Real Consultant Agencies Limited v Nguthi (Environment and Land Appeal 007 of 2023) [2024] KEELC 5458 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5458 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 007 OF 2023

JA MOGENI, J

JULY 16, 2024

BETWEEN

REAL CONSULTANT AGENCIES LIMITED ..... APPLICANT

AND

GERALD WACHIRA NGUTHI ..... RESPONDENT

RULING

1. The Appellant/Applicant approached this court by way of Notice of Motion dated 20/02/2024 seeking an order of stay of execution of the ruling of the Business Rent Tribunal delivered on 17/10/2023 pending determination of this appeal. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on 20/02/2024.

2. In the said affidavit the Applicant gives the background of this matter which is as follows. The Applicant is a sub-tenant of the Respondent in the suit premises which is a shop on Plot No 5118/223 Naromoru. The Applicant an application and reference in the Tribunal dated 30/01/2023 and reference dated 27/01/2023 and the Landlord filed an application dated 03/04/2023. Both the tenant's reference and the Landlord's application were heard together. The Chairman Hon. Gakuhi Chege delivered a consolidated ruling on 17/10/2023 in favour of the respondent.

3. Following the decision of the Tribunal the appellant's application filed dated 30/01/2023 and reference dated 27/01/2023 were all dismissed and the Landlord's application dated 3/04/2023 being Nyeri BPRT No. E034 of 2023 was allowed.

4. The appellant has deponed that if a stay of execution is not granted, his appeal shall be rendered nugatory. He further depones that he is likely to be evicted from his place of business and he stands to suffer irreparable loss and damage.

5. The application was opposed by the Respondent who filed a Replying Affidavit sworn on 5/03/2024. In the said affidavit, the application/appeal is a delay tactic meant to stop him from enjoying the fruits of the judgment.

6. He further averred that the import of the Notice that he had placed on the appellant's door is purely for information to the existing tenants to be informed of how they are supposed to deal with the property. It is his contention that subletting is not allowed. That the notice should not be construed to be an eviction notice.

7. He contends that the tribunal's order was not an eviction order but an averment that the Landlord had a right to enjoy the fruits of his investment including the right to increase rent as per the market forces.

8. The court directed that the application be canvassed by way of written submissions. Both parties filed their submissions and they were given an opportunity to briefly highlight them.

9. By the time of writing this ruling none of the parties had submitted their submissions

10. In his submissions counsel for the Applicant emphasized that the Applicant was facing imminent eviction as both the lower court and the Tribunal had downed their tools citing lack of jurisdiction. He conceded that two lease agreements starting on 1st April 2016 were presented to the court. The first one indicates that the lease was to end on 31st May 2021 while the second one indicates that the lease was to end on 15th.June 2021. It was his submission that even though he obtained interim orders of stay from the Tribunal, the Respondent did not comply with the said orders as he refused to reopen the premises and allow him to occupy the premises while paying rent as per the lease agreement. He faults the Tribunal for holding that it had no jurisdiction as this resulted in the Applicant being exposed.

11. Regarding the application for stay execution, the applicant holds the view that he has met the conditions under Order 42 Rule 6 of the *Civil Procedure Rules* by demonstrating that he shall suffer substantial loss, if the order is not given since he runs an M-Pesa shop on the suit premises and the appellant's contract with Safaricom is heavily founded on the strategic position of his shop. Which position has made his shop marketable to the Naromoru people.

12. That if he had to be evicted and have to search another shop in a strategic place this would cause economic hardships given the prevailing economic hardships. He averred that he has an arguable appeal and that he was ready to comply with any orders or directions issued by the court including orders for security.

13. On the other hand, counsel for the Respondent submitted that the relationship between the Applicant and the Respondent was governed by the lease agreement which ended on 31st May 2021 and the Tribunal was therefore right to down its tools as there was no Landlord/Tenant relationship between the parties. He faulted the Applicant for presenting what he termed as a forged lease agreement before the lower court. It was his further submission that even though the Applicant was in possession of the demised premises, he was not carrying on any business as the premises were locked. He refuted the assertion that the Applicant had met the conditions for stay of execution and argued that in any event the court could not stay a negative order dismissing the applicant's suit. He submitted that if the court was inclined to grant the application for stay then the Applicant should be ordered to pay security for costs in the sum of Kshs. 1,000,000/= being the equivalent of the outstanding rent.

Issues for Determination

14. Having considered the background of this case, the Notice of Motion, and affidavits the only issue for determination is whether execution should be stayed pending appeal.

Analysis and Determination

15. The principles that guide the courts while considering an application for stay pending appeal are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the *Civil Procedure Rules*.

> Order 42 Rule 6 provides in part as follows: -
>
> 6.
>
> (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 sub-rule (1) unless—
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> (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
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> (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.
>
> (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
>
> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

16. The first question I must answer if whether the Applicant has demonstrated that he will suffer substantial loss.

17. In the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR the court considered the question of what constitutes substantial loss. Mativo J stated as follows:-

> " The corner stone of the jurisdiction of the court under Order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted.

What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* where it was held *inter alia* that:-

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.
>
> The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni*, ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"

18. In the instant case the Applicant has deponed that he stands to suffer substantial loss as he has heavily invested in his business. He has not quantified the loss but he has addressed the issue of the strategic position of his shop which information has not been rebutted. On his part the respondent has alluded to the fact that all he wants is to enjoy the fruit of the judgment and that he is not about to evict the tenant. On the other hand he is already posting notices on the premises occupied by the appellant.

19. The respondent's averment is a contradiction in itself since he has already posted a notice on the door of the tenant/appellant and stated that the tenant has declined to pay the new rent. He has even asserted in his replying affidavit that the court already gave him an order allowing him to enjoy his investment. The assertion by the appellant that he has posted notices is controverted by the Respondent but acknowledged. It is therefore my finding that the applicant has demonstrated that if execution is not stayed, he will suffer substantial loss.

20. The second question is whether the application has been filed without unreasonable delay. This application was filed 20/02/2024 for a ruling delivered on 17/10/2023 where the applicant had been given a 30 day stay. Applicant made an application upon receipt of the certified copy of the ruling to file an Appeal out of time and that leave was granted to file a Memorandum of Appeal.

21. The last condition is the issue of security for costs.

22. With regard to security for costs, counsel for the Applicant submitted that he is willing to abide by any conditions that the court may impose.

23. There is no doubt that if a stay is not granted, the appeal will be reduced to an academic exercise. I have considered the applicant's argument of the appeal being reduced to an academic exercise and noted that since this is a tenancy arrangement which has a clear timeframe.

24. However, I must also point out that the court must be careful not to deny the decree-holder the joy of severing the fruit of the judgment. The two rights must be balanced out. The Applicant should not be prevented from exercising his cherished right of appeal which is guaranteed by the constitution but also the decree-holder should be comforted by knowing that his decree can be implemented even in the context at hand.

25. In the premises, and in the interest of justice, I grant the application on condition that the Applicant furnishes security for costs by depositing the sum of Kshs. 100,000 in an interest bearing account in

the joint names of the advocates for the Applicant and the Respondent on or before the 30/08/2024, failing which the order of stay shall automatically lapse. The Applicant shall also file their Record of Appeal within 30 days from the date hereof.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JULY 2024

MOGENI J

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JUDGE

In the presence of:-

Mr. Maina for the Respondent

Ms Nerima for the Appellant/Applicant

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE