



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C.A CASE NO 32 OF 2018

(FORMERLY HCCA NO. 33 OF 2018)

JOE H. KARANJA.....APPELLANT

VERSUS

PRISCA NJURA JOHN.....RESPONDENT

RULING

1. By a notice of motion dated 15th August 2018 filed under certificate of urgency under the provisions of **Order 42 Rule 6(2) of the Civil Procedure Rules**, the Appellant sought the following orders;

a. That there be a stay of judgement of the Chairman Business Rent Restriction Tribunal Case No. 68/17 delivered on the 20th June 2018 until the appeal filed herein is heard and determined. (sic)

b. That costs of this application do abide the appeal. (sic)

2. The said application was based upon the grounds enumerated on the face of the motion. In summary, it was contended that the Appellant was aggrieved by the decision of the Business Premises Rent Tribunal (hereinafter called the *Tribunal*) and had consequently filed the instant appeal. It was further contended that unless a stay of execution was granted, the Appellant would suffer irreparable and substantial loss with the consequence that the pending appeal may be rendered nugatory.

3. The said application was supported by the Appellant's supporting affidavit sworn on 15th August 2018. The said affidavit reiterated and expounded upon the grounds set out in the motion. The Appellant also attacked the decision of the Tribunal on the same grounds set out in his memorandum of appeal. It was further contended that since the Tribunal gave the Appellant a grace period of about 6 months to vacate the suit premises, that period might lapse before the appeal is heard and determined.

4. The Respondent filed a replying affidavit sworn on 31st October 2018 by Muriuki Ndwiga Mwita who is a donee of a power of attorney from the Respondent. The application was opposed on various grounds. First, it was contended that the application lacked merit since the requirements of **Order 42 Rule 6(2) of the Civil Procedure Rules** had not been fulfilled. Second, it was contended that the pending appeal had no chances of succeeding at all. Third, it was contended that the Applicant had filed 3 previous references in a bid to retain the suit premises indefinitely. Fourth, it was contended that the Appellant was granted adequate time up to 31st December 2018 to vacate the suit premises.

5. When the said application was listed for hearing on 19th November 2018, it was directed that the parties should canvass the said application through written submissions. The Appellant was granted 7 days to file his submissions whereas the Respondent was granted 7 days to file hers.

6. The court has considered the Appellant's said notice of motion, the replying affidavit in opposition thereto as well as the submissions on record. The said application was brought under the provisions of **Order 42 Rule 6 (2)** which provide as follows;

(2) 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.

c) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

7. The court has considered the factors which led to the filing of the instant appeal and application for stay. The appeal was provoked by the judgement of the Tribunal which allowed the Respondent's reference under **section 9 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)**. By the said reference, the Respondent had sought to obtain and occupy the premises for her own business.

8. By its judgment dated 20th June 2018 the Tribunal dispelled the Appellant's fears of disruption of his business as follows;

“When the Tribunal makes an order for vacant possession in respect of the suit premises, it does not order the tenant to close the business. The tenant in his evidence considers an order for vacant possession as an order to close his business. The tenant is entitled to relocate his business to any other premises and continue to enjoy the goodwill of his customers. The Tribunal is satisfied that the landlord has proved her notice on a balance of probabilities. The tenant has been given sufficient time to relocate his business and his request for a further period of 5 years is unreasonable in the circumstances of this case.”

9. The main question for determination in this application is what substantial loss, if any, the Appellant may suffer if the order of stay is not granted. The material on record shows that the Appellant was not required by the Tribunal to close his butchery business. On the contrary, the Tribunal gave him a grace period of at least six (6) months until 31st December 2018 to relocate his business.

10. On the basis of the material on record, the Tribunal was satisfied that the Respondent as landlord required the suit premises for her own business. There is no material on record to suggest that the suit premises will not be available should the appeal eventually succeed. In the circumstances, the court finds that the Appellant has not demonstrated that the pending appeal may be rendered nugatory unless a stay is granted.

11. The upshot of the foregoing is that the court finds that the Appellant has failed to demonstrate that he would suffer substantial loss unless an order of stay is granted within the meaning of **Order 42 Rule 6(2) of the Civil Procedure Rules**. Consequently, the court finds no merit in the Appellant's notice of motion dated 15th August 2018 and the same is hereby dismissed with costs to the Respondent.

12. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20th day of DECEMBER, 2018.

In the presence of Mr Muraguri for the Appellant and Mr Wachira holding brief for Mr Mugambi Njeru for the Respondent.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

20.12.18