



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CIVIL APPEAL NO.23 OF 2014**

**MOHAMED ALI MOHAMED & 4 OTHERS.....PLANTIFFS**

**VERSUS**

**CONSOLATA MAINGI & 2 OTHERS.....RESPONDENTS**

**RULING**

1. By a Notice of Motion application dated 29<sup>th</sup> September 2016 and brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 3A, and 79 of the Civil Procedure Act, the applicants are seeking for orders:

**1) That the application be certified as urgent.**

**2) That there be a stay of execution of the Rent Restriction Tribunal made on 30<sup>th</sup> August 2016 pending the hearing and determination of this appeal.**

**3) That cost of this application be provided for.**

2. The application is based on the grounds on the face of the Notice of Motion and is supported by the affidavit of Mohamed Ali Mohamed sworn on 29<sup>th</sup> September 2016. It is deposed that the applicants are tenants in the property known as **PLOT NO.MSA/BLOCK XX/157**, Meru Road. That on 30<sup>th</sup> August 2016, the Tribunal delivered a ruling in which it increased the standard rents payable by the applicants from kshs.1,500.00 to Kshs.9,500.00. It is further stated that the increment has the effect of removing the premises from the protection of the Rent Restriction Tribunal Act Cap 293 Laws of Kenya as the assessment is over Khss.2,500.00 and the respondents will be at liberty to increase rent and even evict the appellants. It is the appellants' contention that unless the order for stay is granted, their appeal will be rendered nugatory. The appellants aver that they are prepared to continue paying the old rent pending the outcome of the appeal.

3. The application is opposed by the respondents who filed a Replying Affidavit sworn by Consolata I Maingi and Auna K Ndambuki on 7<sup>th</sup> October 2016, in which they depose that the appellants would not suffer any loss if the orders sought are not granted. On the contrary, the respondents aver that it is them who will suffer substantial loss if the order for stay is granted as the appellants may vacate the premises with rent arrears in the even the appeal is dismissed. According to the respondents the rent increment was not uniform but varied from 7,500 to 9,500. The respondents further deposed that some applicants did not oppose the application for assessment of standard of rent but are now riding on the present appeal to make an application for stay.

4. The application was prosecuted by way of written submission. It was submitted by the appellants that

if the order of the Tribunal takes effect, it will remove the suit premises from the provisions of the Act as the rent assessment made is above 2,500.00 and the respondents may increase the rent and even apply for the eviction of the appellants, an act that will occasion substantial loss to the appellants.

Counsel for the appellants relied on the case of BUNGOMA HC MISC APPLICATION NO.42 OF 2011 JAMES WANGALA & ANOTHER –VS- AGNES NALIKA CHESETO as quoted in ANTOINE NDAIYA –V- AFRICAN VIRTUAL UNIVERSITY (2015) eKLR and the case of BUTT –VS- RENT RESTRICTION TRIBUNAL (1979) eKLR.

Counsel further submitted that the application for stay was made without delay as required and that the applicants are willing to pay such security as the court may order.

5. On their part, the respondents through their learned counsel submitted that there is no loss which will be occasioned to the applicants should the order for stay not be given. It was submitted that on the contrary, it is the respondents who stand to suffer as they will continue being paid very little rent from a prime house within Mombasa Island. Replying on the case of ALI MOHAMED AL & 3 OTHERS –VS- AHMED JUMA OMAR, MOMBAS HCCA NO.76 OF 2015, counsel argued that it would be more just for the appellants to pay the new rent so that should the appeal succeed, the surplus would be applied as future rent. On issue of security, counsel submitted that none has been suggested, an indication that the applicants are not ready to offer any.

6. I have carefully considered the arguments advanced by both parties in this case and the relevant law as well as the authorities cited.

Order 42 Rule 6 (1) and (2) provided as follows:

**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 be binding on himis satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.**

**b) Such security as the court orders for the due performance of such decree or order as may ultimately has been given by the applicant.**

7. It is clear from the provisions of order 42 rule 6 (1) that the applicants must satisfy the following conditions; namely: **a) that substantial loss may result to them unless the order is made, b) the application has been made without undue delay and c) security has been given by the applicants.**

8. In the present application, the applicants allege that if the order appealed against take effect, there may be an increment of rent and they may be evicted from the suit premises. I have looked at the proceedings at the Tribunal. The main issue is revision of rent and not eviction. In my view, the applicants have not demonstrated that they would suffer substantial loss. Substantial loss is one that may render the appeal nugatory. In the present case, should the applicants succeed in their appeal and the order for increment for rent is reversed, any amount already paid may be refunded or converted to future rent as they would still be obliged to pay rent. The appeal would therefore not be rendered nugatory.

9. The order appealed against was made on 30<sup>th</sup> August, 2016 and this application was filed together with the appeal on 29<sup>th</sup> September 2016. This is a period of about one month. On whether or not the application was brought without undue delay, I am satisfied that there was no delay.

10. In their affidavit in support of the application, the applicants have stated that they are ready to continue paying the old rents as they await the hearing of the appeal. That to me is not an offer for security as required under order 42 Rule 6 of the Civil Procedure Rules. The applicants are expected to pay the said rent whether the appeal was preferred or not. There is therefore no offer of security given by the applicants.

11. Having considered the application before me, I am not persuaded that the same has met the prerequisites of granting of stay of execution under order 42 Rule 6 (1). The same lacks merit and is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Mombasa this 12<sup>th</sup> day of June 2017.

**C. YANO**

**JUDGE**

.....for the applicant

.....for the respondent