



REPUBLIC OF KENYA
IN THE HIGH COURT AT KENYA
AT NAIROBI
MISC. CIVIL APPLICATION NO. 730 OF 2013
BONIFACE KIVINDYO MWANGANGIAPPLICANT
VERSUS
GRACE NYAMBURA KIVINDYO.....1ST RESPONDENT
STEPHEN KIVINDYO.....2ND RESPONDENT

RULING

1. The plaintiff/ applicant hereinafter referred to as the applicant has filed the Notice of Motion dated 11th July 2013. The motion is brought under Order 42 rule 6 of the Civil Procedure Rules 2010.
2. The applicant seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That the Respondent, her agents and /or servants be restrained from levying distress or interfering with the applicant's business known as Ukwala Tyres in L. R. No. 209/ 233/6 Nairobi pending the inter-partes hearing and determination of this application.
 - d. That the Respondent, her agents and /or servants be restrained from levying distress or interfering with the applicant's business known as Ukwala Tyres in L. R. No. 209/ 233/6 Nairobi pending the hearing and determination of the applicant's civil appeal.
 - e. That costs of the application be provided for.
3. The application is premised on 9 grounds stated on the face of the application and the applicant's supporting affidavit dated the 11th July 2013. The applicant depones as follows; that he rented a business premises from the 2nd respondent on the 1st April 2012 and paid all the rent due. On the 30th of May 2013 the 1st respondent sent auctioneers to his shop and his goods were proclaimed for an alleged rent arrears of Kshs. 520,000/= being rent for 13 months. On the 13th June 2013 he filed suit in CMCC No. 3219 of 2013 at the Chief Magistrate's Court simultaneously he filed an application seeking an injunction against the 1st respondent as she was not his landlord. On 19th June 2013 the matter was in Court for inter partes hearing. On 9th July, 2013 the Court delivered a ruling on a preliminary objection on the issue of res-judicata that had been raised by the respondents and his application and suit were struck out. The applicant argues that he has an arguable appeal, that if the stay orders are not granted then the auctioneers will attach his goods and he will suffer irreparable damages, yet he has paid all the rent to the 2nd respondent. The applicant depones that he is ready to pay rent to any of the respondents.

4. The application was opposed. The 1st respondent filed a replying affidavit dated the 30th July 2013. She deponed that; the applicant's application is misconceived, bad in law and is an abuse of the Court process; that the motion was previously presented before two (2) Courts below BPRT NO. 600 of 2012 and CMCC No. 3219 of 2013; that the dispute as to who is entitled to rent has been determined by the Tribunal in BPRT No. 600 of 2012, where the tribunal directed that she is entitled to rent from the applicant and she was granted leave to levy distress on the premises L.R. No. 209/ 233/6; that to date the applicant has not appealed against the said judgment. That despite the said judgment the applicant opted to file another suit CMCC No. 3219 of 2013 which the Court ruled was res judicata. That the applicant has not paid her rent despite the Court order and that she will be greatly prejudiced from the orders are allowed.
5. The applicant filed his submissions on the 20th December 2013 and the Respondent on the 13th January 2014. I have read and considered the affidavits filed, the annexures and the submissions made by Counsel both written and oral. The applicant relied on the following cases; ***HCCC No. 4522 of 1992 The Ripples Ltd vs. Kamau Mucuha, C.A. Civil Appeal No. 91 of 1999 Central Bank of Kenya and another vs. Uhuru Highway Development Ltd & 4 others and HCCC No. 142 of 2011.***

The application under consideration is brought under order 42 rule 6 which provides as follows;

“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 sub rule (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.”

6. What I need to consider in this application are the provisions of Order 42 rule 6(2). The grant of stay is discretionary and this is a Court of equity, it must look at the rights of both parties. The applicant filed the application on 11th July 2014; I find there was no delay in filing the application. On irreparable loss the applicant argues that if the respondent claims there is danger that his goods could be sold that reason alone is not sufficient for the grant of stay. I note that the applicant has not appealed against the Tribunal's order that he should pay rent to the respondent, but has only filed the application to stay execution when the respondent moved to execute against him. Why should he be granted a stay yet there is an order which he has not challenged that he should pay rent? In my view the deposit of the amount claimed to be rent in arrears is no good reason to grant of a stay of execution, neither do I find that the appeal will be rendered nugatory. The applicant has not claimed that the respondent is unable to refund the sum claimed in the event that the appeal is successful. I find no merit in the application for stay of execution and dismiss it with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 3rd day of **July** 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....For the Appellants/Respondents

.....For the Respondent/Applicant

.....Court clerk