



THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA GATEMBU & OTIENO-ODEK, JJA)

CIVIL APPLICATION NAI 207 OF 2018

SHADE MANUFACTURERS AND HOTEL LIMITED....APPLICANT

VERSUS

SERAH MWERU MUTUU.....1<sup>st</sup> RESPONDENT

GRACE GACUKKU.....2<sup>nd</sup> RESPONDENT

VIRGINIA WANJIRU.....3<sup>rd</sup> RESPONDENT

LOUIS WAITHERA.....4<sup>th</sup> RESPONDENT

*(Being an application for stay of execution/injunction pending the hearing and determination of an Appeal from the ruling of Environment and Land Court at Milimani, Nairobi (K. Bor, J.) delivered on 10th July 2018*

in

ELC APPEAL NO. 41 OF 2017)

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RULING OF THE COURT

1. Before us is an application for stay of execution of a Ruling granted by the Environment and Land Court (ELC) sitting as an appeal court in a matter arising from the Business Premises Rent Tribunal in BPRT Case No. 95 of 2015 dated 15th December 2017. The applicant in this matter moved the Environment and Land Court sitting as an appeal court seeking an order to stay execution of the judgment and order of the Business Premises Rent Tribunal made on 13th October 2017. The BPRT had ordered the applicant to vacate the suit premises owned by the respondents. In a ruling delivered on 10th July 2018, the Environment and Land Court dismissed the application for stay. In dismissing the application, the learned judge expressed:

***“The dispute relates to the termination of the appellant’s lease over the suit property. The appellant claims it has developed the suit property and stands to suffer if it is evicted from the suit property. The decision of the BPRT gave the appellant six months to remove its structures from the suit property. The court is not satisfied that the appellant, who is the respondent’s tenant will suffer substantial loss if the orders sought are not granted. The appellant has not furnished any security for the performance of the order of the Chairman,***

***BPRT. The Court has considered the application dated 15th December 2017, the submissions by counsel and finds no merit in the application. It is dismissed with costs to the respondents.”***

2. Aggrieved, the applicant has moved to this Court in a Notice of Motion dated 16th July 2018 in a second attempt to obtain stay of execution. The grounds in support of the Motion before us is that a Notice of Appeal has been filed in Nairobi ELC Appeal No. 41 of 2017; that the applicant has an arguable appeal which raises triable issues; that execution of the order of the BPRT will render the applicant’s appeal nugatory; that unless stay is issued, the respondents will at any moment initiate the process to evict the applicant from the suit property which is known as the Shade Hotel located in the Karen neighbourhood in Nairobi. The Notice of Motion is supported by the affidavit of David Gitau Thairu, a director of the applicant..

3. The respondents filed a replying affidavit deposed by Ms. Louis Waithera dated 17th October 2018. It is averred that the applicant was

duly served with a tenancy notice to terminate the landlord/tenant relationship between the parties; that the applicant filed a reference before the BPRT and the Tribunal, in a judgment dated 13th October 2107, agreed that the applicant had been given a proper notice to terminate the tenancy; that pursuant to the orders of the BPRT, the applicant is obliged to vacate the rented premises.

4. At the hearing of this application, learned counsel Mr. Awour appeared for the applicant. Learned counsel Ms. Rosemary W. Chege appeared for the respondent.

5. Counsel for the applicant urged us to grant orders restraining the respondents from evicting the applicant from the suit premises pending the hearing and determination of the appeal in Nairobi ELC Appeal No. 41 of 2017. The applicant further seeks an order from this Court to stay execution of the eviction order issued by the BPRT on 13th October 2017 in BPRT Case No. 95 of 2015.

6. In support of the application, counsel submitted that the applicant has two pending appeals in this matter. One appeal is pending before the Environment and Land Court being ELC Appeal No. 41 of 2017 and the other appeal is an intended appeal to this Court appealing against the Ruling of the ELC declining to grant an order for stay of execution. Counsel submitted the applicant has an arguable appeal with probability of success; that the ELC court erred in failing to grant stay orders; that the applicant has invested over Ksh. 40 million in the suit premises; the applicant has been a tenant on the premises for over 37 years; that if the applicant is evicted from the suit premises, its appeal before the ELC and this Court shall be rendered nugatory.

