



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 586 OF 2016

KIPKAI ENTERPRISES.....PLAINTIFF

VERSUS

MAURINE LOUISE OSEMBE.....DEFENDANT

RULING

1. On 22/9/2017, Kemei J rendered a judgment in this suit in which she found the defendant liable to pay the plaintiff Kshs 5,075,500 on account of, *inter alia*, unpaid rent, and costs of renovations of the demised premises. The defendant's subsequent application in which she sought an order setting aside the said judgment was found unmerited by this court [Eboso J] on 26/6/2019. Aggrieved by the court's decision declining to set aside the judgment, the defendant filed a notice of appeal dated 1/7/2019. The defendant subsequently filed **Nairobi Civil Appeal No 499 of 2019** seeking to set aside the decision. Subsequent to that, the defendant brought a notice of motion dated 20/2/2020 seeking an order of stay pending appeal. The said application is the subject of this ruling.

2. The application was supported by the defendant's affidavit sworn on 20/2/2020 in which she deposed that the award to the plaintiff was large. She further deposed that she was unable to establish the plaintiff's financial means and therefore she was not certain about the plaintiff's ability to refund the judgment sum in the event the appeal succeeded. The defendant further deposed that she was unemployed and did not have any sustainable source of income.

3. The plaintiff opposed the application through a replying affidavit sworn on 6/5/2020. The case of the plaintiff was that the applicant had not satisfied the criteria for grant of a stay order.

4. Counsel for the applicant filed written submissions dated 21/7/2020 and highlighted the same during the plenary virtual court session on 27/7/2020. Counsel reiterated the applicant's case as summarized in paragraph 2 above. Counsel submitted that the applicant was ready and willing to comply with any reasonable condition set by the court.

5. Opposing the application, counsel for the plaintiff submitted that the applicant had not established that she stood to suffer substantial loss. It was further argued that the applicant had failed to offer reasonable security. Lastly, it was argued that this being a monetary decree, there was no likelihood of the appeal being rendered nugatory. Counsel urged the court to dismiss the application.

6. I have considered the application, the response thereto, and the parties' respective submissions. I have also considered the relevant law. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant an order of stay pending appeal.

7. The jurisdiction to grant an order of stay pending appeal is regulated by the framework in Order 42 rule 6(2) which provides as follows:

42. 6 (2) 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.

8. The principle upon which this discretionary jurisdiction is exercised was articulated by the Court of Appeal in **Butt v Rent Restriction Tribunal [1979] KLR 417** gave guidance on how a court should exercise discretion and held that:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, many not be nugatory”

9. Over the years, our courts have developed the following principles to guide the exercise of this jurisdiction: (i) the power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal; (ii) the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory; (iii) a judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings; (iv) the court in exercising its discretion will consider the special circumstances of the case and unique requirements; (v) the court in exercising its discretion can order security upon application by either party or on its own motion; and (vi) failure to provide security for costs as ordered will cause the order for stay of execution to lapse.

10. The award in the present application is a monetary one. It relates to rent arrears and renovation costs arising from the applicant's tenancy. The Judgment was rendered on 22/9/2017. The impugned ruling giving rise to the appeal was rendered on 26/6/2019. Taxation proceedings took place between 26/8/2019 and 29/10/2019 in the presence of both parties. The present application was brought on 21/2/2020. The application was triggered by a notice to show cause served on the applicant by the decree-holder. In the circumstances, it can hardly be said that the application was brought without undue delay.

11. I will nonetheless, in line with the principle spelt out in **Butt v Rent Restriction Tribunal [1979] eKLR**, and in the subsequent decisions, grant the defendant a conditional stay in the following terms:

a) Pending the hearing and determination of Court of Appeal Civil Appeal No Nrb 499 of 2019, there shall be a conditional stay of execution of the decree herein.

b) The defendant shall within 30 days from today deposit in court the sum of Kshs 2,537,750 being 50% of the original award as security for the due performance of the decree herein.

c) In default of (b) above, the conditional stay order herein shall stand vacated.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the presence of: -

Court Clerk - June Nafula

Note

This Ruling was supposed to be delivered on 14/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE