IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPLICATION NO. 92 OF 2016

BETWEEN

STAR TRANSPORT CO. LTD.....APPLICANT

AND

ALI MWINYI MVITA.....RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against the judgment and decree of the High Court of Kenya at Mombasa (Emukule, J.) dated 11th March 2016 in HCCC No. 350 of 2008)

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RULING OF THE COURT

By a judgment dated 11th March 2016, the High Court of Kenya at Mombasa ***(Emukule, J.),*** entered judgment in favour of the respondent, ***Ali Mwinyi Mvita,*** and ordered the applicant, ***Star Transport Co. Ltd*** to give vacant possession of the property known as ***Plot No. 1097/VI/MN*** (the suit property), to the respondent within 30 days and to pay him ***Kshs 21,300,*** being rent arrears and *mesne* profits of ***Kshs 20,000 per*** month with effect from 1st October 2008 until delivery of vacant possession. The learned judge also awarded the respondent costs of the suit.

Aggrieved by the judgment, the applicant lodged a notice of appeal on14th March 2016 and followed it up on 31st March 2016 with the Motion on Notice now before us, invoking the powers of this Court under ***rule 5(2) (b)*** of the ***Court of Appeal Rules*** and praying for an order of stay of execution of the decree of the High Court, pending the hearing and determination of its intended appeal. It is necessary to advert briefly to the facts leading to the judgment and this application.

On 11th October 1978, the respondent entered into a written lease agreement with the applicant by which he let to the applicant the suit property for a period of 20 years at the monthly rent of Kshs. 100/-! The suit premises were to be used as a ***"transport yard, garage and office."*** The lease expired on 30th

September 1998. The parties disagree on whether the lease was renewed or not, but the learned judge found, on the basis of admissions by the applicant, that the same was renewed verbally for a further period of 10 years until 20th September 2008.

Contending that the applicant had not paid rent from January 1991, the respondent, by a plaint dated 15th December 2008, instituted proceedings in the High Court seeking vacant possession of the suit property, arrears of rent from January 1991 to September 2008, and *mesne* profits at the rate of Kshs 20,000 per month from 1st October 2008 till payment in full. In the plaint it was also contended that the applicant had illegally sublet the suit premises without the respondent's consent.

By its defence dated 3rd February 2009, the applicant admitted the initial lease of 20 years, but denied that the same was extended for a period of 10 years upon expiry. Instead, the applicant averred that upon the expiry of the first lease, the landlord and tenant relationship continued on the basis of a month-to-month tenancy. Accordingly, it was further averred, the applicant became a protected tenant under the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301,*** thus depriving the High Court of jurisdiction to deal with the dispute.

By the impugned judgment the learned judge found that the applicant was not a protected tenant and that the High Court had jurisdiction to hear the dispute. That holding was based on the finding, first that the suit premises, which was used as a *"transport yard, garage and office"* did not qualify as a *"catering establishment", "hotel"* or *"shop"* within the meaning of cap 301. Secondly the learned judge held that the lease between the parties, which was for a period exceeding five years, put the relationship between the parties outside cap 301 and the jurisdiction of the Business Premises Tribunal.

On the merits of the suit, the trial court found that the applicant had accumulated rent arrears for a period of 93 months totaling to Kshs 21,300/-; that it had without the consent of the respondent sublet the suit premises to a third party known as ***Rongai Transporters*** for ***Kshs 300,000/-*** per month; and that the respondent was entitled to *Mesne* profits of Kshs 20,000 per month, as pleaded, with effect from 1st October 2008 being the date from which the applicant was in wrongful possession of the suit premises after the expiry of the renewed lease.

Prosecuting the application, ***Mr. Omar,*** learned counsel for the applicant submitted that the intended appeal was arguable because the learned judge erred in several respects. First, it was contended that the trial judge should have found that after the expiry of the lease, the relationship between the parties became a periodic tenancy. Secondly it was contended that the learned judge erred further by failing to hold that the tenancy relationship between the parties after the expiry of the lease was a controlled tenancy under cap 301. Lastly it was argued that the judge erred too by finding that the initial written tenancy was renewed verbally.

Mr. Omar urged us to grant stay of execution, contending that if the intended appeal were to succeed, it will be rendered nugatory as the applicant will have paid the sums ordered by the High Court and will have been evicted from the suit premises.

Mr. Khatib, learned counsel for the respondent opposed the application on the basis of an affidavit sworn on 11th May 2016 by ***Omar Mwinyi***, the holder of a power of attorney from the respondent. It was submitted that the intended appeal was not arguable because the appellant was wound up in 2003 and that in the event that the intended appeal was successful, the same would not be rendered nugatory, because the applicant could easily be put back into possession of the suit premises. As graphically put by the respondent, the suit premises were not "moving to any other place" and were not in any imminent danger of being destroyed! The respondent finally submitted that it stood to suffer more prejudice as the applicant had continued to occupy the suit premises for many years without paying any rent.

We have duly considered the application, the supporting and replying affidavits and submissions of learned counsel. To obtain the order of stay of execution, the applicant is obliged to satisfy us that the intended appeal is arguable and that unless we order stay of execution, that appeal will be rendered

nugatory. (See ***Ishmael Kagunyi Thande v. Housing Finance Co. of Kenya Ltd*** ***(Civil Application No. Nai. 157 of 2006).*** The applicant is obliged to satisfy both of those conditions; satisfying only one will not suffice. (See ***Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA No. 314 of 2007).***

In an application under rule 5(2)(b), we must refrain from making any definitive findings on the issues in dispute, for that is the province of the Court when hearing the substantive appeal (See ***Njuguna S. Ndungu v. EACC & 3 Others, CA. No. Nai. 304 of 2014***). Accordingly we cannot make a determination at this stage that the applicant does not exist, as urged by the respondent.

On whether the applicant has demonstrated an arguable appeal, we are satisfied that the three issues it has raised are arguable. We remind ourselves that indeed an arguable appeal is not one, which must necessarily succeed. It is simply an appeal, which raises even a single *bona fide* issue that deserves to be fully considered by this Court (See ***Kenya Railways Corporation v. Edermann Properties Ltd, CA. No. Nai. 176 of 2012).***

The crux of the application is whether if the intended appeal succeeds, it will be rendered nugatory. Whether or not a successful appeal will be rendered nugatory depends on the circumstances of each case. The primary consideration is whether, if what is sought to be stayed were to happen, it is reversible and if not whether the applicant can be adequately compensated by damages. (See ***Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others, CA. No. 31 0f 2012).***

The applicant has not alleged, let alone demonstrated, that the respondent is incapable of refunding the amounts awarded to him by the High Court should the appeal succeed. Nor is the decree of the High Court, if executed before the appeal is heard and determined irreversible; the applicant can easily be put back into possession should the appeal succeed. He can also be adequately compensated by award of damages.

On other issue that has weighed heavily in our minds against award of the orders sought by the applicant arises from the fact that the applicant does not dispute that it has not paid rent to the applicant for a period now longer than 93 months. The order of stay of execution that the applicant seeks is an equitable remedy. As this Court stated in ***Titus Gicharu Mwangi v. Mary Nyambura & Another, CA. No. Nai. 162 of 2013 (UR 111/2013***) and ***David Kamau Gakuru v. National Industrial Credit Bank Ltd, CA No. 84 of 2001***, the conduct of a party who seeks an equitable remedy must in all matters relating to the suit meet the approval of a court of equity before he can obtain an equitable relief. An equity relief will not be granted to a party who by his conduct has shown himself to be underserving of such a relief.

In the event, this application must fail and the same is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Malindi this 1st day of July 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR