



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC. 9 OF 2018

STEPHEN KINJA M'KIAIRAAPPELLANT/APPLICANT

VERSUS

JOSEH MICHUBU BIRITHARESPONDENT

RULING

1. By a notice of motion filed in court on 14.3.2018, applicant/appellant is seeking the following orders;

(i) Spent.

(ii) That the Honorable court be pleased to stay execution in tribunal case no. 32 of 2017 pending the hearing and determination of this application.

(iii) That the Honorable court be pleased to stay execution in tribunal case no. 32 of 2017 pending the hearing and determination of the appeal.

(iv) That the honorable court be pleased to stay exparte orders issued on 20.7.2017 by the Business premises tribunal dismissing applicant's application for want of prosecution.

(v) That the honorable court do extend time on which the applicant can file the appeal herein in terms of the annexed memorandum of the appeal.

(vi) That the honorable court do call for the tribunal file in the matter herein already forwarded to Maua CMCC court vide Maua CMCC no. 15 of 2017.

(vii) Costs be in the cause.

2. The grounds in support of the application are on the face of the application and in applicants supporting affidavit.

3. The application is opposed via the replying affidavit of the respondent filed on 3.4.2018.

4. The application was heard by way of written submissions.

5. It has been argued for the applicant that the matter proceeded before the tribunal on 28.4.2017 in his absence because he was not served with the hearing date. As such respondent was allowed to levy distress to recover outstanding rent. Applicant apparently learnt about the matter only at the point of execution.

6. He thereafter filed an application for stay of the tribunals, decision and he obtained the stay order to that effect pending the hearing of that application on 19.6.2017. However the tribunal was not sitting on 19.6.2017.

7. Applicant learnt that the contract of service signed by the then chairman of the tribunal had lapsed with no replacement.

8. Applicant avers that thereafter, his application for stay before the tribunal was dismissed without his knowledge. He therefore claims that he stands to suffer substantial loss if the prayers sought herein are not granted.

9. In support of his case, applicant relied on the following authorities;

- **Halai & another vs Thornton & Turpin (1963) Ltd [1990]KLR- 365**
- **Kenya Shell Ltd vs Kibiru [1986] KLR**
- **United Builders vs Standard Chartered Bank Ltd, HCCC 41/1995**
- **Sangram Singh vs Election Tribunal, Koteh, AIR 1955 SC 664 at 711**

10. The respondent on the other hand avers that applicant was duly aware of the hearing date and that this court is not the right forum for the applicant to ventilate his grievances regarding the dismissal of his application dated 12.5.2017.

11. It is also argued that applicant has not demonstrated that he stands to suffer substantial loss. Finally, it is averred that there is inordinate delay in the filing of the application.

12. In support of his arguments, respondent has relied on the following authorities;

- **Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR**
- **Fahim Yasin Twaha vs Timamy Issa Abdallah & 2 others (2015) eKLR.**

13. I have considered all the arguments raised herein. I find that the gist of this dispute emanate from the proceedings of 28.4.2017, when the matter was allegedly heard exparte. Respondent avers that applicant was aware of the hearing date but doesn't state how the date was served.

14. Article 50 (1) of the constitution provides that;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body”.

15. If the applicant was not aware of the hearing date, then a fundamental tenet of justice was violated. Therefore, it matters not that applicant's application for stay was dismissed, though that is another issue to be looked into.

16. I also find that in paragraph 18 of applicant's affidavit dated 13.3.2018, he avers that he learnt about the matter on 5.3.2018. This application was filed nine days later, on 14.3.2018. I hence find that there is no inordinate delay.

17. All in all, I find that the application dated 13.3.2018 has merits and I proceed to allow the same on the following terms;

- 1) The stay order is to remain in force for a period of **8 months only**.
- 2) Meanwhile, the orders issued herein should not be interpreted as affecting applicant's obligations as a tenant. He should continue paying all dues as a tenant.
- 3) The notice of appeal and the memorandum of appeal to be filed and served within 14 days failure to which the orders granted herein in respect of **“Stay”** shall lapse.
- 4) The costs of this application shall abide the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF APRIL, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Gitonga J.G holding brief for Nkunja for respondent

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE