



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL NO. 18 OF 2016

JAMES NJOROGE NJUGUNA

T/A J. N. NJUGUNA & COMPANY ADVOCATES.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

SEDCO CONSULTANTS LIMITED.....2ND RESPONDENT

ESHIKONI AUCTIONEERS.....3RD RESPONDENT

RULING

James Njoroge Njuguna T/a J. N. Njuguna & Company Advocates has come to this court against the *National Bank of Kenya Ltd, Sedco Consultants Limited* and *Eshikoni Auctioneers* seeking orders that there be stay of execution of the order of the Business Premises Rent Tribunal in Eldoret BPRT Case No. 13 of 2016 in so far as they relate to costs assessed and recovery of the same as part of arrears of rent or execution thereof pending the hearing and determination of appeal. Moreover, that an injunction be issued against the respondents restraining them whether by themselves, servants and/or agents from levying distress for alleged rent arrears at Eldoret Municipality/Block 4/88 or harassing the appellant pending the hearing and determination of the appeal. The application is based on grounds that appellant shall suffer substantial loss of stay in not granted sufficient cause exists to warrant stay of execution and that the application has been made without unreasonable delay.

In the supporting affidavit, the applicant states that he is a tenant at the demised premises known as ELDORET MUNICIPALITY/BLOCK 4/88 belonging to the 1st respondent and that the tenancy is a controlled tenancy within the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301. That he has currently paid his rent to date and that the 1st respondent and himself have had a dispute over the charging of unjustified service charge to pay unjustified sums. The 1st respondent while the dispute over service charge was pending before the Tribunal caused instructions to be issued to the 2nd and 3rd respondents an alleged Estate agent and Auctioneers respectively to collect the disputed service charge.

Based on the said state of affairs, the 3rd respondent issued a proclamation of the appellants property on the 27th January, 2016 and that he immediately lodged a complaint with the Tribunal being **Eldoret BPRT Case No. 13 of 2016 — James Njoroge Njuguna T/a J. N. Njuguna & Company Advocates —v- National Bank of Kenya Ltd & 2 Others.** The Tribunal considered his application under certificate of urgency and granted his interlocutory relief. The respondents upon service filed a replying affidavit. On the date set for hearing based on the information in the replying affidavit it became necessary to lodge a supplementary affidavit thus leave was sought together with the fact that his Advocate was engaged in the Environment and Land Court at Eldoret.

The Chairperson declined to grant leave together with an adjournment and dismissed the application. That he lodged an application to review and rescind the orders in issue but the same was declined on the 14th September, 2016. He is aggrieved by the decision and he has lodged an appeal raising fundamental issues that constitute sufficient cause to warrant the grant of a stay of execution and the grounds are:-

a) That the Learned Chairperson erred in law and fact in failing to find that the appellant as a litigant served with a replying affidavit he was entitled to seek leave in order to file a supplementary affidavit by dint of order 51 rule 14(3) of the Civil Procedure Rules, 2010 and such an exercise would require time thus an adjournment of his application was necessary.

b) That the Learned Chairperson erred in law and fact in failing to accord a fair hearing to the appellant by according him a chance to prepare for his case contrary to the requirements of article 50 of the Constitution of Kenya, 2010.

c) That the Learned Chairperson erred in law and fact in failing to review and rescind his decision to dismiss the appellant's

application dated 29th January, 2016 despite having jurisdiction to do so under section 12 of the Landlord and Tenant (Shops, Hotels and catering Establishments) Act, Cap. 301.

d) That, the Learned Chairperson erred in law and fact in making an erroneous assessment of costs and directing that the same be recovered as rent arrears while the appellant had not been heard on the issue of any alleged rent arrears, thus denying the appellant a fair hearing.

e) That Learned Chairperson erred in law and fact in failing to accord the appellant a fair and just hearing and in proceeding to summarily decide on the appellant's application contrary to article 159 of the Constitution of Kenya, 2010.

The appellant laments that based on the orders, he is likely to suffer substantial loss as he shall be distressed over a dispute which has not been heard on merits. More so, the nature of his business is a law firm which serves the general public and its operations shall be paralyzed and that the 1st respondent is already threatening to execute the orders of the Tribunal and may also distress him. The 1st and 2nd respondents filed grounds of opposition stating that the Notice of Motion Application is misconceived, frivolous, bad in law, vexatious and discloses no grounds for issuance of the Orders sought hence an abuse of the court process.

Moreover, that the application is founded or premised on an appeal which is time barred having been filed in contravention of the provisions of section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya hence the same is a nullity.