7. In opposing the instant application, the respondent submitted that the applicant has no right of appeal to this Court and consequently there is no arguable appeal; that an appeal cannot be arguable if there is no right of appeal; Counsel cited **Section 15 of the Landlord and Tenant Act, Cap 301 of the Laws of Kenya** which provides that an appeal from the BPRT shall lie to the Environment and Land Court whose decision shall be final. It was submitted the finality of the decision of the ELC means that there is no right of appeal to this Court.

8. On the merits of the case, counsel for the respondent submitted that the applicant was served with a notice of termination of the tenancy and should vacate the suit premises as ordered by the BPRT; that the lease agreement between the applicant and respondent expressly stipulated that no development should be made on the suit property without express consent of the landlord; and in any event, the lease provides that upon termination, the tenant shall remove all its structures from the demised premises. Counsel submitted that the issue of the applicant having invested over Ksh. 40 million on structures on the suit property does not arise because the applicant should remove and cart away all developments and structures it put on the property.

9. We have considered submissions by both counsel and the authorities cited. This being an application under **rule 5 (2) (b) of the Rules of this Court**, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see *Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838*; *J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088* and *Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited [2002] 1EA 227*.

10. A notice of appeal and draft memorandum of appeal is on record. Whereas the applicant contends that the intended appeal is arguable, the respondents assert that it is not arguable. In an application for stay of execution, it suffices that a single arguable point is identified and the arguable ground of appeal is not one that must succeed but one that raises triable issue.

11. The first issue for our consideration is the jurisdiction of this Court. The respondent submitted that this Court has no jurisdiction to hear and entertain this application because there is no right of appeal to this Court. **Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** provides that:

***(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:***

***Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.***

***2. In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.***

***3. Deleted by Act No. 2 of 1970, s. 13.***

***4. The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:***

***Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.***

12. We have considered the proviso to **Section 15 (4) of the Act**. The proviso clearly indicates that the decision of the ELC court is final and not subject to further appeal. In *Ramadhan Mohamed Ali vs. Hashim Salim Ghanim [2016] eKLR*, this Court expressed as follows:

***“As we indicated earlier, the first issue that calls for determination before addressing the merits of the appeal is the issue taken by the respondent whether the appellant has a right of appeal to this Court. Mr. Mogaka, learned counsel for the respondent, in a short and succinct submission argued that by dint of section 15(4) of the Act, the appellant did not have a right of appeal to this Court from the decision of the High Court in the exercise of its appellate jurisdiction from the decision of the Tribunal. He relied, in support of that proposition, on the judgment of this Court in Premchand Nathu & Co Ltd. & 4 Others v. Kariuki, CA No.***

**Ultimately, we are satisfied that there is no right of second appeal to this Court from the original decision of the Tribunal. Accordingly, we find that the respondent’s objection is well founded and strike out this appeal with costs to the respondent. It is so ordered.”**

13. Accordingly, we are satisfied that the applicant has no right of appeal to this Court. There can be no arguable appeal if there is no right of appeal.

14. In addition, the applicant has come to this Court seeking to stay the ruling of the Environment and Land Court made on 10th July 2017. The ruling of the ELC is a negative order. The said ruling simply declined to grant stay of execution. The ruling did not order anyone to do anything. In the case of **Kanwal Sarjit Singh Dhiman vs. Keshavji Jivraj Shah [2008] eKLR**, this Court while dealing with stay of a negative order, held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs”.**

15. In **Western College of Arts and Applied Sciences vs. Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

**“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs.**

16. In **Raymond M. Omboga vs. Austine Pyan Maranga Kisii HCCA No 15 of 2010**, it was held that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

**“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”**

17. In the instant case, the applicant is seeking stay of a negative order. The jurisprudence of this Court in such an application is that no stay can be granted from a negative order. It follows that the present application is misconceived. For the reasons stated above, the Notice of Motion dated 16th July 2018 be and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 26th day of October, 2018**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**