



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**APPEAL NO. 122 OF 2018**

**GRANDPARK INVESTMENTS LIMITED ..... APPELLANT/TENANT**

**VERSUS**

**GEORGE NG'ANG'A MANG'ARA ..... RESPONDENT/LANLORD**

**RULING**

1. This ruling is in respect of appellant's Notice of Motion dated 12<sup>th</sup> March 2018, an application through which the appellant seeks an order staying orders made on 23<sup>rd</sup> February 2018 by the Business Premises Rent Tribunal pending hearing and determination of this appeal and further that the respondent be ordered not to interfere with the suit premises pending hearing and determination of this appeal.

2. The application is supported by an affidavit sworn by John Ngure Mehta, a director of the appellant. He deposed that the appellant is the respondent's tenant on Plot No. 221 Industrial Area Naivasha (the suit property). That the appellant filed a reference being BPRT Case No. 15B (Naivasha) and a ruling was delivered in respect of it on 23<sup>rd</sup> February 2018 whereby the tribunal concluded that there was no tenancy relationship between the parties. Following the ruling, the respondent moved in and disconnected water and electricity and also started digging up the entrance of the premises without any order from any court.

3. The respondent opposed the application through his replying affidavit sworn on 16<sup>th</sup> March 2018. He agreed with the tribunal's findings and deposed that a stranger by the name of Simon Wahome has been hiding behind the appellant to occupy the suit premises and to claim a non-existent tenancy. He added that he had not received any rent for the suit premises for over eight months.

4. Besides the two affidavits referred to above, the parties also filed further affidavits and raised matters that go to the merits or otherwise of the appeal itself. For that reason, I have not found it necessary to rehash those aspects.

5. The application was heard by way of written submissions. It was argued for the appellant that the application had been filed without unreasonable delay and that unless stay is granted the respondent would deal with the suit premises thus causing irreparable harm to the appellant. Regarding the aspect of security, it was contended for the appellant that it is willing and ready to pay rent.

6. For the respondent it was argued that the appellant had approached the court with unclean hands and is thus undeserving of discretionary relief. That the appellant had not stated any substantial loss that it will suffer if stay is not granted. That stay will instead result in further delay as regards rental income.

7. I have considered the application, the affidavits, the submissions and the authorities cited. The appellant seeks stay of execution pending appeal. In that regard, **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** provides:

***6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under sub rule (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.***

8. Thus, a litigant who seeks stay pending appeal is under a duty to satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

***It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.***

9. I have read the ruling delivered on 23<sup>rd</sup> February 2018 by Hon. Mbichi Mboroki, Chairman of Business Premises Rent Tribunal. By that ruling the chairman dismissed the appellant's reference as well as an application that was filed alongside it. He did not make any order that the appellant be evicted but instead left it to parties to move the relevant court appropriately.

10. To succeed in the present application the appellant must satisfy the court that the application has been made without unreasonable delay and that substantial loss will result to it if stay is not granted. The application having been filed 16 days after the ruling, I am satisfied that the appellant brought it timeously.

11. Regarding the test of substantial loss, to the extent that the tribunal did not make any order for vacant possession, I do not see how execution of the tribunal's orders will result in substantial loss. Further, although the appellant claims that it is the respondent's tenant, and while the respondent is protesting that he has not been paid rent for several months, the appellant has not shown evidence of payment of such rent or even deposited it in court. In such circumstances, an order of stay will occasion injustice. The appellant's statement that it is ready and willing to deposit security if ordered is not acceptable in the circumstances. All in all, I find no merit in Notice of Motion dated 12<sup>th</sup> March 2018. It is dismissed with costs. Parties should immediately set down the appeal for hearing.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of May 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the appellant/applicant

Ms Ngugi holding brief for Mr Gachiengo for the respondent/respondent

Court Assistants: Beatrice & Lotkomo