



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A CASE NO. 9 OF 2017

ARTHUR MUNENE MBOGO.....APPELLANT

VERSUS

VERONICA RWAMBA MBOGO.....RESPONDENT

(Being an appeal from the ruling and orders of the Chairman of the Business Premises Rent Tribunal delivered on 8th September, 2017 in Tribunal Case No. 40 of 2017 – Embu)

RULING

1. By a notice of motion dated and filed on 22nd September 2017 under certificate of urgency under sections 1A, 1B and 3A of the Civil Procedure Act, Order 42, Rules 1 and 6, and Order 51 Rule 1 of the Civil Procedure Rules, the Appellant sought, *inter alia*, an order of stay of proceedings and stay of execution of the ruling and orders of the Chairman of the Business Premises Rent Tribunal (hereinafter the “Tribunal”) dated 8th September 2017 in **Embu Tribunal Case No. 40 of 2017, Arthur Munene Mbogo Vs Veronica Rwamba Mbogo** pending the hearing and determination of the pending appeal.
2. The said application was based upon the grounds enumerated on the face of the said motion and supported by the Appellant’s supporting affidavit sworn on 22nd September 2017. The Appellant’s case was that he was aggrieved by the decision of the said Tribunal to dismiss his preliminary objection to the jurisdiction of the Tribunal to entertain the reference filed by the Respondent in which she sought to terminate his tenancy of some premises located on plot No. 1112/325 along Haile Selassie Road in Embu. There were also other points of preliminary objection in his notice of preliminary objection dated 22nd May 2017.
3. It was the Appellant’s case that his appeal had good chances of success and that it may be rendered nugatory unless stay of proceedings and stay of execution of the orders made on 8th September 2017 was granted.
4. The Respondent filed a replying affidavit sworn and filed on 13th October 2017 in opposition to the said application. She stated that she was the widow and beneficiary of the estate of the late Gerishon John Mbogoh and the property in issue was given to her absolutely upon confirmation of grant in **NBI Succession Cause No. 989 of 1999**.
5. The Respondent averred that she had been advised by her advocates on record that the Appellant’s said application had no merit since he had failed to demonstrate in what manner he would suffer substantial loss if the stay sought was not granted. It was further opposed on the basis that the Appellant had failed to offer any security for the due performance of the orders granted by the Tribunal and that he had not demonstrated that the Respondent was a person of straw.

6. When the said application was listed for hearing before me, Mr Otieno prosecuted the Appellant's said application while Ms Mutuku opposed the same on behalf of the Respondent. At the hearing hereof, Mr Otieno informed the court that the order for stay of execution had been overtaken by events since costs had already been paid upon execution. He was, therefore, solely concerned with the order for stay of proceedings.

7. The Appellant's counsel submitted that his client had an arguable appeal which could be rendered nugatory because the appeal deals with the issue of the jurisdiction of the Tribunal. He further submitted that the application had been filed without undue delay and that the Respondent would not suffer any loss or prejudice if the orders sought were granted. He relied upon the 3 authorities contained in the Appellant's list of authorities dated 17th October 2017. The cases cited were **Butt Vs Rent Restriction Tribunal [1979] eKLR; National Oil Corporation of Kenya Vs Real Energy [2017] eKLR and Safepark Ltd Vs General Plastics Ltd [2012] eKLR.**

8. The legal principles for granting a stay of execution and stay of proceedings are fairly well settled in Kenya. The statutory basis is **Order 42 of the Civil Procedure Rules, 2010. Rule 6(2)** of the said order provides as follows:

"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."

9. In the case of **National Oil Corporation of Kenya Vs Real Energy Ltd** (supra), the court considered the principles for stay of proceedings in paragraph 9 as hereunder:

"9. In the case of Global Tours & Travels Ltd; Nairobi High Court Winding up Cause No. 43 of 2000 which was cited with approval in Gichuki Macharia & Another Vs Kiai Mbaki & 2 Others, Winding up Cause No 1 of 2001, Ringera J as he then was stated as follows:

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

10. There is another important consideration to be taken into account which was considered in the case of **Butt Vs Rent Restriction Tribunal** (supra). It was put thus by the Court of Appeal;

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

11. So, has the Appellant demonstrated the grounds for granting a stay of proceedings in the instant

proceedings? In the ruling of the Tribunal dated 8th September 2017, the Tribunal simply dismissed the Appellant's preliminary objections and directed that the reference shall be heard on merit at its next session at Embu. There is no doubt that the Appellant has a right of appeal from the said decision of the Tribunal. The court is also satisfied that the appeal is arguable and not frivolous as required by law. The court is also satisfied that the application for stay was filed with reasonable expedition.

12. The only principle which requires interrogation is the one on whether or not the pending appeal will be rendered nugatory if stay of proceedings is not granted. The court also takes the view that if an applicant can demonstrate that his appeal would be rendered nugatory unless stay is granted then that would constitute demonstration of substantial loss.

13. The court has considered the case of *Keter & 6 Others Vs Kiplagat and 2 Others [2004] 2 KLR 159* which considered the question of whether or not the intended appeal therein would be rendered nugatory if stay of execution or an injunction was not granted.

14. The brief facts of that case were that Athletics Kenya had planned to convene an annual general meeting (AGM) but the Applicants contended that the said meeting was being convened in contravention of its constitution. The Applicants therefore sought an injunction to restrain the Respondents from convening the AGM. The Respondents then asked the court to stay the suit and refer the dispute to arbitration in accordance with the constitution of Athletics Kenya.

15. The High Court stayed the suit and referred the dispute to arbitration but refused to grant the injunction sought. The Applicants were aggrieved by those orders and they moved to the Court of Appeal for a stay of those orders. They wanted a stay of the order for arbitration and an injunction to prevent the AGM from taking place.

16. The Court of Appeal was satisfied that the Applicants had an arguable appeal but declined to grant the orders sought. The court held, *inter alia*, that;

a) Even if the elections were held, the success of the appeal would have the effect of nullifying them.

b) Even if the arbitration were to be carried out before the appeal was determined, and if the appeal were to succeed, the consequence of that would be that the arbitration proceedings would be rendered useless and unnecessary and they would be set aside.

c) It had not been shown how the success of the intended appeal would be rendered nugatory if the orders sought were not granted.

17. The court has considered the record, the nature of the preliminary objections raised before the Tribunal, the nature of proceedings before the Tribunal, and the consequences of declining the order of stay of proceedings sought. The court is not persuaded that the pending appeal would be rendered nugatory unless the stay sought is granted. If the Appellant's appeal were to succeed, then the proceedings and decisions of the Tribunal will be nullified. If by the time the decision in the appeal is rendered the Appellant will have suffered any loss or inconvenience, then a suitable award of costs may be made.

18. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 22nd September 2017 and the same is hereby dismissed. The costs of the application shall abide the result of the appeal.

19. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th** day of **JANUARY, 2018**.

In the presence of Ms Moenga holding brief for Mr Otieno for the Appellant and the Respondent in person.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

18.01.18