



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC APPEAL No. 14 OF 2018

HENRY AMBEVA.....APPELLANT

VERSUS

PHANICE KHANJALA.....RESPONDENT

RULING

1. The appellant herein was tenant/respondent while the respondent was landlord/applicant in **Business Premises Rent Tribunal Case No. 64/2018 (Nakuru)**. The tribunal in a decision made on 26th October 2018 granted the respondent vacant possession of premises situated on **Plot No. 1957/1958 Rhonda Jasho** in Nakuru. Aggrieved by the said decision, the appellant filed this appeal.

2. Alongside the Memorandum of Appeal, the appellant filed Notice of Motion dated 14th November 2018 in which he seeks the following orders:

1. Spent.

2. That there be a stay of execution of the ex parte ruling delivered on 26th October 2018 against the respondent/tenant in Nakuru Business Premises Rent Tribunal Case No. 64/2018 and the order resulting therefrom pending the hearing and determination of the appeal.

3. That this honourable court be pleased to set aside the said ex parte ruling delivered on 26th October 2018 against the respondent/tenant in Nakuru Business Premises Rent Tribunal Case No. 64/2018 and the order resulting therefrom pending the hearing and determination of this application

4. That the costs of this application be in the cause.

3. The application is supported by an affidavit sworn by the appellant. Initially, prayer 2 of the application sought stay pending hearing and determination of the application but was amended to read as captured at paragraph 2 above. Though served, the respondent neither filed a response nor attended court. Consequently, counsel for the appellant urged the court to allow the application since it is unopposed.

4. The appellant deposed that he runs a church on the suit premises and that injustice will be occasioned if he is evicted.

5. I have considered the application and the supporting affidavit. The principles applicable an application for stay of execution pending appeal emerge from **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides:

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 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 unreasonable 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.

6. An applicant seeking stay pending appeal must therefore satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. The court of Appeal stated in **Butt v Rent Restriction Tribunal [1979] eKLR** as follows:

If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

*Megarry J, as he then was, followed Wilson (supra) in *Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59.***

7. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

8. The applicant is faced with eviction from the premises. Should that materialise, the substratum of the appeal will have gone. That will certainly amount to substantial loss. I am thus persuaded that the applicant has made out a case for the orders of stay. However, so as to facilitate a quick disposal of the appeal, I will limit the lifespan of the stay orders.

9. Prayer 3 of the application sought setting aside the ruling and order of the tribunal delivered on 26th October 2018. That is the very same order that is sought in the appeal. The order cannot be granted at this stage as it would amount to prematurely determining the appeal.

10. In the circumstances, I order that:

a) stay of execution of the order made on 26th October 2018 in Nakuru Business Premises Rent Tribunal Case No. 64 of 2018 is hereby granted pending the hearing and determination of this appeal.

b) The stay order shall unless otherwise ordered by this court, remain in force for a period of not more than one (1) year from the date of this ruling.

c) Costs of the application are awarded to the appellant/applicant.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23rd day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ngware for the appellant/applicant

Mr Bichanga for the respondent/respondent

Court Assistants: Gichaba & Lotkomoi