



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELCA 4 OF 2016**

**NICHOLAS KIGO WAMBUGU ..... APPELLANT/APPLICANT**

**-VERSUS-**

**MIRIAM NYAWIRA MWANIKI ..... RESPONDENT**

**RULING**

1. On **3rd May, 2016** Nicholas Kigo Wambugu hereinafter referred to as “**the applicant**”) filed the notice of motion dated **2nd March, 2016** seeking stay of execution of the orders issued in Business Premises Rent Tribunal Meru (BPRT) case No.84 of 2014 pending the hearing and determination of the appeal herein and an order directing the BPRT to forward the original file in respect of Meru BPRT case No. 84 of 2014 to this court.

2. The application is premised on the grounds that there has been delay in prosecuting the appeal. The delay in prosecution of the appeal is attributed to failure by the BPRT to forward the original file to this court for further dealing. The applicant is apprehensive that unless stay is granted, the respondent may execute the decree appealed from thus rendering the appeal nugatory.

3. The application is supported by the affidavit of the applicant sworn on **2nd March, 2016** in which the grounds on the face of the application are reiterated.

4. In reply and opposition to the application, the respondent (Miriam Nyawira Mwaniki) has through the replying affidavit she swore on 12th May, 2016 deposed as follows:

That the applicant has not offered sufficient grounds for stay or setting aside the orders appealed from; that the orders sought to be stayed are consent orders. Given the fact that the orders sought to be stayed are consent orders, the application herein and the appeal on which it is hinged are said to be an after thought, vexatious, frivolous, lacking merits and an abuse of the court process.

It contended that there is no lease agreement between the applicant and the respondent on which the orders sought can hinge. It is further contended that there has been inordinate delay in bringing the application and the applicant accused of approaching the court with unclean hands.

5. When the matter came up for hearing, the applicant relied on the grounds on the face of the application and the affidavit he swore in support of the application.

6. Counsel for the respondent, **Mr. Muthui**, submitted that the application is fatally defective for being brought under wrong provisions of the law and because it seeks to stay a consent order.

7. Terming the appeal an afterthought, he reiterated the respondent's contention that no sufficient reasons have been offered for setting aside or staying the execution of the consent order hereto.

8. Reiterating the respondent's contention that no lease exists between the applicant and the respondent to warrant issuance of the orders sought, Mr. Muthui submitted that this court is not the proper forum for agitating the applicant's case for setting aside of the orders hereto.

9. In a rejoinder, counsel for the applicant submitted that the memorandum of appeal raises valid issues concerning the consent.

10. With regard to the contention that the application is fatally defective for citing the wrong provisions of the law he said the defect is curable under **Article 159** of the constitution. He urged the court to allow the application to avoid rendering the appeal nugatory.

### **Analysis and determination:**

11. It is not in dispute that on 13<sup>th</sup> May, 2015 the parties to this dispute recorded a consent in the following terms:

1. By consent the tenant shall vacate and deliver vacant possession of the suit premises on or before 30<sup>th</sup> June 2016, in default an eviction order shall issue without further reference to the tribunal.
2. The tenant shall pay rent up to and including June, 2016.
3. The tenant shall leave the premises in tenantable condition.
4. Each party shall bear their own costs.
5. The O.C.S Nyeri Police Station to ensure compliance and that peace prevails.

### **Law applicable to the application**

12. This being an application for stay pending appeal, the law applicable to the application is found in **Order 42 Rule 6(2)** of the Civil Procedure Rules which provides as follows:-

**"(2) No order for stay of execution shall be made under subrule (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

13. Also see the case of **Sammy Some Kosgei v. Grace Jelel Boit (2013) eKLR** where it was observed:-

**"...The relevant provisions in relation to stay pending appeal are contained in order 42 Rule 6(2) of the Civil Procedure Rules, 2010..... The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal..."**  
(emphasis supplied).

14. The legal position canvassed in **Sammy Some Kosgei v. Grace Jelel Boit (supra)** is replicated in many cases. To name but just a few, the position is replicated in the following cases:-

i. Daniel Kihara Murage v. Jacinta Karuana Nyangi & Another (2015)e KLR where it was stated:-

**“To justify the grant of stay, the applicant must show or establish facts to satisfy the court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant’s case as the successful party in the appeal...The applicant ought to have placed before the court facts to show to the satisfaction of the court that if no stay is granted, he will suffer a loss that is substantial. The mere fact that land is concerned does not make any loss substantial.”** (emphasis supplied).

ii. Everlyn Jebitok Keter v. Henry Kiplagat Muge & 2 Others (2011) eKLR where it was stated:-

**“It is usually a good rule to see if O.41 r.4 (present Order 42 Rule 6) 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...In this case the applicant has not shown how he stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.”**

iii. Robert Ngaruiya Chutha vs. Joseph Chege Ndungu (2014) eKLR where it was stated:-

**“The Court of Appeal in the case of Charles Wahome Gethi v. Angela Wairimu Gethi, Civil Application No.302 of 2007 (2008) eKLR held that:-**

**“...It is not enough for the applicant to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them”....It is my finding that the defendant has not established that he shall suffer loss if the orders sought are not granted. Further, under Order 42 this court is not required to inquire into the merits of the intended appeal as that is a question that can only be determined by the Court of Appeal. Consequently, the ground that the appeal shall be rendered nugatory does not suffice....Lastly, the rules of procedure require that the applicant must offer security as the court may order. On perusal of the application before court, it is evident that the defendant has not stated that he is willing and ready to give security subject to the directions of the court....I accordingly decline to grant the orders sought.”** (emphasis supplied).

### **Analysis and determination:**

15. From the cases cited above, it is clear that for this court to exercise the discretion vested on it in favour of the applicant, the applicant must satisfy the conditions set in **Order 42 Rule 6(2)** of the Civil Procedure Rules. More importantly, the applicant must by way of evidence demonstrate that unless stay pending appeal is granted he will suffer substantial loss. The applicant must also furnish security for due performance of such decree or order as may ultimately be binding on him.

16. In the current application, the applicant has not demonstrated what loss if any, he will suffer if stay is not granted. It is noteworthy that the applicant has not controverted the respondent’s averment that the applicant has another place within Nyeri Town where he can relocate to. The applicant has also failed to furnish security for due performance of such decree or order as may ultimately be binding on him.

17. In view of the foregoing, I find and hold that the applicant has not made up a case for being granted an order for stay pending appeal.

18. With regard to the contention by counsel for the respondent that an appeal is not the proper forum for challenging the consent orders hereto, on the basis of the provisions of **Section 67(2)** of the Civil

Procedure Act and the case of **Uasin Gishu Weekly Advertiser Ltd v. Abdul Aziz Kanji & 2 others (1992) eKLR**, and without going to the merits of the appeal, I hold the view that the best way of challenging a consent order is by an application for review or setting aside of the consent order before the court which made the orders. I say so because, it is such a court which is better placed to determine whether or not there exists a ground or grounds for reviewing or setting aside the orders in question.

19. In **Uasin Gishu Weekly Advertiser Ltd v. Abdul Aziz Kanji & 2 others** (supra) **Aganyanya J.**, as he then was, observed:-

**“Another point to remember is that under Section 67(2) of the Civil Procedure Act once parties have entered into the judgment by consent the same is not appellable and can only be aside on grounds which would necessitate setting aside a contract i.e fraud, collusion or any other reason which would enable a court to set aside an agreement...otherwise in certain circumstances an aggrieved party should apply for review of a court order under order 44 of the Civil Procedure Rules. In the circumstances and while not giving a go ahead to the execution of the decree, I would not hesitate dismissing the application which I feel is misplaced...”**

20. **Section 67(2)** of the Civil Procedure Act, aforementioned, provides as follows:-

**“67(2) No appeal shall lie from a decree passed by court with the consent of the parties.”**

21. In view of the foregoing, I find the application herein as far as it seeks to stay the consent orders hereto to be misplaced and dismiss it. The foregoing notwithstanding, in order to give effect to the applicant’s right to agitate his appeal on its merits; I allow the application in terms of prayer 2.

22. The respondent is awarded the costs of the application.

**Dated, signed and delivered at Nyeri this 5th day of October, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Macharia h/b for C. N. Kingori for the plaintiff

N/A for the defendant

Court assistant - Lydia