



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 1 OF 2017

SALIM MBARAK t/a BISMILAH

LENGUT HOTEL.....1ST APPLICANT

JANE JELAGAT KOSKEI

t/a TACHASIS WHOLESALERS.....2ND APPLICANT

GEOFFREY MUCHIRI t/a

BIBATO WHOLESALERS.....3RD APPLICANT

DANIEL CHEPKONGA

t/a MAROBON WHOLESALERS.....4TH APPLICANT

RAMESH JIVRAJ GOSRANI

t/a RAMESH GORSANI SHOP.....5TH APPLICANT

JAYDIP SHAH t/a SATISH SHAH SHOP.....6TH APPLICANT

ABRAHAM KIPTANUI t/a

KINOIYO FOOTWARE.....7TH APPLICANT

VERSUS

HASHAM LALJI PROPERTIES LIMITED.....RESPONDENT

RULING

The applicants have come to this court with an application seeking orders that the applicants be granted orders of stay of execution pending appeal from Eldoret BPRT Case Nos. 82, 83, 84, 85, 86, 87 and 88 of 2016 delivered as a single judgment on 4.11.2016. The applicants be granted extension of time within which to appeal to this court from the Business Premises Tribunal. That pending the hearing of this application interparties, the applicants be granted temporary orders of stay of execution of the orders of the Business Premises Tribunal made in Causes Eldoret BPRT Nos. 82, 83, 84, 85, 86, 87 and 88 of 2016. Costs of this application be provided for in any event.

The application is based on grounds that the applicants are business people running shops on Plot No. Eldoret Municipality Block 7/69 along Oloo Street in Eldoret town. The applicants were not notified of the determination of the Business Premises Tribunal when the same was rendered on 4.11.2016 and that they became aware of the determination on 5.12.2016 when the statutory 30 days right of appeal had lapsed. The applicants were not able to exercise their right of appeal to the High Court as envisaged by Section 15, Cap. 301. The applicants are still keen on pursuing their right to appeal to the High Court as they are aggrieved by the award of the Business Premises Tribunal. They claim to have an arguable appeal which will be rendered nugatory unless they are granted the prayers they seek. The application has been presented timeously and is in the interest of justice.

Jane Jelagat Kosgei swore the supporting affidavit on her behalf and on behalf of the other applicant's states that she has the authority of the

other applicants to swear this affidavit on their behalf and that she and the other tenants of Hasham Lalji Building Eldoret filed references to the Business Premises Tribunal which were all consolidated and heard under Cause No. 82 of 2015. The dispute between the applicants/tenants and the landlord/respondent revolved around the increment of rent over the lettable area occupied by each tenant. That at the close of the submissions, the Business Premises Tribunal reserved the judgment which parties would be notified. That neither them nor their advocate were ever served with notice of delivery of judgment. That they became aware that judgment had been delivered on 5.12.2016 some 34 days after the event. That she and the other tenants are aggrieved by the judgment of the Honourable tribunal and desire to exercise their unqualified right of appeal to this court. That the time reserved for such appeal is 30 days from the date of delivery which lapsed on 5th December, 2016.

That the Honourable Tribunal increased the rent payable by Ksh. 28,232/= and backdated it to 1.1.2016. The last time rent had been revised was 2012 and that the effect of back dating the rent to 1.11.2016 means she has to pay at once arrears totaling Ksh.338,784/= which is a stiff penalty given the prevailing economic climate.

That the other tenants' arrears work that as follows; -

- | | | |
|------------------------|---|------------------|
| a) Lengut Hotel | - | Kshs.1,049,700/= |
| b) Ramesh Gosrani | - | Kshs. 338,783/= |
| c) Marobon wholesalers | - | Kshs. 338,784/= |
| d) Bibato wholesalers | - | Kshs. 338,784/= |
| e) Satish Shah | - | Kshs. 338,784/= |
| f) Kinoiyo footware | - | Kshs. 746,712/= |

That she and the other tenants/applicants could not apply for review because the tribunal does not sit at one place all the time but is a circuit tribunal that visits various towns throughout Kenya. The new rents are uneconomical and the arrears are even punitive and expose the applicants to likely distress. That given the discreet manner in which the judgment was conveyed, she and the other tenants are apprehensive that execution may be levied in like manner and expose our business to economic ruin. That they have an arguable appeal to this court.

