed a Notice of Motion dated 21st November 2012 seeking stay of execution pending hearing and determination of that appeal.

ANALYSIS

6. I have considered the Plaintiff's and the Defendant's submissions. Their submissions centered on the provisions of Order 42 Rule 6(2). The provisions of that Rule were discussed in the case **PETER ONDANDE T/A SPREAWETT CHEMIS -Vs- JOSEPHINE WANGARI KARANJA (2006)eKLR-**

“The issue for determination by this Court is whether the Applicant has established a case to enable this Court grant him the order of stay of execution sought. For this Court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

7. I however find that the Court in considering an application for stay pending appeal ought to in the first instance consider whether there is sufficient cause to order stay and if there is then the Court should proceed to consider whether the applicant has met the conditions set out in Order 42 Rule 6(2). The requirement of considering whether there is sufficient cause is set out in Rule 6(1) of that Order. That Rule provides-

“6.(1) No appeal or second appeal shall operate as a stay of 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.”

(underlining mine)

8. The Plaintiff filed this suit seeking an injunction on the ground that it had filed an application before the BPRT seeking leave to file a reference out of time. It is also on that basis it sought the interlocutory injunction which was dismissed on 21st November 2012. The appeal to the Court of Appeal against that dismissal of injunction was also premised on the ground that the Plaintiff has pending before the BPRT an application for leave to file a reference challenging the increase of rent.
9. The Defendant annexed to its Replying Affidavit an order of the BPRT in **Tribunal Case No. 145 of 2012 Mombasa** which was issued on 7th December 2012, by that order the Plaintiff’s application for leave to file a reference out of time was denied. There is nothing before Court to show that the Plaintiff has filed an appeal against that denial.

10. In my view without Plaintiff having the right to file a reference before

the Business Premises Rent Tribunal the very substratum of this action is gone. And it then follows that the Plaintiff has not shown sufficient cause for the granting of stay pending appeal.

11. It is for the above reasons that the Plaintiff’s Notice of Motion dated

21st November 2012 is hereby dismissed with costs to the Defendant.

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE