REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL NO. 29 OF 2019

CINDY CYNTHIA ORWA T/A CYTLE CINDY.................APPELANT/APPLICANT

VERSUS

SUGARLAND ESTATE'S LIMITED..RESPONDENT

RULING

This ruling is in respect of an application dated 28th August 2019 by the Appellant/Applicant seeking for the following orders:

a. That the Honourable court be pleased to grant temporary orders for stay of execution of the ruling and or the decree in ELDORET BUSINESS PREMISES AND RENT TRIBUNAL CASE NO. 73 OF 2018 delivered on 26th July 2019 and all consequential orders arising therefrom in relation to property ELDORET MUNICIPALITY BLOCK 6/241 pending the hearing and determination of this application inter partes.
b. That the Honourable court be pleased to grant temporary orders for stay of execution of the ruling and or the decree in ELDORET BUSINESS PREMISES AND RENT TRIBUNAL CASE NO. 73 OF 2018 delivered on 26th July 2019 and all consequential orders arising therefrom in relation to property ELDORET MUNICIPALITY BLOCK 6/241 pending the hearing and determination the Appeal inter partes ELDORET ELC APPEAL NO 29 OF 2019.
c. The costs of this application be provided for.

This matter was filed during vacation and the same was handled in Kitale ELC Court whereby the Judge granted ex- parte stay orders and ordered that the application be heard inter partes on 26th September 2019 before this court.

The respondent was aggrieved by the ex- parte orders and filed an application dated 2nd October 2019 seeking that the court sets aside the orders issued on 29th August 2019 on the grounds that the orders were issued irregularly without disclosure of material facts as there is no appeal from the judgment delivered on 12th April 2019 which terminated the appellant's tenancy.

The court ordered that the two applications be heard together vide filing of written submissions.

Appellant/Applicant's Submission

Counsel submitted that the issue for determination is whether or not this Honourable Court should issue an order for stay of execution of the judgment of the BPRT in this case. Counsel listed the grounds for

grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules as follows;

a. Whether the applicant will suffer substantial loss unless the order for stay of execution is made.
b. Whether Such security as to costs has been given by the applicant.
c. Whether the application has been made without undue delay

On the issue of whether the applicant will suffer substantial loss if an order of stay is not issued, Counsel cited the case of **MACHARIA T/A MACHARIA & COMPANY VS EAST AFRICAN STANDARD 2 [KLR**) in which it was held as follows;

> *"It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution or an award or decree or order before disposal of the applicant's business.*

Counsel therefore submitted that the Appellant/Applicant has established that her business is at a central place where she has already attracted a good clientele and she risks her business being closed down thus the loss of her daily regular customers where she generates her income. That she will suffer loss of goodwill and that the close of her business will render her employees jobless who fully depend on the said business for their daily upkeep and the wellbeing of their families.

Counsel submitted that the appeal as presented by the Applicant/Appellant raises several triable issues which warrant granting of the orders for stay of execution pending the hearing and determination of the appeal and that the said appeal stands to be rendered nugatory should the stay of execution not be granted..

It was Counsel's further submission that the Applicant/Appellant's present appeal is proper as the same is against the ruling and/or order of the Honourable Tribunal issued on 26th July 2019 which order is appealable vide Provisions of Section 15 Cap 301 Laws of Kenya.

Counsel cited the case of AJALE ENTERPRISES LIMITED VS SIMON GIKONYO NDIRANGU (2017) eKLR where Gitumbi J. while allowing an application for stay of execution of the judgment and decree of the Chairman Business Premises and Rent Tribunal took into account that the applicant would suffer substantial loss based on applicant's averments that he stood to lose his business and the goodwill he had built over years as well as employees. Counsel also relied on the case of TONCAP INVESTMENTS VS WORE MANAGEMENT (2018) eKLR in where Ong'ondo allowed an application for stay of execution of the orders issued by the chairman Business Premises and Rent Tribunal pending hearing and determination of the applicant's appeal.

On the issue of security of costs, Counsel submitted that the Appellant/Applicant is ready and willing to tender security and/or abide by any terms and conditions as this Honourable court shall direct for the due performance. Counsel relied on the case of RICHARD MUTHUSI VS PATRICK GITUMA NGOMO & ANOTHER (2017) eKLR where the court took into consideration that the applicant was ready and willing to abide by the terms and conditions set by the court.

On the issue on whether the application was made without delay, Counsel submitted that the application was made in a timely manner the ruling having been delivered on 26th July 2019. Counsel therefore urged the court to allow the application as prayed.

