



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO.18 OF 2018

SIMON MACHARIA KAIRU.....APPLICANT

VS

STEPHEN K WARUINGI

NATHANIEL KIRAGU

(sued as Trustees of

KANU -Kiharu sub branch).....1ST RESPONDENT

JOHN S NJIRE MAINA.....2ND RESPONDENT

RULING

1. The Applicant filed the notice of motion dated 28/8/2012 seeking orders interalia that:

a. Spent

b. There be stay of execution of the of the order of the Business Rent Tribunal dated 6/7/2018 pending hearing of the instant application.

c. There be stay of execution of the of the order of the Business Rent Tribunal dated 6/7/2018 pending appeal in Murang'a HCCA 38/2018.

d. The costs of this application be provided for.

2. The application is grounded on the Applicant /Applicants' supporting affidavit together with further affidavits that were filed with leave of the Court .The grounds of the application are that the Defendant /Applicant has preferred the instant appeal (formerly HCCA 38/ 2018) against the decision of the Chairman of the Tribunal in Business Rent Tribunal case No 22 of 2017 -Murang'a.

3. That the appeal raises triable issues on points of law and facts which have overwhelming chances of success .Unless orders are granted, the appeal will be rendered nugatory .Also that the 2nd Respondent may levy distress for rent if stay is not granted and as such substantial loss will be suffered .That it is in the interest of justice that the Applicant be given a chance to pursue the appeal to its logical conclusion.

4. The application has been contested by the 2nd Respondent. It is contented that the Applicant has a duty to pay rent and that the 2nd Respondent can refund money if the appeal is successful. However, if the appeal is lost and the lease expires on 30/9/2019 he stands to suffer financial loss since the Applicant would not have been paying rent despite residing on the leasehold premises. The 2nd Respondent prays that the Court balances the two interests of the parties.

5. The 1st Respondent did not oppose the application.

6. The 2nd Respondent raised grounds of opposition on points of law. That the Advocate on record for the Applicant is not properly on record and that the application has been brought after inordinate delay since distress was levied on 14/8/2018.

7. It is not disputed that the Applicant did not deposit rent or settle arrears as ordered by the tribunal. The 2nd Respondent avers that he went ahead to proclaim property when the Applicant failed to pay the rent due. That the application has been brought after 9 months from the

date of distress thus inordinate delay. The 2nd Respondent also contends that any payments to KANU Kiharu branch were not legal as they were paid in contravention of the orders of the tribunal. The annexed receipts of payment to KANU and his advocates cannot be considered as compliance of Court orders.

8. Parties filed Written Submissions, the Plaintiff relied on the case of **Antony Muli t/a Mutembei Mathoka General Store -Vs- Kilalani Farmers Coop Society Ltd (2014) eKLR; Focin Motor cycle Co. Ltd Vs Ann Wambui Wangui & Anor (2018) EKL**R and **Southern Credit Bank-Vs- Tulip Apartments & 3 others (2007) EKL**R.

9. The Applicant asserted that the orders of the Tribunal were erroneously extracted to give an impression that the rent payable commences on 1/12/16 instead of 1/11/17. He stated that the ownership of the suit land is in dispute and the tribunal ordered him to pay rent to a stranger. That in pursuance to the orders of the Court, he deposited the rent into the Judiciary account. That there is an apprehension of unjust enrichment on the part of the 2nd Respondent in respect to the property if the rent is paid to him. He contends that the 2nd Respondent is not entitled to rent in view of the pending suits regarding ownership of the property. That it will be difficult to retrieve the rent from the 2nd Respondent if the ownership is finally determined and found not in his favour by the Court.

10. The 2nd Respondent submitted that the Applicant is challenging the decision of the Tribunal on the ground of ownership and yet the property ownership is before the Court for determination. That in any event the Applicant is not a party in the said and his interest in the property is as a tenant and should concern himself with meeting the obligations of rent payment as directed by the Tribunal. He stated that the registered owner of the property is the 2nd Respondent as shown by the various documents that he has attached amongst them a letter from KANU Kiharu branch and the County Government of Murang'a that informed the Applicant that the suit land is registered in the name of the 2nd Respondent.

11. The 2nd Respondent submitted that though the Applicant has averred that he has paid rent, the rent has been paid contrary to the orders of the Court and the Tribunal. That in the unlikely event that the appeal is lost and the Applicant leaves the suit land without paying rent the 2nd Respondent will have been put into financial loss in respect to unpaid rent. The 2nd Respondent stated that they are amenable to the rent being paid into the Courts account should the Applicant feel strongly against paying it to the 2nd Respondent.

12. The following are relevant to the application;

- a. That the Court gave interim stay for 21 days to enable the Applicant deposit rent arrears within 7 days and continue to pay rent.
- b. That the rent was to be deposited at the tribunal.
- c. That the plaintiff deposited moneys with the judiciary account and further amounts with the 1st Respondents thus did not comply with the orders.
- d. The interim orders were conditional and lapsed upon default, they have never been extended or revived.
- e. The 2nd Respondent was decreed to receive the rent by the Tribunal until directed otherwise by the Court.
- f. The disputed decree is a monetary decree.

13. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

14. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

- (a) The application was brought without delay;
- (b) Substantial loss may result to the Applicant unless the stay is granted; and
- (c) Security for the due performance of the order or decree has been provided.

15. As to whether the application has been brought without delay, the orders of the Tribunal were issued on the 6/7/18 and the application was filed on the 22/8/18. It is the view of the Court that it was filed timeously and therefore devoid of delay.

16. As to whether substantial loss may result to the Applicant unless the stay is granted, the Appellant's case seems to be that he is being compelled to pay rent to the wrong owner of the suit land and that the appeal will be rendered nugatory. The Applicant has argued that the ownership of the suit land is in dispute and it would amount to unjust enrichment of the 2nd Respondent if he pays rent to him. That he stands to lose the money should the outcome turn out that the 2nd Respondent is the wrong party.

17. In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR** the Court held;

‘that in such applications for stay it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay...’

18. In this case the Applicant is a tenant in the building and not a party to the ownership dispute in the Court as to who between the Respondents is the owner of the suit property. The 2nd Respondent on the other hand contends that the Appellant/ Tenant has a duty to pay rent and that amounts paid out can be refunded or recovered.

19. Weighing the application on the basis of affidavit evidence adduced, it is the view of this Court that the Applicant has not placed such material evidence on the nature of the loss that he stands to suffer if the application is declined.

20. Has the Applicant provided security for the due performance of the order or decree? In the case of **in Kenya Hotel Properties Ltd vs. Willesden Properties Ltd** the Court held:-

“The decree is a money decree and normally the Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the 2nd Respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the Applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the Applicants if stay is refused purely on grounds that the decree is a money decree. The Court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

21. In this case, the 2nd Respondent has deponed that he is willing to refund amounts paid. Further that as the landlord he stands to suffer irreparably if the Applicant continues to reside on the premises without settling arrears (which stood at 750,000/=) and without further payment of rent. The Applicant has not shown or pleaded that there can be no refund thus any eminent loss to be suffered. It is the view of this Court that payment of rent does not render the appeal nugatory but remains an obligation in the tenancy relationship. The 2nd Respondent does not seem to have an issue with the appellant’s occupation and possession of the premises. There could be no loss that can be suffered under the circumstances since there is no move to evict him.

22. Lastly, the Applicant failed to comply with prerequisite conditions by settling arrears and depositing moneys as directed by the Tribunal.

23. The upshot is the application is devoid of merit. It is dismissed with costs to the 2nd Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANGA THIS DAY OF 24TH DAY OF JUNE, 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant: Absent

Ms Kinuthia HB for Bwonwonga for the 1st Respondent

Waiganjo Gichuki for the 2nd Respondent

Kuiyaki and Njeri, Court Assistants