



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC APPEAL NO. 38 OF 2018

NEW BIBIRIONI INVESTMENT LIMITED..... APPELLANT

VERSUS

MBAME GENERAL SUPPLIERS LIMITED.....RESPONDENT

RULING

The appellant filed this appeal on 3rd August, 2018 against the ruling and orders of the Business Premises Rent Tribunal (“the tribunal”) made on 6th July, 2018. The genesis of the dispute between the parties is difficult to decipher from the material before the court. From the little that I have managed to gather from the record, the appellant is the registered proprietor of all that parcel of land known as L.R No. 209/2455/1 together with the building standing thereon known as Latema Nairobi Plaza formerly known as Transcom House (hereinafter referred to as “the suit property”). The appellant acquired the suit property from Transcom Co-operative Savings & Credit Society Ltd. on 1st November, 2017.

The suit property was sold to the appellant with a number of tenants in occupation. The respondent was one of the tenants who were in occupation of the property. The respondent had entered into a 5 years and 3 months lease with the previous owner of the suit property on 1st May, 2015. After the appellant acquired the suit property, all the tenants were instructed by the appellant to direct all inquiries and matters relating to the suit property including the payment of rent to the appellant. The appellant discovered that the respondent had partitioned and sub-let the Ground Floor of the suit property to a number of sub-tenants. The appellant entered into new leases with some of these sub-tenants who were now to pay rent directly to it. On 27th November, 2017, the appellant served the respondent with a 21 days’ notice terminating its tenancy.

The respondent contended that it was a controlled tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya (“the Act”) and termed the appellant’s notice defective and purported termination of its tenancy unlawful. The respondent filed a reference at the tribunal in Tribunal Case No. 865/2017 and urged the tribunal to investigate and determine the validity of the said notice and other issues it raised in the said reference. Together with the reference, the respondent filed an application dated 27th November, 2017 seeking an order restraining the appellant from evicting it from the suit property. The application was heard ex parte by the tribunal and the orders sought granted on an interim basis on 27th November, 2017 pending the hearing of the application inter partes.

After it was served with the said orders issued by the tribunal in favour of the respondent, the appellant moved the tribunal on 7th December, 2017 with an application brought by way of Notice of Motion dated 6th December, 2017 seeking a stay of the said orders that were made on 27th November, 2017 and the dismissal of the respondent’s application that was pending inter partes hearing and the reference on the ground that the tribunal lacked jurisdiction to entertain the same. The appellant’s application was fixed for hearing on 15th December, 2017. The respondent was served with the application but did not turn up for the hearing of the said application on 15th December, 2017. The tribunal heard the appellant’s application in the absence of the respondent notwithstanding and allowed the same. The tribunal dismissed the respondent’s reference and application for injunction for want of jurisdiction.

On 18th December, 2017, the respondent filed an application at the tribunal seeking to set aside the orders that were made by the tribunal on 15th December, 2017 striking out its reference and application for injunction. The respondent’s application was heard and in a ruling delivered on 6th July, 2018, the same was allowed by the tribunal. The tribunal set aside its orders of 15th December, 2017 and allowed the respondent to defend the appellant’s application dated 6th December, 2017. This appeal is challenging the said decision of the tribunal made on 6th July, 2018. Together with the appeal, the appellant filed an application dated 2nd August, 2018 seeking a stay of the proceedings and orders made by the tribunal pending the hearing and determination of this appeal.

After it moved the tribunal to set aside the orders made on 27th November, 2017 in favour of the respondent, the appellant also filed a suit against the respondent at the Chief Magistrates Court on 11th December, 2017 in Milimani Commercial Court CMCC No. 8722 of 2017. Together with the plaint, the appellant filed an application by way of Notice of Motion dated 9th December, 2017 seeking an injunction to

restrain the respondent from interfering with the suit property or having any dealings with the same pending the hearing of the suit. The application was heard ex parte and interim orders of injunction granted on 14th December, 2017.

By the time the Chief Magistrate's court gave orders on 14th December, 2017 restraining the respondent from having any dealing with the suit property, there were orders in force issued by the tribunal on 28th November, 2017 also restraining the appellant from interfering with the respondent's occupation of the suit property. The parties had knowingly put the two adjudicative bodies in a collision path.

On 12th November, 2018 while the present appeal was pending the appellant filed a constitutional petition in this court namely, ELC Petition No. 75/2018 seeking a declaration that the tribunal had no jurisdiction to hear and determine the dispute between the appellant and the respondent, an order staying the proceedings before the tribunal, the setting aside of all the orders made by the tribunal and an order directing the respondent to proceed with the hearing of the dispute between the parties before the Chief Magistrate's Court. Together with the petition, the appellant also brought an application seeking a temporary stay of proceedings in Tribunal Case No. 865/2017 pending the hearing of the petition. The petition and the said application are still pending.

What is now before the court is the appellant's application by way of Notice of Motion dated 16th October, 2018. In the application the appellant has sought two prayers namely:

1. That the proceedings in Tribunal Case No. 865 of 2017 – Nairobi and all the orders made therein be stayed pending the hearing and determination of this application and the appellant's application herein dated 2nd August, 2018.
2. That the proceedings in Tribunal Case No. 865 of 2017 – Nairobi and all orders issued therein be stayed pending the hearing and determination of this appeal.

The appellant's application was brought on the grounds that while the appeal herein and the appellant's application dated 2nd August, 2018 for stay of the tribunal's proceedings were pending, the respondent filed an application before the tribunal on 9th October, 2018 seeking the punishment of the directors of the appellant for contempt of the orders that were made by the tribunal on 19th December, 2017 and 1st August, 2018. The appellant averred that the tribunal had already issued orders summoning its directors to appear before it on 19th October, 2018 to show cause why they should not be punished. The appellant contended that its appeal herein and the pending application would be rendered nugatory if the contempt of court proceedings against it is not stayed. The respondent did not file a replying affidavit or grounds of opposition to the application. Instead, it filed its own application by way of Notice of Motion dated 25th October, 2018 seeking an order to strike out the appellant's appeal herein. The appellant's application was heard on 27th November, 2018 when Mr. Wanyoike appeared for the appellant while Mr. Kurauka appeared for the respondent.

In his submissions in support of the application, the appellant's advocate reiterated the grounds set out on the face of the application and in the affidavit filed in support thereof. He submitted that the appellant's appeal had high chances of success. He argued that the respondent would not be prejudiced if the orders sought were granted. In his submissions in reply, the respondent's advocate defended the decision of the tribunal which is the subject of this appeal. He submitted that the appeal was filed prematurely in that the tribunal should have been given an opportunity to hear the parties on the issue of its jurisdiction and to pronounce itself on the same before an appeal could be filed. The respondent's advocate urged the court to strike out the appellant's appeal together with the present application.

I have considered the appellant's application together with the affidavit filed in support thereof. The law on stay is now settled. The appellant has sought stay of proceedings in Tribunal Case No. 865 of 2017 and the orders issued therein. The principles that are applied in applications for stay of orders/decrees apply also to a large extent to applications for stay of proceedings. Under order 42 Rule 6 of the Civil Procedure Rules, an applicant for stay of execution pending appeal must demonstrate that he will suffer substantial loss if the order is not granted and that he is ready to furnish security for the due performance of any order or decree that would come to bear on him should he lose the appeal.

As I have mentioned earlier in this ruling, the appellant has sought to stay the proceedings of the tribunal together with the orders that were made by the said tribunal. I have at the begging of this ruling set out in detail the genesis of the dispute between the parties. The appeal before this court is only against the decision of the tribunal that was made on 6th July, 2018. In its order of 6th July, 2018, the tribunal set aside the orders it had made on 15th December, 2017 on the appellant's application dated 6th December, 2017. The tribunal had allowed that application and dismissed the respondent's reference and application for injunction. That application was heard in the respondent's absence. On the respondent's application that gave rise to the ruling made on 6th July, 2018, the respondent had urged the tribunal to hear it on the appellant's said application dated 6th December 2017 that sought the dismissal of its reference and application for injunction. In the ruling of 6th July, 2018, the tribunal granted the respondent's request. The effect of that order was that the appellant's application dated 6th December, 2017 would be heard afresh by the tribunal.

I am not satisfied that the appellant would suffer substantial loss if the stay sought is not granted. The appellant has a right of appeal against any decision that the tribunal may make after hearing the said application afresh inter partes. With regard to the contempt proceedings, I have noted from the record that the same relate to the orders that were made by the tribunal on 19th December, 2017 and 1st August, 2018. The said orders are not the subject of this appeal and as such the said contempt of court proceedings cannot be a basis for the stay sought herein. In any event, I see no prejudice that would be suffered by the appellant if the contempt proceedings are prosecuted. The appellant shall be accorded an opportunity to defend itself and will have a right to appeal to this court should it be aggrieved with the decision of the tribunal on the matter.

Since, I am not satisfied that the appellant would suffer substantial loss if the orders sought are not granted, it is not necessary for me to consider other conditions that ought to be met before a stay is granted. In conclusion, I find no merit in the application dated 16th October, 2018. The application is dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 21st day of March 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nganga for the Applicant

Mr. Kurauka for the Respondent

C. Nyokabi-Court Assistant