<u>Respondent's Submission</u>

Counsel for the respondent opposed the application and gave a brief background to the case as follows:

a. On 12th April 2019 the Honourable Tribunal made a determination on the Tenant's reference dated 11th October 2018 in the following manner:-

i. The Tenant's reference dated 11th October, 2018 is dismissed.
ii. The Landlord's notice dated 13th September, 2018 is allowed.
iii. The Tenant shall vacate and hand over vacant possession of the suit premises on/ or before 1st June 2019 in default an eviction order shall issue without further reference to the Tribunal and shall be enforced by the O.C.S Eldoret Police Station.
iv. The Landlord shall pay the Tenant a sum of Kshs. 400,000/= compensation for loss of tenancy and in particular costs of the Tenant's structures and incidental costs for relocating her business.
v. The said sum of Kshs. 400,000/ = shall be paid by way of a Banker's Cheque or direct bank deposit on or before 30th April, 2019.
vi. Each party shall bear its own costs.

Counsel annexed the copies of the decree and judgment and submitted that vide an application dated 20th May 2019 the Appellant applied for interpretation of the judgment as to whether she should surrender her fixtures and fittings upon receiving compensation for the said fixtures and fittings of which Counsel stated that they filed a response to the said application on 6th June 2019 in which they asserted that the Appellant was awarded Kshs. 400,000/ = for the structures and should not claim or cart away the same structures as that would amount to double compensation hence unjust enrichment.

It was Counsel’s submission that the Appellant's application was a review application disguised as an application for interpretation. Counsel further submitted that they lodged an application for review of the judgment to the extent that the Appellant may retain her structures as she now wishes and lose the entire award of compensation of Kshs. 400,000/ for the said structures.

That the two applications were consolidated and heard together and on 26th July 2019 ruling in respect of the two applications for review was delivered in the following terms:-

a. The Tenant shall vacate and hand over vacant possession of the suit premises on or before 1st September 2019, in default an eviction order shall issue without further reference to the Tribunal and shall be enforced by the O.C.S Eldoret Police Station.
b. For avoidance of doubt and to facilitate vacant possession, the tenant shall remove and carry away the existing structure which she has erected on the suit premises at the cost of Kshs. 274,000/=.
c. The order for compensation of a sum of Kshs. 400,000/ = to the Tenant is hereby set aside and replaced by the following order;

i. The Landlord shall pay the Tenant a sum of Kshs. 126,000/ = to facilitate the Tenant's relocation.
ii. The Landlord shall refund the Tenant the deposit of Kshs.121,800/=.
iii. The Landlord shall refund the Tenant a sum of Kshs. 10,000/ = in respect of the unregistered lease.

d. The total sum of Kshs. 257,800/ = set out in order 3 above shall be paid by the Landlord to the Tenant on or before 15th August 2019.
e. The Tenant shall continue to pay rent up to and including August 2019.
f. Each party shall bear its own costs for their respective applications. Mention for compliance on 2nd September 2019.

Counsel submitted that in compliance with the above order, they issued a banker’s cheque for the sum of the Kshs. 257,800/ = to the Appellant on 30th July 2019. That the said cheque was well received by the Appellant through her advocate who took note of the reminder that the Appellant should render vacant possession of the premises to the respondent by 1st September 2019. That to the consternation and in utter bad faith and non-disclosure of material facts the Appellant rushed to court and obtained interim stay orders to remain in possession of the premises despite the fact that no tenancy relationship exists between the Appellant and the Respondent. That the Appellant is merely seeking to frustrate the judgment of the

Business Premises Rent Tribunal which upheld the Respondent's tenancy termination notice and dismissed the Appellant's reference.

Counsel listed two issue for determination of the court as follows:

a. Is there an appeal from the judgment of the Business Premises Rent Tribunal delivered on 12th April 2019?
b. If the answer is in the affirmative, has the Applicant met the conditions for stay pending appeal?

On the first issue Counsel, submitted that there is no appeal from the determination of the Tribunal made on 12th April 2019 dismissing the Appellant's reference and upholding the Respondent's tenancy termination notice. The ruling of 26th July 2019 in which the Appellant is seeking to stay in this application was in respect of a review application on quantum of compensation due following termination of tenancy which the court found to be valid.

Counsel submitted that the Tribunal having dismissed the Appellant's reference for lack of merit on 12th April 2019 and partly allowed the Respondent's review application, the Appellant accepted her fate and received the cheque for Kshs. 257,800/ = being Kshs. 126,000/ = to facilitate her relocation and Kshs. 121,800/ = being refund of rent deposit and Kshs. 10,000/ = in respect of the unregistered lease. That by accepting the said payment and not preferring any appeal from the judgment of the Tribunal made on 12th April 2019, the Appellant acknowledged that her tenancy was extinguished and ought to vacate the premises.

Counsel submitted that the Respondent should be allowed to enjoy the fruits of the judgment and should not be exposed to the danger of losing their anchor tenant through an application filed by a party who has not lodged any appeal.

Further that on 27th May 2019, the Tribunal restrained the Respondent from evicting the Appellant until the Appellant's review application dated 20th May 2019 is heard and determined. Following delivery of ruling on the said application on 26th July 2019 the Appellant was allowed to be in the premises up to 31st August 2019.

Counsel cited the case of **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J** (as he then was) held:

> "The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."

Similarly, in **Wangui Kathryn Kimani v Disciplinary Tribunal of Law Society of Kenya & another [20171 eKLR Odunga J** held that:-

> "Where therefore the application for stay is directed to a decision against which the intended appeal is not directed, and cannot possibly be directed, a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score."

On the second issue as to whether the applicant has met the conditions of stay pending appeal, Counsel submitted that even if there was a valid appeal from the decree of 12 th April 2019, the Appellant has not satisfied the criteria for grant of stay of execution pending appeal. In particular that the Appellant has not demonstrated that she will suffer substantial loss should she vacate the premises as the appeal has no

bearing at all with her tenancy but the same is purely on quantum of damages awarded to the Appellant, who was the unsuccessful party in the Tribunal.

Counsel relied on the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another [19861 eKLR** the Judges of the Court of Appeal opined that:-

> "...As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause...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."

Counsel therefore submitted that the Appellant wants to have her cake and eat it having accepted deposit refund and relocation facilitation but as an afterthought and with the intent to frustrate the Respondent is applying for stay of execution which if granted by this Honourable Court means that she will continue in possession of the Respondent's premises to the detriment of the Respondent losing their anchor tenant who occupies two floors.

Analysis and determination

The background to this case has been well enumerated by both parties. This is an application of stay of execution of orders of the BPRT. The appellant filed this application under certificate of urgency during the August recess whereby the court granted ex parte orders.

When a party files an application, then such party must disclose all material facts to the court to enable the court come to a just conclusion. If at the inter partes hearing the court finds out that there was non-disclosure of material facts then the party who is guilty of such material non-disclosure cannot benefit from the discretion of the court to get equitable remedies.

In the case of **SIGNATURE TOURS & TRAVEL LIMITED V NATIONAL BANK OF KENYA LIMITED (2017) EKLR** where the Court of Appeal dealt with the issue concerning material non-disclosure while making an application for injunction. the court in **BAHADURALI EBRAHIM SHAMJI V. AL NOOR JAMAL & 2 OTHERS CIVIL APPEAL NO. 210 OF 1997 HELD**:

> *"It is perfectly well-settled that a person who makes an ex parte application to the court — that is to say, in the absence of the person who will be affected by that which the court is asked to do — is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts — facts, not law. He must not misstate the law if he can help it — the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...ln considering whether or not there has been relevant nondisclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The*

applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material nondisclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus pentitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...ln the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...lt is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made" The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

In the case of GOTV KENYA LIMITED V ROYAL MEDIA SERVICES LIMITED & 2 OTHERS [20151 EKLR where the court on paragraph 25 opined that "From the foregoing, it is clear that under our Civil Procedure Rules, an ex parte order can be discharged. The court has a wide discretion in a proper case to discharge its orders made exparte. Such discretion cannot however be exercised in a draconian manner. It has to be exercised judiciously and in terms of the known legal principles.

Having said that I find that the ex parte orders were obtained by material non-disclosure of facts and are therefore vacated.

Going to the issue of stay of execution, the grounds of stay pending appeal have not been met as no substantial loss has been established which must be established before such stay is granted. The appellant cannot have her cake and eat it there is no appeal against the judgment of the Tribunal and this application is meant to delay the execution of the said judgment without any proper justification.

I find that the application lacks merit and is therefore dismissed with costs to the respondent.

DATED and **DELIVERED** at **ELDORET** this **20TH** DAY OF **NOVEMBER, 2019.**

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Yego for Respondent and Miss.Ogenda for the Applicant.

Mr.Mwelem - Court Assistant