Martin Bett, the Legal Officer of the respondent filed a replying affidavit stating that the Tribunal informed parties of the judgment date and therefore it was not the respondents' duty to serve the notice and that the applicants were aware of the judgment date. According to the respondent, the appeal is frivolous and a waste of this court's precious time. The applicants have not shown the substantial loss or suffering they will incur if the order is not granted. According to the respondent, the applicants have not shown what the respondent intends to do in execution. The respondent states that the court ought to make an order that an interest earning account be opened between the applicants and respondents' respective law firms.

The applicant submits that they have the right of appeal and that the failure to serve the applicants with the notice of judgment interfered with the right to appeal as provided under section 15(1), Cap. 301, Laws of Kenya which provides that any party to a reference aggrieved by any determination or order of the Tribunal made therein may within thirty days after the date of such determination or order appeal to the Environment & Land Court provided that the Environment & Land Court may where it is satisfied that there is sufficient reason for so doing extend the said period of thirty days upon such conditions if any as it may think fit.

The right of appeal according to the applicant is unfettered and unqualified. The applicants' reasons for seeking extension of time to enable them file appeal out of time is that they were not aware of the judgment.

The respondent submits that the applicants are not candid as they are not informing the court how they became aware of the judgement of the court.

Moreover, it is the respondents' contention that the applicants have not shown that they will suffer substantial loss if the stay of execution of the judgment issued by Honourable Mbichi Mboroki on 4.11.2016 is not issued. The respondent further submits that as a landlord, he has the right to enjoy the fruits of his judgment which is a fundamental right in the adversarial system. Moreover, that the respondent is capable of reimbursing the incremental rent. Most importantly, the applicants have not offered any security and thereto. The principles for grant of stay of execution pending appeal are now settled. The application ought to be made without unreasonable delay and upon proof that substantial loss may result to the applicant unless the order is made.

That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the application should be given by the applicant.

On the first issue, I do find that judgment was entered on the 4.11.2016 in the presence of the respondent's advocate but in the absence of the applicants' advocate. Though the matter was reserved for judgment after submissions, there is no evidence that parties were notified of the judgment date. The respondent has not informed the court how he became aware of the date of the judgment. Conversely, the applicants have not informed the court how they became aware that judgment had been delivered. However, the applicants state that they became aware on the 5.12.2016 that judgment was delivered on 4.11.2016. I do find that absence of evidence of Notice of the date of delivery of Judgment accounts for the period between 4.11.2016 when judgment was delivered and the 5.12.2016 when the applicants became aware of

the judgment.

The remaining period is between 5.12.2016 and 22.12.2016 when the Memorandum of Appeal was filed being a period of 17 days. This is less than the 30 days stipulated by the law and therefore, I do find that the appeal was filed within reasonable time after discovery of judgment. Moreover, the right to be heard is sacrosanct and cannot be wished away as the same is cardinal and enshrined in the Constitution of Kenya 2010.

On substantial loss, I do find that the applicants have demonstrated that if execution is levied, they are likely to suffer substantial loss and that their business will suffer economic ruin. However, the applicants have remained curiously silent on security. Ultimately, I do find that the applicants have demonstrated that they are entitled to the orders sought. I do grant extension of time within when the appeal from Eldoret BPRT Case No. 82, 83, 84, 85, 86, 87 and 88 of 2016 in the judgment delivered on 4.11.2016 and the said appeal should be filed within the next 30 days. Pending the hearing of the appeal, there be stay of execution of the decree issued for the said judgment.

Last but not least, the applicants to deposit in court each an equivalent of three months' rent, failure of which, execution to issue. In the alternative, each applicant to furnish security equivalent to three months' rent, failure of which, execution to issue. Orders accordingly.

Dated and delivered at Eldoret this 26th day of January, 2018.

A. OMBWAYO

JUDGE