



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 38 OF 2016

JOHN KIMANI KARIUKI..... APPELLANT

VERSUS

KANVALDEEP SEHMI.....RESPONDENT

RULING

The appellant filed the appeal herein on 31st March, 2016 to challenge the decision that was made by the Business Premises Rent Tribunal (hereinafter referred to as “the tribunal”) on 18th March, 2016 in BPRT CASE NO. 285 OF 2015 (hereinafter referred to as “the tribunal case”). The appellant had filed a reference (complaint) at the tribunal against the respondent in respect of business premises known as Shop No. C situated on L.R. No. 209/136/109, Nairobi (hereinafter referred to as “the suit property”). The appellant had claimed that the respondent who is the owner of the suit property had threatened to alter the terms of tenancy illegally and had unreasonably refused to accept rent.

Together with the complaint, the appellant filed an application seeking orders to compel the respondent to receive rent and to restrain the respondent from interfering with his occupation of the suit property. The tribunal heard the application and in a ruling delivered on 18th March, 2018, struck out the complaint and the application on the ground that the appellant had no capacity to file the same as he had not obtained grant of letters of administration in respect of the estate of his mother, Agnes Wangare Kariuki (deceased) on whose behalf he had brought the proceedings. It is that decision that provoked the present appeal. Together with the memorandum of appeal, the appellant filed an application by way of Notice of Motion dated 30th March, 2016 seeking the following orders:

- a) THAT a temporary injunction do issue restraining the respondent whether by himself his agents, servants and/or advocates from unlawfully interfering with the appellant/applicants use and occupation of the premises known as Shop C situated on L.R 209/136/109 (“the suit property”) pending the hearing and determination of the appeal.
- b) THAT the honourable court be pleased to order a stay of execution of the decree issued pursuant to the ruling of the Chairman of the Business Premises Rent Tribunal Hon. Mbichi Mboroki delivered at Nairobi on 18th March, 2016 in Tribunal Case No 285/15 pending the hearing and determination of the appeal.
- c) THAT this honourable court be pleased to give directions as to where the applicant shall henceforth deposit the monthly rent payable in respect to the suit property pending the hearing and determination of the appeal.
- d) THAT the cost of and incidental to the application abide the result of the appeal.

The application was opposed by the respondent through a replying affidavit sworn on 22nd April, 2016.

Appellant's case:

The appellant has averred that he has been a tenant of the respondent on the suit property and he has been diligently paying rent. The appellant has contended that sometimes in January, 2015 the respondent refused to accept rent payable for the suit property and threatened to alter the terms of the tenancy by introducing a written lease. This turn of events compelled him to file the tribunal case. After filing the case, he filed an application and obtained an order to deposit rent at the tribunal. The appellant has contended that his application at the tribunal was not opposed. He has averred that instead of opposing the application, the respondent filed another application dated 15th June, 2015 seeking to discharge the interim orders that the tribunal had made in his favour to which application he responded accordingly. The appellant has averred that despite the fact that he was paying rent on time, the tribunal declared that he was not a tenant of the respondent and struck out his reference together with the application for interlocutory orders alluded to earlier. The appellant has urged the court to grant the orders sought so that he is not unfairly evicted from the suit property. The appellant has contended that he has an arguable appeal which will be rendered nugatory if the orders sought are not granted.

The respondent's case:

In his replying affidavit, the respondent has contended that the tenancy in respect of the suit property was between him and the appellant's mother Agnes Wangare Kariuki (hereinafter referred to as "the deceased"). The respondent has averred that since the tenancy agreement between him and the deceased was not put into writing, the same was automatically terminated upon the demise of the deceased. He has averred further that the deceased was his tenant for nine (9) years and as such the tenancy could not be deemed as controlled under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya.

