



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 49 OF 2017**

**TONCAP INVESTMENTS.....APPLICANT/APPELLANT**

**VERSUS**

**LUORE MANAGEMENT.....RESPONDENT**

(Being an application for stay of execution of Business Premises Rent Tribunal

Decision (Mbichi Mboroki, Chairman) in Kisii BPRT case No. 26 B of 2016 dated 27<sup>th</sup> March 208)

**RULING**

1. The applicant filed an application by way of notice of motion under Certificate of urgency dated 6<sup>th</sup> April, 2018 seeking the following orders;

**i. Spent**

**ii. Spent**

**iii. THAT the honourable court be pleased to grant orders for stay of execution of the orders of the Chairman in business premises Rent Tribunal case no. 26 B-2016 pending the hearing and determination of applicant's this appeal.**

**iv. The status quo be maintained pending the hearing and determination of the applicant's intended appeal.**

**v. Costs of this application be in the cause.**

2. The application is anchored on a supporting affidavit sworn on the even date by one Tom Ndege/Tenant/Applicant six (6) grounds on the face of it. The grounds include:-

**a. The Chairman to the Tribunal heard and determined the matter in the absence of the applicant on the 27<sup>th</sup> March 2018.**

**b. If the orders staying execution are not granted, the applicant risks being forcefully evicted from the only business premises they have known for a very long time.**

**c. It is in the interest of justice, and no party will be prejudiced if the orders sought herein are granted.**

3. The respondent opposed the application by 19 paragraphed replying affidavit sworn on 3<sup>rd</sup> May 2018 by Engineer Philip Okundi, the director of the respondent company. He averred, inter alia, that the tribunal case was duly heard, there are no triable issues in the appeal preferred herein, he is desirous in renovation of the building and that the stay sought is an abuse of the process of the court.

4. The applicant is represented by learned counsel Samwel Nyauke. The respondent is represented by learned counsel Mr. Henry Kabiru.

5. On 7<sup>th</sup> May, 2018, the court directed that the application be argued by way of written submission, see; Orders 51 Rule 6 of the Civil Procedure Rules 2010 and practice direction No. 33 (b) of the Environment and Land Court Practice Directions, 2014.

6. Learned counsel for the applicant filed submission dated 19<sup>th</sup> July, 2018 whereby he gave brief facts of the case and identified two issues for determination namely:-

**- Whether the hearing notice was served on the applicant and whether the rules of Natural Justice were observed in determining the matter.**

7. Counsel cited Article 50 (1) of the Constitution of Kenya 2010 on right to fair hearing and the case of **Baker –v- Canada (Minister of Citizenship and Immigration) 2 S.C.R. 817** with regard to procedural fairness. He urged the court to allow the application as the matter had proceeded in the absence of the applicant who was not duly served for hearing before the tribunal.

8. Learned counsel for the respondent filed submission dated 30<sup>th</sup> May, 2018 and stated that applicant has deliberately misled the court and that the applicant participated in the tribunals proceedings. He relied on authorities which include; **Attorney General –v- Law Society of Kenya** and another (2013) eKLR in respect of the meaning of sufficient or good cause in law, James **Wangaliwa and another –v- Agnes Naliaka Chesoto (2012) eKLR** with regard to the issue of substantial loss occurring, **David Morton Silverstein –vs- Atsango Chesoni (2002) eKLR** on rendering an appeal nugatory and Order 4 rule 6 of the Civil Procedure Rules,2010. Counsel identified three (3) issues for determination and sought dismissal of the application with costs.

9. I have examined the entire application, the replying affidavit and submission including issues identified for determination and authorities cited by counsel for the respective parties herein. Has the applicant met the threshold for the orders sought in the application. The analysis and determination are as hereunder:-

10. The application has been brought pursuant to, inter alia, Order 42 rule 6 of the Civil Procedure Rules,2010 which governs stay of execution or proceedings under a decree or order in case of appeal . The three conditions that have to be satisfied for the grant of an order for stay of execution are that:-

- a. Substantial loss may result to the applicant unless the order is made.
- b. The application has been made without unreasonable delay and
- c. Such security has been given by the applicant as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant.

11. The applicant contended that if orders of stay are not granted herein, the applicant risk, forceful eviction by the respondent from the only business premises known for a long time. The orders in question were made by the Business Premises Rent Tribunal (the BPRT) on 27<sup>th</sup> March 2018 and the record of appeal dated 6<sup>th</sup> April 2018 was filed on 19<sup>th</sup> April 2018, thus the application was made without unreasonable delay. However, no security has been given by the applicant as the court has the discretion to make such orders in order to meet the ends of justice.

12. It was the respondents' contention in part that the attached amended notice of motion to the record of Appeal was in respect of a different cause before the BPRT and not the subject matter of this appeal hence no appeal has been preferred in the said cause. That there are no triable issues in the appeal being preferred to warrant stay of the proceedings in this matter. That the applicant has not demonstrated that he is likely to suffer substantial loss and that the applicant does not have proceedings, judgment and decree appealed from as provided by the law.

13. The applicant (appellant) claimed, that the BPRT determined the reference ex-parte on 27<sup>th</sup> March 2018. That is an issue for trial of the appeal on its merit. The respondent is yet to respond to the appeal duly filed. Nonetheless I find that there are triable issues raised in the memorandum of appeal which call for the hearing of the appeal, upon its admission on merit.

14. This court has authority to issue preservation orders including interim and permanent injunctions under Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011). Moreover, order for maintenance of status quo obtaining on a subject matter may be granted rather than an injunction in terms sought, see **Musa Angira Angira –v- ICDC (2015) eKLR**.

15. In the case of **Board of Governors Moi High School Kabarak and another –v- Malcolm Bell**, the Supreme Court of Kenya applications Nos. 12 and 13 (2012),it was held that the court has authority to issue orders for the preservation ,in the interim period, of a subject matter of appeal.

16. As already noted there are triable issues in the appeal. If the stay of execution is not granted, the appeal may be rendered nugatory, see **R- v- Kasaman t/a Kasamani & Co. Advocates (2005) 2 KLR 297 at 300** and **David Silverstein** case (supra).

17. **In Malindi Law Society of Kenya –v- The Law Society of Kenya Nairobi Branch & 5 others Civil application No. 20 of 2017, the Supreme Court of Kenya held** that grant of stay of existing orders can't be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch.

18. In the instant application I am of the considered view that interim preservation order of stay of execution subject to conditions, would be appropriate, merited and necessary in the interest of justice.

19. Accordingly I order as follows.

- a) **The application dated 6<sup>th</sup> April 2018 be and is hereby allowed in terms of orders (iii) and (iv) sought therein subject to order (b) herein below.**

b) The applicant to give security in terms of Kshs. 300,000/= to be deposited with this court within the next 14 days from the date hereof.

c) The applicants shall pay costs to the respondent's counsel and adjournment fee as ordered on 31<sup>st</sup> May 2018 within the next 14 days from the date hereof.

d) Costs of this application be in the cause.

e) Mention for directions on the appeal is hereby fixed for 20/11/2018. Parties to comply accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 26<sup>th</sup> day of September 2018.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Odoni Awino learned counsel holding brief for learned counsel Kabiru for the respondent

Tom Maurice – Court Assistant