



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC APPEAL CASE NO. 8 OF 2018

HASSAN ABDI HARSIL.....APPLICANT/APPELLANT

VERSUS

GEORGE LOCH MBUYA OGOLA.....RESPONDENT

(Being an appeal from the order of Mbichi Mboroki, Chairman Business Premises

Rent Tribunal in Tribunal Case No. 34 of 2018 at Kisii dated 12th October, 2018)

RULING

1. By an a Notice of Motion application dated 16th October 2018 and filed on 17th October 2018, the applicant (appellant) through Kerario Marwa and Company Advocates is seeking a stay of execution of the order dated 12th October 2018 of the Business premises Rent Tribunal (hereinafter referred to as “ **the tribunal**”) until the hearing and determination of the instant appeal. He has also sought that the costs of this application be in the appeal.

2. The application is anchored on the applicant’s supporting affidavit sworn on even date. He averred, inter alia, that **Kshs. 1,650,000/=** is a colossal amount of money which he can not raise within thirty (30) days as ordered by the tribunal, that the respondent is not his landlord and that he has been paying rent to court pursuant to order issued in Kisii HCCC No. 180 of 1993 filed by the respondent against the applicant. To the said affidavit, the applicant annexed a copy of the tribunal’s order marked “HAH1” and an order made on 3rd October 2000 in Kisii HCCC No. 180 of 1993 marked HAH3”, among other documents.

3. The application is also anchored on three (3) grounds on it’s face. Simply put, the grounds are that the applicant has already filed this appeal, he will suffer irreparable loss as the sum of Kshs. **1,650,000/=** is a colossal sum of money and that the justice of the case dictates that stay of execution be granted as sought in the application.

4. The respondent who appears in person has opposed the application by his replying affidavit sworn on 24th October 2018 and filed on even date. He averred, inter alia, that he is the bonafide owner of plot No. 24 Migori and that the stay order sought by the applicant is blind as the court has to be satisfied that the applicant is right to have occupied and continue to occupy the respondent’s property namely plot No. 4 aforesaid without payment of rent.

5. The respondent further averred that the tribunal moved to protect the suit property irrespective of the status of the parties to the dispute. That there is no basis for the application and the appeal lacks merit hence sought it’s dismissal with costs.

6. In his submissions dated 7th January, 2019, learned counsel for the appellant contends that the respondent who is one of the sons of the late Daniel Ogola Sigera alias Roch Ogola, issued a notice of termination of tenancy under the Landlord and Tenant (shops, Hotels and **Catering Establishments**) Act (Cap 301 Laws of Kenya) and that the notice is challenged at the tribunal. He set out four (4) conditions to be met for the grant of the orders sought in the application. The conditions are :-

i. THAT the applicant must establish a sufficient cause

ii. THAT the court must be satisfied that substantial loss would ensue from the refusal to grant a stay.

iii. THAT the court can order security in any form

iv. THAT the application must be made without unreasonable delay.

7. Counsel also submitted that there is no evidence that the appellant is in rent arrears and that payment of the deposit of **Kshs. 1,650,000/=** as ordered by the tribunal would be irregular. Counsel relied on Court Appeal decision in **Carter and Sons Ltd –v- Deposit Protection Fund Board and others Civil Appeal No. 291 of 1997** and High Court case of **Equatorial Commercial Bank Ltd and 2 others –v- Retreat Villas Ltd (2006) eKLR**, to buttress his submissions.

8. In his submissions dated 17th January 2019, the respondent contends inter alia, that the appellant is in contempt of court orders for failing to deposit rent into the court for plot No. 24, Migori Town further to orders in Kisii HCCC No. 180 of 1993. That the matter was finalised in the Court of Appeal at Kisumu Civil Appeal No. 199 of 2001 on 16th December 2016.

9. The respondent generally submitted on the appeal and issues for determination including, whether the appeal is res judicata. He cited authorities such as **Arnold –v- West Minister Bank (1991) AC 93** and **the Owners of Motor Vessel Lilian “S” –vs- Caltex Kenya Ltd (1989) KLR 1**.

10. I have considered the entire application, the replying affidavit and the rival submissions including the cited authorities by counsel for the respective parties in this application, **Order 42 Rule 6 of the Civil Procedure Rules, 2010** under which the application is expressed provides the threshold for the grant of stay execution of the order in simple terms that :-

- a) Substantial loss may result to the applicant if the stay order is not made.
- b) The application for stay of execution has been made without unreasonable delay.
- c) Such security as the court orders for due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

11. On the issue of substantial loss, the order of the tribunal marked **“HAH1”** reads in part that:-

“The tenant shall deposit the dispute rent of Kshs. 1,650,000/= in the Tribunal pending the hearing and determination of this reference within the next 30 days in default the Landlord shall levy distress.”

12. The appellant contends that he will suffer irreparable and substantial loss as the said amount is a colossal sum which he cannot raise as ordered by the tribunal. That the order of 3rd October 2000 in Kisii HCCC No. 180 of 1993 has not been set aside and that he has been paying rent to court hence another deposit of **Kshs. 1,650,000/=** would be unconscionable in the circumstances.

13. In the case of **Blue Shield Insurance Company Ltd –v- Mahinda (2009) KLR 559 at 560 and 561**, the Court of Appeal held, inter alia,:-

“We are satisfied that if the application is not allowed the intended appeal will not only be rendered nugatory but also that the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer”. (Emphasis added).

14. There is no dispute that a sum of kshs. **1,650,000/=** rent deposit in dispute was ordered against the applicant by the tribunal. The applicant’s case is that the amount is unconscionable as he has been paying rent as earlier ordered in Kisii HCC No. 180 of 1993. The substantial nature of the amount and circumstances point to the likely substantial loss in terms of extra, parallel or double rent payment to the applicant in case he proves so on appeal. It would be a considerable financial loss to the applicant if he eventually succeeds on the present appeal and if the order of stay of execution sought in the current application is refused by the court.

15. With regard to delay, this application was made about four (4) days after the order (HAH1). In that scenario, I am of the considered view that the applicant was quite vigilant in the matter because he brought this application without unreasonable delay.

16. This court is bound by the national values and principles of governance under **Article 10 of the Constitution of Kenya, 2010**. So, the principles of equity particularly regarding delay and vigilance, apply very handy in favour of the applicant in the current application.

17. In respect of security, it must be noted that it is arguable whether the applicant could be ordered for a sum in excess of the decretal amount and which has not been ascertained either by the court or consensus of the parties; see also **Blue Shield case (supra)**. The order annexed and marked **“HAH1”** relates to the disputed rent. The applicant contends that he has been paying rent as ordered in Kisii High Court Civil Appeals No. 180 of 1990. Therefore, the court will have to ascertain the decretal amount during the determination of this appeal. Nonetheless, the applicant has to give security thereof as the application is merited.

18. Wherefore, the applicant’s notice of motion dated 16th October 2018 be and is hereby allowed in the following terms;-

- a) **That there be stay of execution of the order of the tribunal dated 12th October 2018 until hearing and determination of this appeal.**
- b) **The appellant shall deposit in this court security for the due performance of the orders in the sum of Kshs. 800,000/= or a security of an equivalent amount together with the relevant certificate of official search and a valuation report within the next thirty (30) days from this date.**

c) Costs of the motion to abide the outcome of this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED AT MIGORI THIS 19th DAY OF MARCH 2019.

G.M.A. ONG'ONDO

JUDGE

In the presence :-

Mr. Mwita Kerario, learned counsel for the appellant

Respondent in person

Tom Maurice- Court clerk