



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 37 OF 2015**

**GRACE MUTHONI MAHINDI (Suing as the Personal Representative  
of the Estate of JACKSON MAHINDI GITONGA)..... APPLICANT**

**VERSES**

**ANDREW KIMANI.....1<sup>ST</sup> RESPONDENT**

**JOSIAH MWANGI .....2<sup>ND</sup> RESPONDENT**

**WANJOHI WATHEKA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The facts giving rise to this appeal were set out in detail in my ruling dated 26<sup>th</sup> October 2015. The same are reproduced herein where relevant. The respondents are the registered proprietors of all that parcel of land known as LR. NO. 209/230/1 (hereinafter referred to only as “**the suit property**”). At all material times, Jackson Mahindi Gitonga, deceased (hereinafter referred to only as “**the deceased**”) was carrying out business on the suit property as the respondents’ tenant under the business name Macbones Hotel. On or about 13<sup>th</sup> August, 2008, the respondents served the deceased with a notice under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya (hereinafter referred to as “**the Act**”) of their intention to increase rent for the suit property from Kshs.80,000/= per month to Kshs.253,600/= per month with effect from 1/11/2008. The deceased objected to the proposed new rent and filed a reference to the Business Premises Rent Tribunal (“**the tribunal**”) on 25/8/2008 for the tribunal to investigate the matter and determine the appropriate rent. The tribunal in a judgment delivered on 24/6/2009 found the new rent that was proposed by the respondents of Ksh. Kshs.253,600/= per month fair and reasonable and ordered the deceased to pay the same with effect from 24/6/2009.

2. The deceased was not satisfied with the decision of the tribunal and decided to appeal against the same to this court. The deceased filed a memorandum of appeal on 22/7/2009. Together with the said memorandum of appeal, the deceased filed an application seeking a stay of execution of the said decision of the tribunal pending the hearing and determination of the appeal. The stay application was opposed by the respondents and the same was heard by Okwengu J.(as she then was) who in a ruling delivered on 29/10/2009, granted the stay conditionally. Among the conditions imposed by the court were that; the deceased was to pay an increased rent of Kshs.155,000/= per month, file and serve a record of appeal within 90 days and take necessary steps to have the appeal heard within 12 months from the date of the order failure to which the stay would lapse unless otherwise extended by the court. The deceased filed and served a record of appeal within the time that was prescribed by the court. The deceased however failed to have the appeal heard within 12 months from the date when the stay order was granted. The deceased

applied for the extension of the said order and succeeded in having it extended from time to time.

3. On 11/7/2014, the respondents instructed Pyramid Auctioneers to levy distress against the deceased for the recovery of rent arrears based on the new rent that had been determined by the tribunal. The said auctioneers are said to have proceeded to the deceased's business premises on the suit property and removed therefrom several movable properties without first serving the deceased's legal representative with a proclamation.

4. Following this action by the respondents, the appellant herein in her capacity as the legal representative of the deceased brought an application by way of Notice of Motion dated 16/7/2014 seeking among others, the following orders;

(i) A temporary injunction to restrain the respondents from taking over possession, alienating, leasing, interfering with the fixtures or in any other manner dealing with the suit property without complying with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 Laws of Kenya ("the Act") pending the hearing and determination of the appeal herein.

5. The application was opposed by the respondents. In a ruling that I delivered on 26/10/2015, I allowed the appellants application with costs. The effect of the orders given on 26/10/2015 were that the respondents were restrained from taking over possession, alienating, leasing, interfering with the fixtures or in any other manner dealing with the suit property without complying with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 Laws of Kenya ("the Act") pending the hearing and determination of the appeal herein. The respondents were also required to restore to the appellant the goods that were illegally distrained by Pyramid Auctioneers on their instructions.

6. The respondents were dissatisfied with my orders aforesaid and filed a Notice of Appeal on 4/11/2015. On 11/11/2015, the respondents brought the present application by way of Notice of Motion dated 10/11/2015 seeking stay of execution of the orders made on 26/10/2015 pending appeal against the same to the Court of Appeal. The application was brought on the grounds that the respondents were dissatisfied with the decision of the court and wished to appeal against the same. The respondents contended that they will suffer irreparable loss unless the stay sought is granted. The application was opposed by the appellant through a replying affidavit dated 7/12/2015. The appellant contended that the respondents were guilty of none disclosure of material facts and that the application has no basis.

7. The application was argued by way of written submissions. I have considered the respondent's application together with the affidavit filed in support thereof. I have also considered the appellant's affidavit filed in opposition to the application and the written submissions filed by the advocates for both parties. As was held in the case of **Halai & Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR 365**, this court's discretion to order stay of execution of its order or decree is fettered by three conditions. The first condition is that the applicant must establish sufficient cause to warrant the granting of the stay sought. Secondly, the applicant must satisfy the court that substantial loss would ensue if the stay sought is not granted and lastly, the application must be brought without unreasonable delay and the applicant must furnish security.

8. On the material before me, I am satisfied that the respondents have met the conditions for granting the orders sought. The issues raised by the appellant do not disclose good grounds for denying the respondents the stay sought. It appears from the affidavit evidence before me that the suit property has already been let to a third party. The execution of the orders granted herein would therefore have the effect of evicting a third party from the said property. The third party seems have been in occupation of the suit property for some time and it is not only running hotel business which the appellant used to operate on the premises but also shops. The respondents risk massive losses in terms of lost rent and damages that is likely to be claimed from them if they were to terminate the tenancy of the third party. It appears also that the appellant had paid to the respondents a sum of Ksh. 1.5million as rent on the basis of the new rent that was determined by the tribunal on the erroneous belief that the stay that she had been

granted had lapsed. The respondents will have to refund this amount to the appellant if the stay sought is not granted. In fact, in paragraph 4 of her replying affidavit, the appellant has demanded a refund of the said amount. The sum of Ksh. 1.5 million is a substantial amount and it is not clear from the material before me that the appellant would be able to pay back the amount to the respondents if they succeed in the intended appeal. I am satisfied from the foregoing that the respondents would suffer substantial loss if the stay sought is not granted.

9. I am also satisfied that the stay application was filed without unreasonable delay. On security, the respondents have stated that they are ready and willing to abide by any condition that may be imposed by the court.

10. In the final analysis and for the foregoing reasons, I find merit in the Notice of Motion application dated 10/11/2015. The application is allowed on the following terms;

a The orders issued by this court on 26/10/2015 are stayed for a period of twelve(12) months from the date hereof or until the hearing and determination of the intended appeal by the respondents to the Court of Appeal whichever comes earlier.

b The stay is granted on condition that the respondents shall deposit in an interest earning bank account in Nairobi in the joint names of the advocates on record for the parties a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=) within the next thirty(30) days from the date hereof failure to which the stay shall automatically stand discharged without any further reference to the court.

.c The costs of the application shall be in the cause.

**Delivered and signed at Nairobi this 4<sup>th</sup> Day of November, 2016**

**S. OKONG'O**

**JUDGE**

**In the Presence of**

**N/A** **for the Appellant**

**Mr. Benji h/b for Kanyi** **for the Respondents**

**Kajuju** **Court Assistant**