



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 6 OF 2015

GICHONI NGANGU.....1ST APPELLANT

ELIAS MURIITHI KINYUA (KIMURI).....2ND APPELLANT

VERSUS

ESTHER MBANDI KAGINA.....RESPONDENT

***(BEING AN APPEAL FROM THE FINDINGS OF THE BUSINESS PREMISES RENT TRIBUNAL
AT EMBU IN CASE NO. 2 OF 2015)***

RULING

This is in respect to the appellants/applicants' Notice of Motion dated 29th June 2015 seeking the following prayers:-

1. *Spent*
2. *Spent*
3. *That this Honourable Court be pleased to order a stay of execution of the ruling and order of the Tribunal in Tribunal Case No. 2 of 2015 restraining the defendant, her agents and/or servants from distressing or interfering with the applicant's quiet occupation possession of the premises on L.R No. EMBU/MUNICIPALITY/111/37 pending the hearing and determination of the appeal herein.*
4. *That costs of the application be provided for.*

The said application is founded on the grounds set out therein and supported by the affidavits of **ELIAS MURIITHI KINYUA** the 2nd appellant/applicant herein.

Briefly the appellant/applicants have since 2008 been tenants in premises known as L.R No. EMBU/MUNICIPALITY/111/37 (hereinafter the suit premises) owned by the Estate of the late **SILAS KAGINA GICHONI** and for which they have been paying rent and are not in arrears. However, on 4th June 2015, the Business Premises Rent Tribunal in Embu ordered the appellants/applicants to pay a sum of Ksh. 286,614 to the respondent or distress for rent would be levied against them. It is the appellants/applicants' case that no rent is due from them as they pay their monthly rent monthly and promptly to the administrators of the Estate.

The application is opposed and in a replying affidavit sworn by the respondent **ESTHER MBANDI KAGINA**, it is deponed, inter alia, that the suit premises belongs to her solely and therefore the rent is

due to her and the appellants/applicants have colluded with one **CHRISTOPHER NDARU KAGINA** to deny her of the rent. Besides, there is no reason why the rent should be paid to one administrator alone.

Submissions have been filed by counsels for both parties.

I have considered the application, the rival affidavits including the supplementary affidavit and annexures as well as the submissions of counsels.

The parties herein had a rent dispute being Business Premises Rent Tribunal Case No. 2 of 2015 Embu in which on 4th June 2015 the appellants/applicants (as tenants), were ordered to pay the respondent (as landlord) a sum of Ksh. 286,614 within the next thirty (30) days and in default, the landlord shall levy distress to recover the same plus additional arrears of rent which may have accrued from un-paid rents. The landlord was also allowed to serve the tenants with a notice to terminate the tenancy or increase rent in accordance with the provisions of **CAP 301 Laws of Kenya**. Aggrieved with those orders, the appellant/applicants filed a Memorandum of Appeal on 25th June 2015 followed by this application on 30th June 2015.

Although the application cites **Order 40 Rules 1 and 2 of the Civil Procedure Rules** and **Sections 3 and 3A of the Civil Procedure Act**, it is an application for stay of execution pending appeal which is governed by the provisions of **Order 42 of the Civil Procedure Rules. Sub-rule 6 (1) and (2)** of the said order provide as follows:-

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 of 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”.***

In an application of this nature, the applicant has to satisfy the Court as follows:-

1. ***That he may suffer substantial loss unless the order of stay is granted.***
2. ***That the application has been made without un-reasonable delay and***
3. ***That 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.***

On the issue of substantial loss, **PLATT Ag J.A** (as he then was) in **KENYA SHELL LTD VS KIBIRU (1986) K.L.R 410 at page 416** expressed himself as follows:-

“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 cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without that evidence it is difficult to see why the respondents should be kept out of their money”

In the same case, **GACHUHI Ag. J.A** (as he then was) addressed himself on that issue in the following terms:-

“It is not sufficient by merely stating that the sum of Ksh. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted”.

I have perused both the supporting and supplementary affidavits of **ELIAS MURIITHI KINYUA** in support of this application and no averment is made therein of what substantial loss if any, he will suffer if this application is not granted. It must be noted that stay of executions order involve judicial discretion and while a party must be allowed to pursue his right of appeal which should therefore not be rendered nugatory, the Court must also remember that a successful litigant should not be deprived of the fruits of his success. In his supplementary affidavit, the 2nd appellant/applicant **ELIAS MURIITHI KINYUA** has annexed an affidavit by **CHRISTOPHER NDARU KAGINA** in which it is deponed, inter alia, that the appellants/applicants have paid their rent in full. Clearly, the Business Premises Rent Tribunal was not convinced that the rent had been paid and that is why it made the order that it did which is the subject of the pending appeal. Among the various annexures to the supporting affidavit are those orders issued in **HIGH COURT SUCCESSION CAUSE NO. 147 of 2010 EMBU**. In the first order issued by **Warsame J.** (as he then was), on 29th March 2011, it was directed that the proceeds, profits and/or monies of the Estate of **SILAS KAGINA GICHONI** with respect to the suit premises be paid to his two widows being the respondent and **TABITHA IKAMBA KAGINA**. A second order was issued by **Ong’udi J.** on 21st February 2012 directing that from February 2012, the tenants on several properties including the suit premises deposit their rents in Court. The final order issued by **Ong’udi J.** on 11th October 2012 was, as far as is relevant to this application in the following terms:-

**2 “That ESTHER MBANDI KAGINA to draw rents from
Embu Municipality/37”**

There are no other orders that I can see issued subsequent to the orders of 11th October 2012 and there is no dispute that the reference to the property as Embu/Municipality/37 is the same suit property subject of this suit. In the circumstances, it is not clear why **CHRISTOPHER NDARU KAGINA** can depon that *“The tenants have paid their rent in full as required”* yet the respondent **ESTHER MBANDI KAGINA** has deponed that the rent is payable to her. It is clear to me that not only have the applicants not shown what substantial loss they will suffer if the order for stay is not granted but secondly, if rent was paid to **CHRISTOPHER NDARU KAGINA**, that was in violation of the orders of **Ong’udi J.** dated 11th October 2012 directing that the rent be paid to the respondent. That violation would be enough to disentitle the applicants to the orders sought herein which, as I have already indicted above, are discretionary. The applicants no doubt filed this application without un-reasonable delay. However, they have not shown what substantial loss they will suffer if the orders sought are not granted. In any event, it is now clear that there is an express order directing the appellants/applicants to pay rent to the respondent. That order has been violated yet the appellants/applicants are required to approach this Court with clean hands. Equity demand so. On the material before me, they have not.

In the circumstances, therefore the appellants/applicants’ Notice of Motion dated 29th June 2015 is dismissed with costs.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Ruling delivered this 26th day of February, 2016 in open Court

Mr. Tanui for Mr. Isika for Respondent present

Mr. Macharia for Kahuthu for Applicant present.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016