REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A CASE NO. 34 OF 2018

LAWRENCE RUTERE...APPELLANT

VERSUS

AGRICULTURAL SOCIETY OF KENYA.......RESPONDENT

RULING

1. By a notice of motion dated 2nd November 2018 brought under **Order 42 Rule 6 of the Civil Procedure Rules** (hereinafter the *Rules*) the Appellant sought an order for stay of execution of the order of the Chairman of the Business Premises Rent Tribunal (hereinafter the *Tribunal*) in *Embu Tribunal Case No. 99 of 2016* (hereinafter *Case No. 99/2016)* dated 26th October 2018 pending the hearing and determination of the pending appeal.

2. The said application was based on the grounds set out on the face of the motion. It was contended that the ruling resulting in the order was delivered without notice; that the ruling did not grant the Appellant time within which to vacate the demised premises; and that the appeal had good chances of success.

3. The said application was supported by an affidavit sworn by the Appellant on 2nd November 2018 which expounded upon the grounds set out in the motion. It was contended that the Appellant's Case No. 99 of 2016 was not among the ones consolidated with Tribunal Case Nos. 8 – 12 of 2017 in which the Respondent's tenants on the demised premises were ordered to vacate upon dismissal of their references. It was, therefore, contended that the Chairman of the Tribunal erred in allowing the Respondent's preliminary objection holding that his reference in case No. 99/2016 was *res judicata*. The Appellant also lamented that the ruling on the preliminary objection was delivered on 26th October 2018 without due notice to him.

4. The Respondent filed a replying affidavit sworn by Dr John Kennedy Omanga on 9th November 2018. It was contended that the Tribunal's order of 26th October 2018 was a negative order which merely struck out or dismissed the Appellant's reference as being incompetent. It was, therefore, contended that there was nothing to be stayed. It was further contended that there was no appeal against the judgement delivered in Tribunal Case Nos. 8 – 12 of 2017 by which all the references by the Respondent's tenants were dismissed.

5. The Respondent further contended that at all material times the Appellant was a party to Case Nos 8 – 12 of 2017 which concerned the same demised premises owned by the Respondent. It was further contended that it was upon dismissal of the consolidated references that the Appellant purported to reactivate case No. 99/2016 with a view to forestalling his eviction. It was finally contended that the Respondent was desirious of re-developing the suit property with a modern building and that all the other tenants save the Appellant had vacated. It was also contended that the Appellant shall not suffer any substantial loss since the Respondent has the means of making food any such loss or paying damages.

6. When the said application was listed for hearing on 12th November 2018, it was directed that the said application be canvassed through written submissions. The Appellant was granted 21 days to file and serve his submissions whereas the Respondent was granted 14 days to file and serve its submissions upon service by the Appellant. The court has noted, however, that none of the parties had filed submissions by the time of preparation of the ruling.

7. The court has considered the Appellant's said application as well as the Respondent's replying affidavit in opposition thereto. The court has noted that the parties have raised issues which touch on the merits of the pending appeal as opposed to the application for stay of execution. The court shall, however, endeavor to confine itself to consideration of matters falling with the purview of **Order 42 Rule 6 of the Rules** so as not to prejudice a fair hearing of the appeal.

8. The provisions of **Order 42 Rule 6 (2) of the Rules** on stay of a decree or order stipulate as follows;

> **"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.

9. There is no doubt that the Appellant moved the court without unreasonable delay in seeking a stay of the orders made on 26th October 2018. What the court needs to examine is whether the Appellant has demonstrated what substantial loss he may suffer unless the order of stay is granted. It is also worthwhile to consider whether the orders of 26th October 2018 are capable of being stayed within the meaning of **Order 42 Rule 6 of the Rules.**

10. The material on record indicates that the Appellant has been carrying on the business of a bar and restaurant. The court has noted from the affidavit in support of the Application that the Appellant has not averred that he would suffer substantial loss unless a stay is granted. He has only contended in paragraph 19 of his affidavit that it would be inhumane for him to be evicted since he had invested over 3 million in the business.

11. It was not contended he would encounter any peculiar hardship (apart from normal inconvenience) in relocating or continuing with his business from alternative premises. So far as the court can gather from the record, the Tribunal did not require the Appellant to shut down his business. The court is thus not satisfied that the Appellant has demonstrated substantial loss within the meaning of **Order 42 Rule 6 of the Rules**. If the Appellant is apprehensive that he may suffer some financial loss as a result of relocation, then that may not necessarily constitute substantial loss.

12. The court has also considered the nature of the orders made on 26th October 2018. Although the Appellant did not exhibit a copy of the relevant ruling, it is clear that the Tribunal upheld the Respondent's preliminary objection and struck out the Appellant's reference for being *res judicata*. A striking out order or dismissal order is not an order which is ordinarily capable of execution although it may have adverse and far reaching consequences. A party aggrieved by such an order should carefully select his possible remedies before moving the court.

13. It would appear that upon the striking out of the Appellant's reference in Case No. 99/2016, it triggered execution of the judgement in Tribunal Case Nos. 8 -12/2017. That judgement was apparently delivered on 15th November 2017. There is no prayer for stay of the judgement dated 15th November 2017. In fact, the Appellant has distanced himself from that judgement. He contended that he was not party thereto. In those circumstances the court will take the view that the striking out order made on 26th October 2018 is not capable of being stayed. It was not a positive order. It was an order which merely upheld a preliminary objection to the Appellant's reference and consequently had it struck out.

14. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 2nd November 2018 and the same is consequently dismissed with costs to the Respondent.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 13TH day of MARCH 2019.

In the presence of Mr. Ndolo holding brief for Mr. Mugambi Njeru for the Appellant and in the absence of the Respondent.

Court clerk: Muinde

Y.M. ANGIMA

JUDGE

13/3/2019