The respondent has contended that the tribunal did not err in striking out the appellant's reference and application. The respondent has contended that the appellant has never been his tenant and that he was not a party to the said tenancy agreement between the respondent and the deceased. The respondent has contended that the appellant has misled the court by declaring himself a tenant in the suit property as it is his mother who was a tenant until her demise. The respondent has averred that the appellant has failed to disclose to the court the fact that in the tribunal case, he had sued on behalf of the estate of the deceased and that the receipts attached as "JKK1" to the affidavit in support of the application herein do not bear the name of the appellant but of the deceased who was the tenant.

The respondent has contended that the appellant has no locus standi to sue on behalf of the estate of the deceased as he has not provided any proof that he is the administrator of the estate of the deceased and that the deceased had wished to transfer the tenancy of the suit property to him. The respondent has averred that since the ruling of the tribunal, he has not issued the appellant with eviction notice as alleged by the appellant and that the appellant has no prima facie case to warrant the issuing of the injunctive orders sought. The respondent has contended that the orders for stay of the ruling of the tribunal has no basis since the orders that had been issued by the tribunal cannot be executed save to the extent of costs. The respondent has averred that the appeal filed herein is frivolous, vexatious and an abuse of the court process and should be dismissed. The respondent urged the court not to grant the orders sought to avoid unnecessary losses and unwarranted interruption of his business.

Determination:

The application was argued by way of written submissions. The appellant filed his submission on 26th August 2016 while the respondent filed his submission in reply on 9th January, 2017. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavit of the respondent in opposition to the application and the submissions by the respective advocates for the parties. The application has three (3) limbs. The first limb seeks injunctive relief, the second limb seeks a stay and the third limb seeks directions. I will consider each limb of the application separately. The

injunction sought by the applicant is interlocutory in nature. The order is sought pending the hearing of the appeal. For the appellant to obtain this kind of relief, he has to demonstrate that he has an arguable appeal with good chances of success. I have perused the pleadings that were filed at the tribunal and the ruling of the tribunal. I have noted that the appellant had brought the tribunal case on behalf of the estate of Agnes Wangare Kariuki (deceased). Contrary to the appellant's contention, the tribunal did not make a finding that the appellant was not the respondent's tenant. The tribunal's finding was that although the appellant had brought the complaint on behalf of the estate of the deceased, the appellant did not place any material before the tribunal showing that he had been appointed as the administrator of the estate of the deceased. The tribunal did not dismiss the appellant's complaint and application but struck out the same as incompetent for want of locus standi. The appellant has not persuaded me that he has a good appeal against the decision of the tribunal. The appellant has not placed any material before this court showing that he had capacity to file a complaint at the tribunal on behalf of the deceased. For the foregoing reasons, I am not satisfied that a case has been made out for grant of an injunction pending appeal.

With regard to the limb of the application seeking a stay of execution, Order 42 Rule 6(1) of the Civil Procedure Rules gives this court power to stay execution of a decree of the court appealed from pending appeal. Order 42 Rule 6(2) provides for conditions that must be met before an order for stay of execution is granted. The rule bars the court from making an order for stay of execution unless it is satisfied that the applicant would suffer substantial loss if the stay is not granted, and that the application for stay has been made without unreasonable delay. In addition, the applicant must furnish such security as the court may order for the due performance of the decree in the event of that the appeal fails.

I am not satisfied from the material before me that the plaintiff stands to suffer substantial loss unless the stay sought is granted. As I have already stated above, the tribunal struck out the appellant's complaint and application as incompetent. I am in agreement with the respondent's submission that, save for the order for costs, the tribunal did not give any positive order capable of execution. The appellant has not demonstrated that he will suffer substantial loss if he pays the respondent's costs at the tribunal.

In view of my findings on the first two limbs of the application, it is not necessary for me to consider the third limb.

The upshot of the foregoing is that I find no merit in the Notice of Motion application dated 30th March, 2016. The application is dismissed with costs to the respondent.

Delivered and Signed at Nairobi this 12th day of April 2018.

S.OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Mburu for the Appellant

Ms. Motabori h/b for Mr. Nyachoti for the Respondent

Catherine Court Assistant