



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAKURU

HCA NO. 137 OF 2017

JULIA WANGARE.....1ST APPELLANT

PHARES NDUNGU CHEGE..... 2ND APPELLANT

VERSUS

GRACE MUKUHA.....1ST RESPONDENT

LINET WAIRIMU MUKUHA.....2ND RESPONDENT

RULING

1. By Notice of Motion dated 30th October 2017, the appellants sought the following orders:

1. Spent

2. Spent

3. There be a stay of execution of the ruling in Nakuru Rent Restriction Tribunal Case Number 33 of 2017 and the consequential orders thereto pending the hearing and determination of the appeal filed in relation thereto.

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

2. The application was supported by an affidavit sworn by Phares Ndungu Chege, the 2nd appellant. He deposed that the tribunal made a ruling on 25th September 2017 in which it dismissed the 1st appellant's application and directed that rent be paid and in default, distress for rent be levied against the 1st appellant. He added that unless stay is granted, the appeal will be rendered nugatory.

3. The respondents opposed the application through a replying affidavit sworn by the 2nd respondent on 10th November 2017. She deposed that the 1st appellant owed rent of KShs 250,000 as at the date of swearing of the replying affidavit and that the 1st appellant last paid her monthly rent of KShs 25,000 on 21st January 2017. She therefore urged the court to order that the defendant pays rent as a condition for any stay.

4. The application was heard by way of written submissions. The applicants filed submissions on 15th January 2018 while the respondents filed theirs on 5th February 2018. I have considered the application, the affidavits and submissions.

5. The principles to be considered while dealing with 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. 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.

7. A litigant 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. Needless to state, an appeal ought to have been filed.

8. In this case, following the decision of the tribunal on 25th September 2017, the appellants filed Memorandum of Appeal on 17th October 2017 in the High Court. The matter was later transferred to this court but was not reassigned an ELC Appeal number. The appellants also filed the present application on 30th October 2017. I therefore find that the application was filed without unreasonable delay.

9. What about the question of substantial loss? A perusal of the order of the tribunal made on 25th September 2017 shows that the 1st appellant was ordered to pay rent for February 2017 to September 2017 within 30 days and to pay rent from October 2017 on or before the 10th of each month in advance. In default, the respondents were free to levy distress. It is therefore manifest that distress for rent would only follow if the appellants failed to pay rent as ordered. Whereas the right of appeal should always be safeguarded, I do not see how the appellants will suffer substantial loss if stay is not granted. The 2nd appellant has described himself in his supplementary affidavit sworn on 8th December 2017 as a man of means who cannot fail to pay the respondents any amount of money if ordered to do so. The appellants should just pay the rent as well as the arrears as they await the determination of the appeal.

10. Having failed to surmount the test of substantial loss, Notice of Motion dated 30th October 2017 cannot succeed. It is dismissed with costs to the respondents.

Dated, signed and delivered in open court at Nakuru this 18th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Karanja Mbugua holding brief for Mr Otieno for the appellants/applicants

No appearance for the respondents/respondents

Court Assistants: Gichaba & Lotkomoi