



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC APPEAL NO.6 OF 2018

HABIBA ALI MURSAL & 4 OTHERS.....APPELLANTS

=VERSUS=

MARIAM NOOR ABDI.....RESPONDENT

(Being an Appeal from the Judgement of the Honourable Mr. Mbichi Mboroki, Chairman

of the Business Premises Rent Tribunal in Nairobi Tribunal cases No.989-993 of 2016

(As consolidated) dated and delivered on the 26th of January 2018).

RULING

1. This is a ruling in respect of a notice of motion dated 21st February 2018, brought by the Appellants /Applicants. The application seeks the following orders:-

i. Spent

ii. Spent

iii. This Honourable Court be pleased to stay the execution of the judgement of the Honourable Mr Mbichi Mboroki, Chairman of the Business Premises Rent Tribunal dated and delivered on the 26th January 2018 and the consequential orders emanating there from pending the hearing and determination of the substantive appeal filed herein.

iv. The Respondent and/or her agents continue accepting the agreed rent or in the alternative the appellants be at liberty to deposit the same in the honourable court at the Respondent's cost.

v. The OCS Pangani Police Station do assist /ensure compliance of the orders granted herein.

vi. The costs of this application be provided for.

2. The applicants are tenants of the respondents in a building on LR No.36/11/17 Eastleigh in Nairobi. The respondent issued notices to the applicants seeking to terminate their tenancies based on three grounds. The applicants moved to the Business Premises Rent Tribunal (BPRT) where they filed their individual references. The references were consolidated and heard together. The first two grounds for termination of the tenancies were dismissed by the Chairman of the Tribunal who upheld the third ground and ordered the applicants to move out of the premises by 1st March 2018.

3. The applicants were aggrieved with part of the judgement of the Tribunal and preferred an appeal to this court against part of the judgement. The applicants sought stay of execution pending appeal. The applicants contend that they will suffer substantial loss if execution is carried out. They contend that they paid good will and have invested heavily on their businesses and had taken goods on credit. If they were to be evicted before their appeal is heard, they will suffer substantial loss and the appeal which they filed will be rendered nugatory.

4. The respondent opposed the applicants' application based on a replying affidavit sworn on 13th March 2018 and a further affidavit sworn on 25th May 2018. The respondent depones that the 5th applicant has since re-located from the country and there is no longer a Landlord/Tenant relationship between her and the 5th applicant; that the 2nd applicant has since passed on and as such there is no tenancy

relationship between her and the deceased and that the 3rd applicant has failed to disclose the source of her authority to act on behalf of her co-applicants.

5. The respondent further contends that there is only one applicant who has preferred an appeal against the decision of the Tribunal; that the applicants have filed this appeal to mark time and they intend to flee from the premises and that some of them particularly the 3rd applicant has vowed to stall her intention to rebuild the premises. The respondent further states that she took a loan of KShs.80,000 000/= for purposes of renovating the premises and that she is now repaying the same while the applicants are staying on the premises and that they stopped paying rent after the decision of the Tribunal until she sent in auctioneers when they paid their respective rents.

6. In answer to the issues raised in the respondent's replying affidavit, the applicants filed a further affidavit sworn on 11th May 2018 in which the deponent states that the 5th applicant who re-located out of the country gave her authority to represent her. As regards the 2nd applicant who is said to have passed on, the deponent states that there are administrators of the estate who can be appointed to act in place of the deceased in this appeal. The applicants deny that they will run away from the premises as they have heavily invested in the same in form of good will and stock.

7. Though the applicants had sought leave to respond to the respondent's further affidavit, there is no such affidavit filed as at the time of writing this ruling. I have carefully considered the applicants' application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. Order 42 Rule 6(2) provides for the conditions upon which stay of execution may be granted. First the application must be brought without unreasonable delay. Second the court has to be satisfied that substantial loss may result to the applicant if stay is not granted. Third, there has to be such security for the due performance of the decree as may ultimately be binding upon the applicant.

8. It is now upon the court to determine whether the applicants have met the threshold for grant of the stay pending hearing and determination of the appeal. The judgement being impugned was delivered on 26th January 2018. The present application was filed on 21st February 2018. This was less than a month after judgement. I find that there was no unreasonable delay in bringing the application.

9. On the issue of substantial loss, I have perused the judgement of the chairman of the Tribunal. Some of the applicants testified that they paid good will of USD 33000 to the previous advocate of the respondent. I notice that there is mention of agreements for good will which were prepared by the previous advocate of the respondent. The respondent herein accepted rent from the applicants. She later tried to raise the issue that the applicants were not tenants but this was overruled by the Tribunal Chairman. At least there is some evidence that good will was paid. Even if this evidence did not convince the chairman of the Tribunal, this is what the applicants are appealing against. In the case of **Rhoda Mukoma Vs John Abuoga (1988) KLR**, the court of Appeal Judges had this to say:-

“ Where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard”.

10. The main concern of the court is to ensure that where an appeal has been filed, the appeal should not be rendered nugatory by declining to grant stay. I have looked at the decisions cited by the respondents. All the cited decisions were dealing with money decrees and the judges in those cases had to require certain evidence other than a blanket statement that the applicants therein stating that they were likely to suffer substantial loss without more. In the instant case it is common knowledge that vacating tenants demand good will and there was evidence placed before the chairman that some payments were made. This is the evidence which the applicants want this court to examine as a first appellate court to determine whether the chairman was right in stating that the applicants had not demonstrated that they would suffer and that they would not be compensated.

11. If the applicants were to be evicted before their appeal is heard, this will render the appeal nugatory and this is what the court should guard against. The court is alive to the fact that whereas the applicants are exercising their undoubted right of appeal, the respondent should also not be kept away from the fruits of her judgement unless there is a just cause for depriving the respondent of her right.

12. I have weighed the case of the applicants against the case of the respondent. The respondent stated that she had taken a loan of KShs.80,000 000/- for purposes of re-building the premises. She stated that she had started repaying the loan yet the applicants have not vacated to pave way for re-building. Although there is no evidence of disbursement of the loan; there was only a letter of offer which was shown before the Tribunal. This can be mitigated by the rent from the applicants which rent they are willing to pay. I therefore find that the applicants have demonstrated that they will suffer substantial loss should stay be declined.

13. The respondent seems to be concerned about one of the applicants who has re-located from Kenya and the one who has passed on. The concern of the court at this stage is on the appeal which was filed before re-location and death occurred. In the case of the applicant who has re-located, there is authority given to the 3rd applicant to take care of his interest. In the case of the one who has died, the appeal has not abated and his representatives can always apply to take over if they so wish.

14. Based on the analysis herein, I find that the applicants deserve stay of execution pending appeal. I therefore allow the applicants application on the following terms:-

a) A stay of execution of the judgement of Hon. Mbichi Mboroki Chairman of the Business Premises Rent Tribunal delivered on 26th January 2018 together with consequential orders therefrom is hereby granted pending hearing and determination of the Appeal filed herein.

b) The applicants are directed to pay the agreed monthly rent to the respondent but should the respondent or her agents decline to receive the rent, the applicants are at liberty to deposit the same in court until advised otherwise by the court.

c) The applicants shall deposit a sum of Kshs.500,000/=in Court in equal amounts within 30 days from today failing which the stay herein shall lapse automatically.

d) The costs of this application shall abide the results of the appeal.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 19th day of September 2018.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Tebino for applicants

Mr Ayieko for Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE