



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

**AT NYERI**

**ELCA NO. 24 OF 2015**

**(Formerly HCA No. 20 of 2015)**

**REAL CONSULT AGENCIES LTD..... APPELLANT/APPLICANT**

**-VERSUS-**

**GERALD WACHIRA**  
**NGUTHI .....RESPONDENT**

**RULING**

**Background**

1. By a notice of motion dated **30th June, 2015** the appellant/applicant seeks the following orders-
  - a. **stay of execution of the order of the Chairman Business Premises Rent Tribunal (BPRT) issued on 26th June, 2015 in Tribunal case No. 2 of 2015 Nyeri pending the hearing and determination of the appeal herein;**
  - b. **A temporary injunction to restrain the respondent by himself, his agents, employees or servants from evicting, locking out, harassing or in any other manner interfering with the running of the appellant's business on plot No. 5118/223 Naromoru pending the hearing and determination of the appeal herein;**
  - c. **That pending the hearing and determination of the appeal, this court be pleased to direct that the appellant to deposit rent in court in the event the respondent fails to accept it.**
  - d. **That the OCS Naromoru Police station to ensure compliance with the orders of this court.**
  - e. **Costs of the application.**
2. The application is premised on the grounds that there exists a controlled tenancy between the applicant over the business located in **plot No.5118/223 Naromoru** (hereinafter referred to as the suit premises); that owing to a dispute between the applicant and the respondent over the existence of the said tenancy agreement, the applicant filed a complaint in the BPRT which was struck out on the ground that the tribunal had no jurisdiction. Pointing out that after the tribunal declined jurisdiction, the respondent threatened to evict it from the suit premises, the applicant contends that it will suffer substantial loss if the orders sought are not granted.
3. The applicant explains that it has been carrying out business in the suit premises for more than six (6) years and deposes that it is ready and willing to comply with any directions of this court concerning its application.

4. Through the replying affidavit he swore on **23rd July, 2013** the respondent Gerald wachira Nguthi, opposes the application on the grounds that there no longer exists a tenancy relationship between him and the applicant; that the applicant has failed to disclose to the court that the rent he paid after the lapse of the tenancy agreement was refunded and that the applicant did not issue a notice for renewal of the lease.
5. Explaining that he has no intention to enter into a new lease agreement with the applicant, the respondent contends that granting the orders sought will be tantamount to forcing him to enter into a new lease agreement with the applicant and constitute an infringement of his right to property.
6. When the application came up for hearing, counsel for the applicant, **Mr. Chibole** reiterated the applicant's contention that there exists a controlled tenancy between the applicant and the respondent and faulted the Chairman of the BPRT for having held that the tribunal had no jurisdiction to hear and determine the dispute preferred before it.
7. Reiterating the respondent's contention that no tenancy agreement exists between him and the applicant, counsel for the respondent **Mr. Muchiri**, submitted that the appeal herein is not arguable. Mr. Muchiri further reiterated the respondent's contention that allowing the current application will be tantamount to forcing the respondent to enter into a lease agreement with the applicant.

#### **Law applicable to an application for stay of execution pending appeal**

8. The law on stay of execution pending appeal is found in **Order 42 Rule 6** of the Civil procedure Rules, 2010 which provides 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 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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

9. It is now trite law that the conditions that the courts consider in an application of this nature are those stipulated under **Order 42 Rule 6(2)** of the Civil Procedure Rules and not whether or not the applicant has an arguable appeal, as submitted by counsel for the respondent. In this regard see **Order 42 Rule 6(2)** (*supra*) and the following cases:-

- i. **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 which provides as follows.....It will be seen that the above provisions are couched in mandatory terms and three conditions must be satisfied**

before an applicant may succeed on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for due performance of the decree...

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..."

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...."

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

"... 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:

10. 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 out 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/she will suffer substantial loss. The applicant must also furnish security for satisfaction of such decree as may ultimately issue against him.

### Application brought without delay

11. The instant application was filed on 30<sup>th</sup> June, 2015 barely one week from the time the order appealed from was issued. So there was no delay in filing the application.

### Security

12. On the question of security, the applicant has at paragraph 17 of his supporting affidavit deposed that it is ready and willing to comply with any directions this court may issue as a condition for granting the orders sought.

### Question of substantial loss

13. On whether the applicant has demonstrated that it stands to suffer substantial loss if the orders sought are not granted, it is not in dispute that the applicant has been carrying out business in the suit premises since 2009 and has invested heavily. There is evidence that the respondent, who no longer wishes to renew the tenancy agreement that existed between him and the applicant has already threatened to evict the respondent following expiry of the lease that existed between them. In my view, whereas the respondent has a right to terminate the lease that existed between him and the applicant, given the fact

that there exists a question of law and fact to wit, whether there exists a controlled tenancy between the applicant and the respondent, I hold the view that the applicant will suffer substantial loss if he is evicted from the suit premises before that question is heard and determined, as it may unprocedurally lose its investment in the suit premises. I say this because, should the court ultimately find that there exists a controlled tenancy between the applicant and respondent, the respondent would have to issue the applicant with the notice contemplated in law before he can lawfully remove the applicant from the suit premises.

14. The upshot of the foregoing is that the application herein has merit and is allowed as prayed.

**Further directions**

15. To take care of the concerns raised by the respondent, I direct the applicant to prepare and set down the appeal for hearing within ninety (90) days from the date hereof. The applicant is also directed to pay any pending arrears of rent to the respondent and continue paying rent to the respondent, at the rate agreed under the expired lease, pending the hearing and determination of the appeal. Should the respondent refuse to accept the rent, the rent arrears shall be deposited in court within twenty (21) days from the date of this ruling and thereafter the applicant shall deposit the monthly rent on or before the 5<sup>th</sup> day of each succeeding month until the appeal is heard and determined.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 17<sup>th</sup> day of November, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Ms. Chibole h/b for Mr. Kamau for the applicant

Mr. Macharia h/b for Mr. Muchira Gathoni for the respondent

Court assistant - Lydia