



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

[CONSTITUTION AND HUMAN RIGHTS]

PETITION NO. 18 OF 2016

IN THE MATTER OF ARTICLE 3(1), 10, 20, 22, 23, 24, 40 AS READ WITH ARTICLE 260, 47(1) AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULE 86(5) OF THE UNIVERSITIES REGULATIONS, 2014, UNDER THE UNIVERSITIES ACT, NO. 42 OF 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE DECISION OF THE COMMISSION OF UNIVERSITY EDUCATION TO CLOSE KISSI UNIVERSITY (ELDORET CAMPUS) AT ELDORET MUNICIPALITY/BLOCK 7/162

BETWEEN

SIOKWEI TARITA LIMITED.....PETITIONER

VERSUS

THE COMMISSION OF UNIVERSITY EDUCATION.....1ST RESPONDENT

KISII UNIVERSITY.....2ND RESPONDENT

RULING

The applicants Professor John S. Akama and Dr. Kipyegon Kirui have come to court in application dated 15.1.2018 praying for an order that there be a review of the Order issued on 22.11.2017 limiting stay of proceedings to 60 days. That the court to issue an order of stay of proceedings pending appeal. The application is premised on grounds that the appeal is yet to be heard and that the petitioners are likely to move the court to enforce the orders made prior to the grant of the order of stay of proceedings. The application has been filed promptly and in good faith.

In the supporting affidavits, the applicants, Dr. Kipyegon Kirui and Professor John S. Akama state that they have filed the appeal but the appeal is yet to be heard and determined and therefore, it is prudent to make an order that there be stay of proceedings until the hearing and determination of appeal.

The petitioner filed a replying affidavit stating that any order issued to a party must be balanced against the interests of others and that the court should promote social justice and realization of the potential of all human beings.

On his part, on 15.3.2018, the petitioner filed an application dated 12.3.2018 seeking orders that the ruling of the court made on 22.11.2017 be reviewed, set aside or varied and that the order of the court made on 22.11.2017 be extended pending determination of the appeal to be filed on condition that Kisii University pays all rent arrears owing to the Petitioner over tenancy at Tarita Centre L. R. No. Eldoret Municipality Block 7/162 and restraining the said premises Tarita Centre the pre-tenancy condition.

The application is based on grounds that the interests of justice shall suffer and the present application risks being nugatory if the present application is not heard together with the Notice of Motion dated 15th January 2018, that seeks extension of the Orders of Court of 22nd November 2017;

That this Honorable Court issued a Ruling herein on 22nd November 2017, staying proceedings herein together with the Order for Conservatory Orders issued herein on 14th December 2016, in favour of an appeal that was to be filed by the 2nd Respondent herein, for a period of sixty (60) days, which stay of sixty (60) days has since expired;

The 2nd Respondent has filed an application for extension of the stay infinitely, until an appeal, which has yet to be filed is heard and determined. The Issues of dispute between the parties herein involve fundamental rights of the Petitioner for protection of property and interest over property guaranteed by Article 40 read with 260 of the Constitution of Kenya. The 2nd Respondent, a tenant of the Petitioner at Tarita Centre in Eldoret, has rent arrears now totaling Kshs. 45, 671,470.85. These rent arrears, the 2nd Respondent has declined to settle, even after enjoying occupancy of the premises;

Further that the 2nd Respondent has declined to vacate the property and restore the property to pre-tenancy condition so as even to allow letting to other tenants to mitigate the losses and assist in alleviating the 2nd Respondent's liability under the Term Lease of the parties;

As a result of refusal of the 2nd Respondent to settle the rent and restore property for further leases, the Petitioner has suffered and continue to suffer extreme prejudice, and such breach of the 2nd Respondent has imperiled the Petitioner's property since the Petitioner has been unable to settle its instalments to the bank. The Petitioner's property is in danger of dissipation by the bank exercising Statutory Power of Sale;

The 2nd Respondent has a statutory duty to pay rent for demised property under section 66(1)(a) of the Land Act, No. 6 of 2012, which obligation the 2nd Respondent cannot be lawfully excused from;

Further, the 2nd Respondent has a statutory duty under section 66 of the of the Land Act, No. 6 of 2012 to restore the property to pre-tenancy condition and hand over to the Petitioner, which obligation the 2nd Respondent cannot be lawfully excused from;

That granting a blanket stay of enforcement of the Conservatory Orders of this Honourable Court of 14th December 2016, excuses the 2nd Respondent from statutory responsibilities, which is itself an affront to the Rule of Law and administration of justice;

Granting a blanket stay of enforcement of Conservatory Orders of this Honourable Court of 14th December 2016, excuses the 2nd Respondent from statutory responsibilities, and endangers the Petitioner's fundamental right to property and interest in property guaranteed by Article 40 and 260 of the Constitution;

By Article 19(1) & (2) and 24(1)(d) of the Constitution, this Court is enjoined to do a balancing act in enforcing any claim for violation rights, and by that duty the Court is debarred from extending Orders that excuse a party from statutory obligation, and particularly where issuing such unlawful extension shall violate fundamental rights of the Petitioner;

That there is no correlation between the statutory duty to pay rent and to restore premises and a claim of failure to be heard for purposes of contempt application. If anything, by the filed affidavits and repeated court appearances, the 2nd Respondent became aware of pendency of Orders and of court and the claim for settlement of rent arrears;

That It is in the interests of the fair administration of justice and the rule of law that the application is granted to protect against the otherwise devastating violation of fundamental rights of the Petitioner guaranteed by the Constitution of Kenya, 2010.

I have considered the rival submissions of parties herein and do agree with the applicants, Prof. John S. Akama and Dr. Kipyegon Kirui that the fixing of the hearing date of the appeal before the Court of Appeal is the preserve of the Court of Appeal and that the applicants have no control of the same. The typing of proceedings is also the preserve of the Environment & Land Court and not the applicants. For the above reasons, I am inclined to review the orders made on 22.11.2017 and do order that there be a stay of proceedings pending hearing and determination of the intended appeal.

However, In the interest of justice, the court orders that the respondents do repair the premises, Tarita Centre to the pre-tenancy condition. The issue as to the rent payable to be determined in the petition. Each party to bear own costs for the two applications. Orders accordingly.

Dated, signed and delivered at Eldoret this 10th day of August, 2018.

A. OMBWAYO

JUDGE