The respondent argues that the Notice of Motion Application does not meet the threshold for grant of a stay of execution or temporary orders pending Appeal as set out at Order 42(r. 6(2)) of the Civil Procedure Rules, 2010. The Notice of Motion does not disclose any substantial loss that the Appellant will suffer if the orders sought are not granted and as such the application is unmerited.

The appellant contends that the Memorandum of Appeal and the Notice of Motion Application have been filed after an inordinate, unreasonable and unexplained delay having been filed more than seven months after the Honourable Tribunal gave its Orders and that the application is a move by the applicant to delay and bar the respondent from exercising their legal rights which is an abuse of the process of this Honourable Court.

The respondent further contends that the applicant is seeking an equitable remedy in the nature of a temporary injunction hence he should have come to court with clean hands and having failed to do so by failing to pay rent, this Honourable Court should not exercise its discretion in his favour.

The respondent is opined that the Notice of Motion is seeking to elevate the Appellant's purported equitable rights over the 1st Respondent's constitutional, statutory and contractual rights which is a contravention of a cardinal principle of equity that equity follows the law and not vice versa.

The appellant submits that he has satisfied the conditions for stay of execution and therefore, the order should be granted. According to the appellant, the decision of the Tribunal required the appellant to pay costs and also recovery of alleged rent arrears. The amount of the arrears is unspecified in the order of the Tribunal and that the respondent shall be at liberty to execute unspecified sum of money. The business of his law firm shall suffer. He states that the amount of costs is unreasonably high. The amount assessed as disbursement is Kshs.26,000. There are no particulars. On sufficient cause, he submits that the memorandum of appeal raises substantial legal issues as to the conduct of proceedings before the Tribunal. Thus, the fundamental right to fair hearing was denied by the Tribunal in failing to grant leave to the supplementary affidavit. On the issue of the application for stay being made without unreasonable delay, he argues that appeal was filed in time under the law and the application was presented expeditiously.

The 1st and 2nd respondents submit that the applicant has not demonstrated the substantial loss likely to be suffered if stay is not granted. The respondents further submit that there is inordinate delay which is unreasonable and unexplained. Thus, 7 months after the Tribunal gave its orders. Lastly, that the appellant has not furnished any security for due performance.

I have considered the rival submissions and do find that the matter before the Tribunal came up for hearing on 13.9.2016 before ***Mbichi Moroki (Chairman)*** in the presence of Wanyonyi holding brief for Kemei for Landlord and the tenant's Advocate was absent. The application dated 8.3.2016 was dismissed with costs to the respondent. Costs were assessed at Kshs.20,000/=. All costs awarded to the respondent were to be paid within 30 days in default the Landlord was to recover the same as part of arrears of rent or executive in respect of the same.

The application dated 8.3.2016 was for variation of the order made on 7.3.2016 dismissing the tenants' application dated 29.1.2016 discharging interim orders made on 1.2.2016, only Kshs.59,400/= and adjoining the reference.

It is important to note that the application dated 8.3.2016 was meant to reinstate the application dated 29.1.2016 that was dismissed on 7.3.2016. Both applications were dismissed. The appellant has not annexed the proceedings of the Tribunal to enable the court understand the reasons for the dismissal of the application. The appellant relies on the extracted orders which do not bring out clearly the proceedings that led to the dismissals. On whether the appeal was filed in time, I do find that the same was lodged on 18.10.2016 whilst the decision was made on 13.9.2016 in respect of application dated 8.3.2016. The appeal is within 30 days and therefore not filed out of time. The application was made on 12.10.2016 not more than 24 hours after the ruling and therefore, there is no inordinate delay.

On substantial loss, the appellant hereby states that he would be distressed over a dispute which has not been heard on merit and his operation will be paralyzed. I have perused the order dated 13.9.2016 and do find that the respondent was awarded Kshs.20,000 as costs. In 7.3.2016, the respondent was awarded costs of Kshs.59,400. All costs awarded by the Tribunal amount to Kshs.79,400. The plaintiff has not demonstrated that if he pays this amount of money, he is likely to suffer substantial loss. For the applicant to succeed in this application, he

must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. The applicant must demonstrate that there are no prospects of recovering the money if he succeeds on appeal. In this case, the applicant has not demonstrated that the respondent is incapable of paying the money if he succeeds.

From the foregoing, in respect of prayer 2 of the notice of motion dated 12.10.2016, this court finds that there is need to balance the interest of the tenant and the landlord and orders that all moneys owed by the tenant to the landlord in respect of the orders made on 7.3.2016 and 13.9.2016 which amount to Kshs.96,400 to be deposited in court within 30 days. There is hereby granted a stay of execution for a period of 60 days within which the appeal should be heard and determined. Appeal to be fast-tracked for hearing.

Dated and delivered at Eldoret this 2nd day of March, 2018.

A. OMBWAYO

JUDGE