



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.403 OF 2017

NURU ALI SALIM JEIZAN

T/A ALI KHALEEL TRADING.....PLAINTIFF

-VS-

DILEEP PATEL.....DEFENDANT

RULING

1. By Notice of Motion dated 6th March, 2018 and brought under Section 1A, 1B, 3A and 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, the Defendant seeks orders that this Honourable court be pleased to stay the execution of the orders issued on 8th February 2018 pending the hearing and determination of this application and pending the hearing of the appeal. The application is based on the grounds set down therein and supported by the affidavit of Ajay Mehta, sworn on 12th March 2018.

2. The defendant avers that he is aggrieved by the ruling by this court made on 8th February 2018 and has lodged an appeal to the court of Appeal. That the pendency of the said orders of 8th February 2018 will render the appeal nugatory. The defendant avers that the plaintiff has deliberately flouted those orders by failing to pay the monthly rent and is in arrears. That the pendency of the order inhibits the defendant from lodging the appeal since the matter was reserved to the Business Premises Rent Tribunal.

3. The application is opposed by the plaintiff who filed grounds of opposition dated 24th April 2018. The plaintiff states that the application is unmeritorious and does not meet the stringent requirement for stay pending appeal under Order 42 Rule 6 of the Civil Procedure Rules and should be dismissed with costs. The plaintiff further states that the defendant has not demonstrated to the court what irreparable loss he will suffer or that the appeal will be rendered nugatory if the stay is not granted. Further, the plaintiff stated that the intended appeal has no chances of success.

4. The application came up for hearing on 11th July 2018 when Mr. Lutta appeared for the defendant/applicant while Ms. Ngigi appeared for the Plaintiff/respondent. Mr. Lutta submitted that the applicant has complied with the provisions of Order 42 Rule 6. He submitted that the defendant filed a notice of appeal on 16/2/2018 and has brought the application within a reasonable time. Further, that if stay is not granted, the applicant will suffer substantial loss. Mr. Lutta further submitted that if the matter is referred to the Business Premises Rent Tribunal, the applicant may be unable to obtain vacant possession of the suit premises or in the alternative, he will not be able to review the rent charged in the suit property. He submitted that the applicant has no intention of evicting the respondent so long as he pays rent while the appeal is pending hearing and determination. He relied on the case of Kenya Shell Limited –v- Kibiru & Another (1986) KLR 410.

5. Ms. Ngigi submitted that the application has not met the conditions for stay pending appeal as laid down under the Civil Procedure Rules. She submitted that the court has not been told of the nature of the stay being sought as the ruling of the court was to the effect that the court lacked jurisdiction to determine the matter and referred the matter to the Business Premises Rent Tribunal. It was Ms. Ngigi's submission that the stay sought basically means that the applicant does not want the matter to go to the Tribunal, yet it is the right forum that the court has directed him to. Counsel submitted that no loss would be suffered as the plaintiff will continue paying rent which in any event if it not paid is quantifiable and cannot be said to be irreparable loss. Ms. Ngigi further submitted that no draft memorandum of appeal has been annexed to the application and that no reason has been given why the applicant thinks the appeal will succeed. It was submitted that the application lacks merit and should be dismissed with costs.

6. The only issue for determination is whether this court should stay execution of the orders issued on 8th February 2018 pending determination of the intended appeal. Order 42 Rule 6 sets to the conditions that must be met before an order for stay of execution is allowed. It states as follows:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from

except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court appealed from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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 undue 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.

7. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Therefore stay of execution should only be granted where sufficient cause has been shown by the applicant. In determining whether sufficient cause has been shown, the court would be guided by the three principles provided under Order 42 Rule 6 above.

8. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the applicant unless stay of execution is granted; and thirdly, 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 this particular case, the order appealed against was made on 8th February 2018 and the Application herein was filed on 13th March 2018. The period between filing of this application and the issuance of the orders is about 33 days. I do not find that there was prolonged delay in filing the application. I therefore find that there was no delay on the part of the applicant in bringing this application.

10. I have perused the application and the documents annexed thereto. There is on record and filed a Notice of Appeal dated 12th February 2018. The law does not allow this court at this stage to determine whether the appeal is merited or not.

11. Has the applicant demonstrated that he will suffer substantial loss if the order of stay is not grounded? The Applicant has submitted that if the matter is referred to the Business Premises Rent Tribunal he may be unable to obtain vacant possession of the suit property and will not be able to review the rent payable.

12. The orders of the court made on 7th February 2018 was that this court had no jurisdiction and therefore referred the matter to the Business Premises Rent Tribunal. The applicant herein had raised an objection dated 18th August 2017 that this court lacks the jurisdiction to entertain the suit as pleaded. It is therefore apparent that the defendant's preliminary objection was upheld. To me, it is quite superfluous for the defendant whose objection was somehow upheld to now turn around and submit that it will suffer irreparable loss. In my view, the Applicant has failed to demonstrate to this court how he will suffer substantial loss from the implementation of the order of 7th February 2018. In this case, I am not convinced that the intended appeal will be rendered nugatory if the stay is not granted. The applicant's right to collect rent pending appeal has not been curtailed. In case of default, there are remedies under the relevant law.

13. For the foregoing reasons, I find that the Notice of Motion dated 6th March 2018 as lacking in merit and hereby dismiss it.

Costs of this application to be borne by the applicant.

Delivered, signed and dated at Mombasa this 24th September, 2018.

C. YANO

JUDGE