



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L APPEAL NO. 5 OF 2015

JULIUS CHERUIYOT KIBWALEI.....APPELLANT

VERSUS

FELIX KIPCHOGE LAGAT.....RESPONDENT

RULING

The application dated 3.3.2016 seeks orders that this Honourable court be pleased to set aside and/or vary its orders of status quo issued on the 1.10.2015 and order the Appellant to pay rent pending hearing and determination of this appeal and that the appellant to pay his rent that is in arrears of Kshs.2,100,000/= and continue to do the same as he is still in the respondent's house and failure to comply, he be evicted. The Officer Commanding, Eldoret Police Station to assist in execution of this orders. The application is based on grounds that this application has been brought in utmost good faith and that the same has been brought without laches. It is contended that the appellant is not paying the respondent his monthly rent of Kshs.100,000/= and that he is rent arrears of Kshs.2,100,000/= and continue to accrue. The application leading to the said orders issued on 1.10.2015 proceeded exparte.

The application is supported by the affidavit of Amos K. Songok, an Advocate of the High Court of Kenya who states that on the 11th day of June 2015, this Honourable court granted orders to the appellant herein which were confirmed on 1.10.2015 and that it is not just and fair for the appellant to continue staying in the respondent's house without paying rent. According to the applicant, the appellant should be ordered to pay the respondent's rent arrears. He believes that the appellant will not suffer any prejudice if she pays rent pending determination of the appeal and that it is in the interest of justice that the instant application be granted as the same has been brought in utmost good faith. The appellant is not paying the respondent his monthly rent payments and he is in rent arrears of Kshs.2,100,000/= and continue to accrue. That the respondent had maintained to counsel that he was opposed but was not available to sign the replying affidavit due to personal commitments. That counsel attended court on 23.6.2015 and requested for time to file a replying affidavit but was not able to do so in time. That the appellant now uses the injunction orders as a scapegoat not to pay rent to the detriment of the respondent.

The appellant filed grounds of opposition stating that no order of status quo was granted pending the hearing and determination of the appeal hence the application seeking to set aside/vary such an order is misconception. The respondent contends that the order granted on 1st October, 2015 was an order of stay of execution pending appeal and which the respondent did not challenge or has never applied to set aside and argues that the affidavit of the advocate for a party cannot constitute evidence of non-payment of rent. Lastly that the court has no jurisdiction to order the eviction of the appellant and enforcement of the order by the Officer Commanding, Eldoret Police Station and to order for the payments of rent which was never sought for in the Lower Court and granted as relief.

**Mr. Songok leaned counsel for the applicant** submits that the orders have been extracted by the respondent and that he now seeks interpretation of the orders. The applicant/respondent is in a difficult situation because he needs rent and therefore the respondent should be ordered to pay rent.

**Mr. Kigamwa learned counsel for the respondent**, argues that the orders granted were for stay of execution pending appeal. There is an appeal pending based on the issue of distress from rent. He argues that the applicant did not oppose the application for stay pending appeal. Mr. Songok replies by

submitting that the court should note the demeanor of the respondent who does not want to pay rent.

I have considered the application and do find that this court issued an order that there be stay of execution of the orders of the court made on the 28.5.2015 in Eldoret Chief Magistrate Misc. Application No. 27 of 2015 pending the hearing and determination of the appeal. The application for stay of execution pending appeal was duly served but the applicant failed to attend. The order being stayed is for the breaking in the premises of the appellant namely a house in Elgon View Estate on parcel No. Eldoret/Municipality/Block 13/739 which are used by the appellant. The court did not make any order staying the payment of rent and therefore, this application is misconceived. Moreover it was not proper for the advocate of the applicant to swear the affidavit in support of the application as the issues raised are in contention. *By swearing to such matters, the advocates becomes an adversarial party and therefore might be asked to step from his privileged position at the bar into the witness box and he is liable to be cross-examined on his disposition. it is impossible for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness and cannot be both counsel and witness in the same case.* The application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET ON 28TH DAY OF OCTOBER, 2016.**

**ANTONY OMBWAYO**

**JUDGE**