

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, LAKHA & PALL, J.J.A.)
CIVIL APPLICATION NO. NAI. 110 OF 1998 (45/98 UR)
BETWEEN

JOHNSON NYAKUNDI KINGOINAAPPLICANT
AND
HEZRON NYANGAURESPONDENT

**(Being an application for stay of execution pending the
hearing of the Intended Appeal from the ruling of
the High Court of Kenya at Kisii (Mbaluto, J.) dated
the 11th day of January, 1998**

**in
H.C.C.C. NO. 103 OF 1998)**

RULING OF THE COURT

At this stage, what the court has to consider is whether the applicant's intended appeal is arguable, and if so, whether that appeal, in the event of its being successful, would be rendered nugatory if we do not grant the stay sought.

On the issue of whether the appeal is arguable, there was the evidence that at some stage, the applicant served on the respondent a notice terminating the tenancy - that notice was given under the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301. The notice given to terminate was on the ground that ownership of the premises had changed, not that the respondent had not paid rent for three years. The respondent resisted that notice and made a reference to the tribunal. It is agreed that reference is still pending in the tribunal.

Again, it was agreed there was also no dispute that there was High Court Civil Case No. 29/95 and that the High Court had ordered that rent for the premises should be paid into the court. In those circumstances the applicant asked Mr. Justice Mbaluto to believe that ignoring all these matters the applicant entered into an unwritten amicable arrangement by which the respondent agreed to quit and did quit the premises. The applicant then told the Judge that he took the premises with the consent of the respondent. The learned Judge roundly rejected the applicant's contention and on our own assessment of the recorded word, we do not see that there is that much to be argued on that point. Put another way, we do not think the applicant has shown before us an arguable appeal.

Nor are we satisfied that if the intended appeal were to succeed, it would be rendered nugatory if we do not grant to him a stay. If the appeal succeeds, the premises will still be there and the applicant will take them over. What loss we can see is that the applicant says he has put goods worth Shs.1.5 million in the premises and if he is kept out, he will lose the goods and the profits to be made from selling them. Our answer to that is that that would be unfortunate but the applicant would have been the author of his own misfortune.

We think this application fails to satisfy both limbs of this court's principles as to the arguability of the appeal and whether the appeal would be rendered nugatory if a stay is not granted. We order that this application be and is hereby dismissed but with no order as to costs.

Made and delivered at Nairobi this 21st day of May, 1998.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR