



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CIVIL APPEAL NO.2 OF 2017

(FORMERLY NAIROBI CIVIL APPEAL 90 OF 2016)

EERICK MWIRIGI MBABU.....APPELLANT/APPLICANT

-VERSUS-

PETER NDUU MUNJOGU.....1ST DEFENDANT/RESPONDENT

KENYA POWER & LIGHTING CO.....2ND DEFENDANT/RESPONDENT

BEING AN APPEAL FROM THE RULING AND ORDER OF

HON. LINUS KASSAN, SPM DATED 14TH JUNE 2016

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL CASE NO.6610 OF 2012

BETWEEN

EERICK MWIRIGI MBABU.....PLAINTIFF/RESPONDENT

VERSUS

PETER NDUU MUNJOGU.....1ST DEFENDANT/APPLICANT

KENYA POWER & LIGHTING CO.....2ND DEFENDANT/APPLICANT

RULING

The Appellant/Applicant herein *Erick Mwirigi Mbaabu* filed a *Civil Suit No.6610 of 2012* at *Milimani Commercial Court* on *7th November 2012* and sought for various orders against the Respondents herein who are Defendants in the above stated suit. Among the orders sought are:-

a) A declaration that the 1st Defendant is in breach of the terms of the Tenancy Agreement dated 1st November 2010 in respect of all that parcel of land know as title No.Ruiru West Block 1(Githunguri) 3481.

b) Specific performance by the 1st Defendant of the terms of the Tenancy Agreement dated 1st November 2010.

c) A mandatory injunction to compel the 2nd Defendant and/or its employees, servants and/or agents to immediately restore and reconnect electricity supply to the 1st Defendant suit property Ruiru West/Block 1(Githunguri) 3481 wherein the Plaintiff's school is established.

Various interlocutory applications were filed in the said **Chief Magistrate's Case No.6610 of 2010**. Among them was an application dated **5th June 2013**, seeking restraining orders against the 1st Defendant barring him from dealing with the Applicant's moveable properties named thereon and a mandatory injunction compelling the 1st Defendant to furnish the Plaintiff with a complete and proper and accurate **Statement of Account** in respect of all rent paid by the Applicant herein, since the commencement of the **Tenancy Agreement** dated **1st November 2010**.

The said prayers were allowed vide a **Ruling** delivered on **4th July 2013** by **Mr. C. Obulutsa (Ag. Chief Magistrate)** and the said Orders were issued on **6th August 2013**. However, on **2nd September 2015**, the 1st Respondent filed a **Notice of Motion** application by way of Certificate of Urgency and sought to have the orders given on **4th July 2013** stayed pending the hearing and determination of the said application.

Further, the Court was urged to set aside the Orders of **18th May 2015**, which dismissed the 1st Defendant's **Notice of Motion** application dated **14th October 2014**, and reinstating the same for hearing on merit.

The above **Notice of Motion** application was heard by **Hon. Linus Kassan** and he subsequently allowed the said application wherein he stayed the Orders of the Court issued on **4th July 2013** and reinstated the Defendant's **Notice of Motion** dated **14th October 2014**. The Appellant/Applicant was dissatisfied or was aggrieved by the Orders of **Hon. Linus Kassan** issued on **14th June 2016**.

Consequently, the Appellant filed the instant **Notice of Motion** application dated **13th July 2016** and sought the following orders:-

1) That there be a Stay of the proceedings in the Chief Magistrate's Court at Nairobi Milimani Commercial Court, Civil Case No.6610 of 2012 until the hearing and determination of the Applicant's intended Appeal.

2) That there be a Stay of Execution or further execution of the Order, and all consequential Orders thereof, of the Hon. Linus Kassan in the Chief Magistrate's Court at Nairobi Milimani Commercial Court, Civil Case No.6610 of 2012 made on 14th June 2016 until the hearing and determination of this application.

3) That there be a Stay of Execution or further execution of the Order, and all consequential Orders thereof, of the Hon. Linus Kassan in the Chief Magistrate's Court at Nairobi Milimani Commercial Court, Civil Case No.6610 of 2012 made on 14th June 2016 until the hearing and determination of the Applicant's intended Appeal.

4) That the costs of this application be provided for.

The Appellant/Applicant alleged that he has an arguable Appeal which will be rendered nugatory if no Stay of Proceedings and Stay of Execution is granted as sought. Further that the intended Appeal has overwhelming chances of success and if no Stay is granted the substratum of the Appeal would be destroyed thus causing grave denial of justice to the Appellant/Applicant.

It was also averred that if the Stay of Execution sought was not granted, the Appellant stood to suffer irreparable loss and damage in the event that the Appeal succeeds. Further that grant of the Stay Orders would not occasion the 1st Respondent any prejudice.

On the first instance, **prayer No.4** of the instant application was granted and has been extended severally by the court and is still in force.

The Appellant too filed a **Memorandum of Appeal** on **14th July 2016**, wherein he sought to have the Orders of **Hon. Linus Kassan** made on **14th June 2016**, set aside and the said proceedings in **CMCC No.6610 of 2012** stayed until the Appeal is determined.

The instant application was contested and 1st Respondent filed **Grounds of Opposition** and stated that the Applicant has not met the threshold set out under **Order 42 Rule 6(1)** of the Civil Procedure Rules, which provides:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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."

Further that the Applicant's Appeal stands no chances of success as the same seeks to challenge the exercise of discretion by the trial court without demonstrating that the trial court in reaching that decision appealed against took into account extraneous matter or failed to take into account relevant matters.

The 1st Respondent filed a **Replying Affidavit** and averred that he is the *bonafide* owner of the suit premises erected on the parcel of land **Ruiru West/Block 1(Githunguri) 3481**. He also averred that he entered into a **Tenancy Agreement** with the Appellant in the **year 2010** for a period of **10 years**. The Appellant took **possession** and **occupation** of the same premises but had difficulties paying rent and other utilities such as electricity and rent. As a result, the 2nd Respondent disconnected electricity supply to the Appellant's school situated on the suit property. Subsequently the Appellant filed a **Civil Suit** at **Milimani Chief Magistrate's Court** being **CMCC No.6610 of 2012**.

Further, that the Applicant filed an application for injunction on **11th June 2013**. Further orders were issued exparte on **6th July 2013**.

Thereafter the 1st Defendant filed the **Notice of Motion** application dated **14th October 2014** seeking for Orders to set aside the Orders of the court issued on **4th July 2013**. The application was dismissed on **18th May 2015**, but another application was filed to reinstate the dismissed application. The said application was heard and allowed on **14th June 2016** and the Orders of **4th July 2013** were set aside.

He contended that since he is the *bonafide* owner of the suit property and Appellant is in rent arrears of about **2 Million** as at **June 2018**, he is not deserving of the orders sought.

The 2nd Respondent too filed a **Replying Affidavit** through **Justus Ododa** the **Legal Assistant** of the 2nd Respondent who averred that the Appellant is not deserving of the orders sought as he has not established that he will suffer **substantial loss** and that his Appeal would be rendered **Nugatory**. Further that the Appellant will not suffer any loss as he is no longer in the suit premises. Further that the Appellant is still in arrears of electricity bills and that this Appeal and application is only meant to delay the expeditious disposal of the suit before the **Chief Magistrate's Court, Milimani Commercial Court** and that this Appeal has a slim chance of success.

The **Notice of Motion** was canvassed by way of written submissions. From the onset, the court had stated that the **Ruling Order** being appealed against was issued in **Milimani Commercial Court, CMCC No.6610 of 2012** which suit had been filed by the Appellant herein. The above suit is **over 5 years** and it ought to be among the suits that **should be finalized** by **31st December 2018**.

The Court has noted that from **14th July 2016**, the Court has just been dealing with interlocutory applications and has not gone to the merit of the Appeal. The records of the said intended Appeal has not yet been filed as at the date of writing this Ruling.

The Court has carefully considered the whole proceedings and the said Orders issued by the Subordinate Court on **14th June 2016**. The Court has also considered the written submissions, the cited authorities and provisions of **Order 42 Rule 6(2)**.

The above provision of law set out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“No order for stay of execution shall be made under subrule (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.”

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See **Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

Has the Applicant/Appellant herein satisfied the required standard for grant of stay orders pending Appeal.

Firstly, the Applicant must show that he will suffer substantial loss. It should be noted that the bone of contention herein is the **Tenancy Agreement** between the Appellant and the 1st Respondent. The Appellant had alleged in the **Lower Subordinate Court** that the 2nd Defendant had disconnected electricity supply to his school with instructions from the 1st Respondent. The 1st Respondent on his part alleged that the Appellant has failed to meet his obligations as a tenant as he had failed to pay rent to the tune of **Kshs.2,000,000/=** and has also failed to settle electricity bills and thus disconnection of the electricity supply. Further that the Plaintiff/Appellant is no longer occupying the suit premises and therefore failure to grant Stay of Execution would not occasion any substantial loss to the Appellant/Applicant herein.

The Orders of the Court that was issued on **14th June 2016** were to the effect that the injunctive orders issued on **4th July 2013** were set aside and that application was to be heard interparties and be decided on merit. Further the 1st Respondent's **Notice of Motion** dated **14th October 2014** was reinstated and it was to be heard and be decided on merit.

By allowing the two applications to be reinstated and heard on merit was an exercise of judicial discretion. The Court has not found any wrong doing on the part of the **Hon. Magistrate**. Further, instead of the Appellant filing this application since he was the Plaintiff in **CMCC No.6610 of 2012**, he ought to have moved expeditiously and set the **Notice of Motion** dated **5th June 2012** for hearing interparties so that if it was merited, then it would have been allowed.

Further, there was no harm in allowing the 1st Respondent to prosecute his application seeking to be allowed to file his Defence out of time. The Appellant/Applicant was accused by the Respondents of being in breach of payment of rent and for electricity supply. He never attached any evidence of payment of such rent and settling of electricity bills. The Appellant/Applicant should have demonstrated good faith before filing the instant application. The Court finds that the Appellant is not on the suit property and there would be no substantial loss that would be occasioned to him if the orders sought are not granted.

The Application was filed within a reasonable time. However there is unreasonable delay in filing the intended Appeal since from **July 2016** the Appellant has not filed any records of Appeal. **Order 42 Rule 35 (2)** provides that:-

“If within one year after service of the Memorandum of Appeal, the Appeal shall not have been set down for hearing, the registrar shall on Notice to the parties list the Appeal before the Judge in Chambers for dismissal.”

The Appellant has not prepared the Appeal for hearing since he has not even filed the record of Appeal. The Court finds that there is unreasonable delay in prosecution of this Appeal and the Appellant/

Applicant is not deserving of Orders of Stay sought herein given that the case at the lower court was filed in **2012** and should be concluded by **31st December 2018**.

The other condition is grant of such security as the court may order. The Appellant has not demonstrated any good faith on his part by paying the alleged rent arrears or accumulated electricity bills. Failure to offer security or any offer on how the alleged rent arrears would be paid, leaves this court with no option but to find that the Appellant/applicant is not deserving of the stay order sought.

In deed since the **CMCC No.6610 of 2012**, had been filed by the Appellant/Applicant herein after the orders of the court issued on **14th June 2010**, he would have moved with speed to set down the said application for injunction for hearing or even the main suit and maybe be now, the said suit would have been finalized and if his claim is merited, then for sure the Appellant would have benefited from expeditious disposal of the suit herein. However, the filing of the instant application just created a backlog both in the subordinate court and in this Court because the Applicant/Appellant continued filing numerous interlocutory applications while enjoying the interim orders in place.

Having now carefully considered the **Notice of Motion** dated **13th July 2016**, the **Court finds it not merited and the same is dismissed entirely with costs to the Respondents**.

For avoidance of doubt, **the interim orders in place are hereby discharged and/or vacated**. The **Appellant to file his records of Appeal** within the next **21 days** from the date of this **Ruling**. Failure to do so, the **intended Appeal will stand dismissed as provided by Order 42 Rule 35(2)** of the **Civil Procedure Rules**.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of November 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Madegwa for the Appellant/Applicant

Mr. Karinga holding brief for M/S Mwachiro for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court clerk

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

2/11/2018