



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 2 OF 2018

EVANS TUMA KALUME.....APPELLANT/APPLICANT

VERSUS

MOSES MASIVAI BARASA.....RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 26th June 2018. By the said application Evans Tuma Kalume prays for orders:-

2. That leave be granted to appeal out of time the entire Ruling and Orders of the Hon Mbichi Mboroki (Chairman) in Business Premises and Rent Tribunal Case No. 35 of 2018 between Moses Masivai Barasa and Evans Tuma Kalume delivered on 18th May 2018 and that the Memorandum of Appeal dated 26th June 2018 be and is hereby deemed as duly filed and served upon the Respondent within the prescribed time.

3.....

4. That there be a stay of execution of the entire Ruling and Orders of Hon Mbichi Mboroki(Chairman) in Business Premises and Rent Tribunal Case No. 35 of 2018 between Moses Masivai Barasa and Evans Tuma Kalume delivered on 18th May 2018 pending hearing and determination of this appeal.

5. That the cost be in the cause.

2. The application is supported by an affidavit sworn by the said Evans Tuma Kalume on 26th June 2018 and is premised on inter alia, the following grounds:-

i) That the Applicant is aggrieved by the entire Ruling delivered on 18th May 2018;

ii) That the Applicant has filed a Memorandum of Appeal dated 26th June 2018 and requested for typed proceedings and the ruling;

iii) That the Memorandum was filed three days out of time. The delay was occasioned by the fact that the Appellant was acting in person in the Lower Court and was indisposed when the Ruling was delivered.

iv) That the ex parte orders directed the Applicant to vacate the business premises immediately and will have the effect of rendering the preferred appeal nugatory if effected; and

v) That it is in the interest of justice and fairness that the same be allowed.

3. In a Replying Affidavit sworn on 2nd July 2018 and filed herein on 6th July 2018, Moses Masivai Barasa (the Respondent) avers that the present application is filed after an inordinate delay and is an afterthought being brought after the Applicant failed to pay outstanding rent arrears as ordered by the Tribunal.

4. The Respondent denies that the Applicant built any structures in the suit premises as alleged, as the Applicant was merely a rent-paying tenant with no authority to put up structures in the premises. The Respondent further avers that the Applicant cannot be trusted to comply

with any conditions that may be imposed by the Court as he has previously disobeyed orders of the Tribunal.

5. I have considered the application and the response thereto. This Court is being called upon to exercise its discretion to extend time for filing the Memorandum of Appeal and to consider staying the decision of the Business Premises Rent Tribunal pending the hearing and determination of the intended appeal.

6. As the Court of Appeal stated in *Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi*(Civil Application No. Nai. 255 of 1997) (unreported):-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

7. In the matter before me, the impugned decision was delivered on 18th May 2018. Under Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya, any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within 30 days after the date of such determination or order, appeal to the Environment and Land Court.

8. The Provisor to Section 15(1) of the said Act grants this Court the discretion where it is satisfied that there is sufficient reasons for so doing, to extend the said period of 30 days upon such conditions, as it may think fit. In this regard, this Court notes that the Memorandum of Appeal was filed on 26th June 2018, some one week after the due date.

9. The Applicant states that he was previously acting in person in the Lower Court and that at the time the decision was granted, he was indisposed and it took him a little while before he could get the resources to instruct an Advocate to lodge an appeal herein.

10. In the circumstances of this case I am satisfied that there was sufficient reason for the delay in lodging the Memorandum of Appeal.

11. I further take note that the Applicant contends that the Respondent was not his landlord at the suit premises and that he was paying rent to a different person. I am in this regard also satisfied that the Applicant has an arguable appeal and that the Respondent shall not be prejudiced in any way if the Appeal is heard on merits.

12. Accordingly, I shall allow the application dated 26th June 2018 as prayed in Prayer Nos 2 and 4 on condition that the applicant shall deposit the decretal sum of Kshs 35,000/- in Court within 45 days from the date hereof.

13. In default in depositing the decretal sum as stated the orders of stay granted pursuant to Prayer No. 4 of the application shall lapse forthwith.

14. The costs of this Application shall be in the cause.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

J.O. OLOLA

JUDGE