



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 18 OF 2016

PAUL MWANGANGI.....APPELLANT

-VERSUS-

ABDULAZIZ AHMED.....RESPONDENT

RULING

1. The appellant/applicant has moved this Court under the provisions of section 1A, 1B & 3A of the Civil Procedure Act in his application dated 5th September 2016 seeking the following orders:

1. Spent

2. Spent

3. Spent

4. That pending hearing and determination of this appeal there be an injunction and/or stay of rent-increment as intimated by the Landlord's Advocate letter dated 16th August 2016 to the effect of that rent be increased to Ksh 25,000 per month from the 1st October 2016.

5. That pending hearing and determination of this appeal there be an injunction and/or stay of any attempt to levy distress for rent by the Landlord based on the rent increment for rent Ksh 25,000 per month from the 1st October 2016.

6. That the costs of this application be provided for.

2. The application is supported by the several grounds listed on the face of it and on the affidavit deposed to by the applicant. Briefly the applicant contends that he appeared before the Rent Restriction Tribunal on 29.8.16 and the Tribunal in clear abuse of his right to be heard issued directions that it had no jurisdiction to entertain the dispute. Further that the appellant is seeking to set aside the rent restriction certificate which the Tribunal relied on as a basis that it had no jurisdiction as the same was obtained via a consent order. It is the applicant's case that if the stay is not granted and his appeal is successful any increment will be in contravention of the Rent Restriction Act.

3. The application is opposed by a replying affidavit sworn by Abdul Aziz Ahmed. Mr Ahmed deposed that he exercised his right to assess the standard rent and the same was assessed at Kshs 4000= effective from 1st May 2013 thus effectively decontrolling the premises. That the applicant has been paying rent at

the rate of Kshs 4000 per month. Mr Ahmed deposed that the appellant's advocate had authority to enter into the consent and is therefore estopped from denying that authority.

4. The Respondent also stated that he was never served with the application the subject of this appeal and the applicant is merely seeking to block his right to increase rent. The Respondent also states that the Court cannot exercise its discretion where there are clear provisions of the law available. He also said the applicant is speculative because he has not issued any distress for rent notice therefore there is nothing for this Court to restrain.

5. The parties filed written submissions which I have had opportunity to read. I noted that the applicant submitted as if he was arguing the appeal which is not the yet for determination. I will therefore not make reference to the parts of the submissions which relate to the merit of the appeal. Even the case law cited relates to the merit or otherwise of the appeal and not whether this Court should grant the orders of temporary injunction as sought in the application.

6. Having considered the pleadings and the submissions, the issues I find arising for my determination in this application are two :

a) Whether the applicant's advocate is properly on record.

b) Whether the appeal will be rendered nugatory unless the stay order is given.

7. The Respondent submits that the applicant's advocate Ms Madzayo, Mrima & Jadi are not properly on record in accordance with the provisions of Order 9 rule 9. In the matter previously before the tribunal, the appellant/applicant was represented by the firm of Manwa Mabeya & Co Advocates. The matter was concluded by a consent dated 7.5.2013. The question arising is whether the proceedings before the tribunal is a continuation in this appeal or the two are independent. The Respondents take the view that the two are one.

8. I am of the opinion that the two proceedings are independent of each other. So that the Appellant's present advocate did not need leave of the Court or consent as provided for under Order 9 Rule 9 of the Rules. My opinion is premised on the position that this appeal was filed by the tenant in person. The firm of Manwa Mabeya & Company are not on record in this appeal to require compliance with Order 9 rule 9. I share the position taken in the case of **Philip Kamuyu Njenga & Another vs Joseph Nganga Kimani (2016) eKLR** where Serگون J held that the previous advocates were on record for the applicants in the lower Court while the new advocate were instructed to file an appeal so the new advocates were not appearing on record in place of the former. He found such a Preliminary Objection to be without merit.

9. The 2nd issue is whether the appeal will be rendered nugatory if the orders sought are not granted. This Court is required to consider whether there is an arguable appeal before granting or refusing stay of execution. The appellant filed an application before the tribunal seeking to review and/or set aside a consent entered on 7.5.13. In the alternative he sought for the tribunal to assess the standard rent.

10. The tribunal did not give him a hearing for want of jurisdiction before the applicant could put forth his case. The rules of natural justice now espoused under article 50 (1) of the Constitution requires that a party should not be condemned unheard for reason that the appellant was not afforded an opportunity to present his case. I am satisfied that he has an arguable appeal and is therefore entitled to orders of stay.

11. Since the subject of the application before the tribunal and this appeal is about the notice to increase rent, it is only fair that the implementation notice be stayed. However so as not to prejudice the interest of the Respondent in the event the appeal fails, I hereby direct the appellant to file an undertaking as security to pay the new rent from the date the appeal was filed as security. The stay given is conditional on the security of the undertaking being filed within 14 days of this ruling.

Dated and delivered in Mombasa this 23rd day of February 2017.

A. OMOLLO

JUDGE