



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 49 OF 2016 (UR 27/2016)

MOHAMMED NYONGESA SICHANGI APPLICANT

AND

BENSON N. OPWORA RESPONDENT

***(Application for stay of execution from the ruling of the High Court Of Kenya at Bungoma,
(Mukunya, J.) delivered on the 12th day of November, 2013***

in

Environment & Land Case No. 63 of 2015)

RULING OF THE COURT

1. This is an application for stay of execution of orders made by **Mukunya, J.** on 12th November, 2015 where the learned judge struck out the applicant's suit and awarded costs thereof to the respondent. The application is brought under the wrong provisions of the law, **order 45** of the **Civil Procedure Rules** and **Sections 3** and **3A** of the **Civil Procedure Act**, instead of **rule 5 (2) (b)** of this **Court's Rules**. The applicant is an unrepresented lay person. We shall overlook that procedural impropriety in the spirit of **Article 159 (2) (d)** of the **Constitution**.
2. The applicant, being aggrieved by the aforesaid order, has preferred an appeal to this Court. The applicant states that the appeal has high chances of success and it may be rendered nugatory unless the order of stay is granted.
3. The brief facts that gave rise to Environment and Land Case No. 63 of 2015 that was before Mukunya, J were that the appellant filed Tribunal Case No. 34 of 2014 at the Business Premises Rent Tribunal, (hereinafter the Tribunal) at Kakamega, stating that he was the landlord of certain business premises at Kimilili and the respondent was his tenant but the tenant had refused to pay rent for over 14 years. He urged the Tribunal to order the respondent to pay the outstanding arrears rent and surrender vacant possession to him.
4. The Tribunal heard the case and determined that it was the applicant who was a tenant of the respondent and ordered him to pay arrears of rent amounting to Kshs. 103,350 and costs of Kshs.30,000/=.

5. The applicant then moved to the Environment and Land Court and filed the suit that gave rise to this appeal, seeking more or less the same orders as he had sought before the Tribunal. The court held that the filing of another suit shortly after the Tribunal's determination of the same dispute amounted to abuse of the court process and struck it out with costs to the respondent. It is against that decision that the applicant preferred an appeal to this Court.

6. In his appeal, the applicant faults the Environment and Land Court for summarily striking out his suit; for failing to find that he was operating on his own plot; and for failing to carefully consider the evidence that the Tribunal had erred in making its decision.

7. In his replying affidavit, the respondent argued that the appeal has no chances of success; that there was nothing to be stayed since execution had already taken place, the applicant's property having been lawfully attached and sold by an Auctioneer in an effort to recover the decretal sum.

8. The respondent further averred that he is a prominent businessman within Bungoma County with a monthly income of over 1 million shillings and would therefore be able to refund the costs of Kshs.89,365/= in the event that the applicant were to succeed in his appeal.

9. **Mr. Bw'onchiri**, the respondent's learned counsel, submitted that the applicant had not demonstrated that his appeal is arguable and that it would be rendered nugatory unless stay is granted. He reiterated that there was nothing to be stayed since execution had already been done, although only a sum of Kshs.30,000/= was realized from the sale of the applicant's goods, leaving a balance of about Kshs.61,000/=.

10. The applicant conceded that execution had been done and his property sold. He urged the court to order stay of further execution that he feared was likely to be undertaken for recovery of the balance of the decretal sum.

11. We have considered the application before us. The principles upon which this Court determines an application of this nature are well settled. An applicant has to demonstrate that the appeal or intended appeal is arguable and that unless stay of execution is granted the appeal will be rendered nugatory. The two conditions must be met. See **RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD [2002] 1 E. A. 232**.

12. Having carefully perused the proceedings before the Tribunal and the trial court as well as the impugned decision and the grounds of appeal, we are satisfied that the appeal is arguable. We need not say more about that limb.

13. We do not, however, think that the appeal shall be rendered nugatory unless stay of further execution is granted. The execution that was ordered was for recovery of arrears of rent and costs. In the event that the applicant is successful in his appeal, the respondent has said that he will be in a position to repay whatever amount that would have been paid to him. The applicant does not dispute the respondent's financial ability to so repay.

14. In the circumstances, the orders sought cannot be granted. Consequently, the application for stay of execution is dismissed with costs to the respondent.

It is so ordered.

DATED and DELIVERED at Kisumu this 16th day of December, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR