



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL CASE NO. 197 OF 2015**

**FREDRICK MUTUA MULINGE/T/A KITUI UNIFORM.....APPELLANT**

**VERSUS**

**KITUI TEACHERS HOUSING CO-OPERATIVES SOCIETY LIMITED ...RESPONDENT**

**RULING**

This ruling determines the appellant/applicants Notice of Motion dated 15<sup>th</sup> May 2015 under certificate of urgency seeking orders of stay of execution of the judgment delivered in Tribunal Case No. 45 of 2014 in Machakos – **Fredrick Mutua Mulinge T/A Kitui Uniform V Kitui Teachers Housing Co-Operative Society Ltd** pending hearing and determination of this appeal.

The application is brought under the provisions of Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law and is predicated on the grounds that on 10<sup>th</sup> April 2015 the tribunal delivered a judgment which the appellant/tenant is aggrieved by and hence this appeal. That the appeal has high chances of success and that the tenant risks being evicted from the premises and that unless stay is granted the appeal herein shall be rendered nugatory. Finally that the application was made without undue delay.

The application is supported by the annexed affidavit of Fredrick Mutua Mulinge sworn on 15<sup>th</sup> May 2015 annexing the decision appealed from and emphasizing that he had been a tenant in the subject premises for ten years hence if evicted before this appeal is heard and determined then he stands to suffer great losses and damage and the appeal herein shall be rendered nugatory and that he is willing to abide by any conditions that this court may impose.

The application is opposed by the respondent/landlord who filed grounds of opposition on 30<sup>th</sup> June 2015 and a replying affidavit sworn by Joshua Mumo Mwitwa the chairman of the management Committee of the respondent Kitui Teachers Housing Co-operative Society Ltd.

The respondents contend that the applicant has not appealed against the judgment of the Tribunal delivered on 27<sup>th</sup> January 2015 and that the current appeal is only against the Ruling of the Tribunal delivered on 10<sup>th</sup> April 2015 dismissing the applicant's application that sought for review of the judgment. That the termination notices were served on all tenants who have vacated save for the appellant who is frustrating the respondent's bid to develop its property as a result, the respondent has lost monthly rent of shs 100,000/- from September 2014 to date. That there are no special

circumstances warranting the tenant (applicant) to be treated special from other tenants who vacated and that no undertaking for the losses and damages has been given and that should the court grant stay then the appellant should be ordered to pay shs 100,000/- per month being lost income from the premises as a result of his refusal to vacate the premises to give way for development. That even if security is offered, the entire appeal lacks merit hence the application should be dismissed with costs.

The parties' advocates canvassed the application by way of written submissions duly filed and exchanged. The appellant's submissions are dated 11<sup>th</sup> August 2015 whereas the respondent's submissions are dated 22<sup>nd</sup> October 2015.

The appellant submitted that being aggrieved by the decision/ruling of the Tribunal made on 10<sup>th</sup> April 2015 dismissing his application for review of the judgment delivered on 27<sup>th</sup> January 2015, he has exercised his constitutional right to appeal against that ruling within the statutory period of 30 days and that if the stay of execution is declined he stands to suffer irreparable loss and danger as he stands to be evicted from the subject premises wherein he has been a tenant for the last 30 years. Further, that he continues to pay his monthly rent therefore the landlord/respondent does not stand to suffer any loss. The applicant contends that his tenancy agreement with the respondent was between the two of them and did not involve a group of tenants and therefore he does not understand the circumstances under which the other tenants vacated the premises and neither is he seeking any special treatment but to be accorded an opportunity to ventilate his grievances on appeal. Further, that he cannot undertake as to damages which are too remotely connected to his grievance and that the issues raised by the respondent should be canvassed at the hearing of this appeal. The appellant/applicant relied on the cases of **Ramadhan Mohammed Ali V Hashim Salim Ghaim HCCA 32/2013 Mombasa** and **Cloke Butchery V Nasser Puna Memon Jamat HCCA 20/2013 Mombasa** wherein the court granted stay of execution of the judgment of the Business Premises Rent Tribunal pending hearing and determination of the appeal on condition that the appellant does not fall into rent arrears.

The respondent's submissions' filed on 22<sup>nd</sup> October 2015 contend that this application lacks merit, giving a background of the dispute before the Business Premises Rent Tribunal which was resolved by a determination of 23<sup>rd</sup> January 2015 after which the applicant herein applied for review of that judgment but by a ruling rendered on 10<sup>th</sup> April 2015, the Tribunal dismissed the application for review hence this appeal and application.

The respondent contends that the application does not specify the date of the judgment and that he annexed a ruling of 10<sup>th</sup> April 2015 which he refers to as a judgment which is misleading to the court and that it is only the respondent's grounds of opposition and replying affidavit that clarified on the Notice of termination of tenancy. The respondent maintains that all the tenants were issued with similar notice and the ruling of the Tribunal referred to that aspect but that only the applicant had declined to vacate the premises hence the contention that the notice was defective or that he was not served with notice to terminate tenancy has no basis.

On the undertaking as to damages, the respondent contends that since they only receive shs 3,718 monthly from the applicant as opposed to shs 100,000/- monthly when all other tenants were in the premises, and now that those tenants have vacated the premises, the applicant should pay for that loss, since the respondent continues to incur heavy losses from September 2014.

The respondent also contended that the applicant had not satisfied the conditions under Order 42 Rule 6 of the Civil Procedure Rule for stay of execution pending appeal to issue for reasons that the

application is based on serious misrepresentations; the appellant has not appealed against the judgment of the tribunal which stands unchallenged; that he has not demonstrated any substantial loss that he is likely to suffer if stay is declined; It is the respondent who will be greatly prejudiced by the stay and that the appellant has not offered an undertaking as to damages.

I have carefully considered the applicant's application, the opposition thereto and the parties advocates submissions together with the authorities submitted by Mrs Owino counsel for the applicant.

The law applicable in applications for stay of execution of decree pending appeal is Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which enact that:

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 since application and 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 of stay 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 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.*

The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a letter remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

The cornerstone of the jurisdiction of the court under Order 42 Rule 6 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What would constitute substantial loss varies from case to case as was aptly discussed by Gikonyo J in **James Wangalwa & Agnes Naliaka Cheseto** where the learned Judge held:

***“ 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 Civil Procedure Rules. 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 Silvertern V Chesoni the issue of substantial loss is the cornerstone of both jurisdiction. It is what has to be prevented by preserving the status quo because such loss would render the***

***appeal nugatory.”***

The applicant herein is the tenant of the respondent/landlord. The dispute between them revolves around the validity of notice to terminate tenancy which culminated in a reference being filed before the Business Premises Rent Tribunal. The Tribunal heard the parties and rendered its decision on 23<sup>rd</sup> January 2015 dismissing the tenant's reference. The tenant/applicant did not exercise the right of appeal under Section 79G of the Civil Procedure Act. Instead, he applied for Review under Section 12(1) 4(4) and 6(1) of the Landlord Tenant (Shops, Hotels and Catering Establishment Act) Cap 301 Laws of Kenya. He also sought for leave to file reference out of time on the Landlord's Notice dated 28<sup>th</sup> June 2014 since the reference earlier filed was dismissed on a technicality- having been brought under the wrong provisions of the Act ( Cap 301) .

That application for review of the Tribunal's judgment was dismissed on 10<sup>th</sup> April 2014 culminating in this appeal.

According to the applicant, he has been a tenant in the suit premises for over 30 years and that he is aggrieved by the refusal to review the judgment and lodged this appeal which will be rendered nugatory unless stay is granted. Further that he shall also suffer irreparable loss and damage and that he is not aware of the circumstances under which the other 22 tenants were issued with notices to vacate the suit premises hence he cannot be faulted for challenging the Landlord's tenancy since he has justifiable reasons for doing so. He also submits that this application is brought timeously and that he is ready to abide by any conditions as to security as the court may order.

On the other hand, the respondent contends that it stands to suffer irreparable loss if stay is granted as it has already lost tenants and rental income of shs 100,000/- per month from September 2014 by the applicant's refusal to vacate the premises to pave way for the planned re-development of the premises. The respondent contends that no appeal has been lodged challenging the decision of the Tribunal made on 23<sup>rd</sup> January 2015 and that this appeal which is filed against the ruling refusing review of the judgment as delivered on 10<sup>th</sup> April 2015 is misleading to the court.

On whether the application has been brought without undue delay I note that the ruling of the Tribunal was made on 10<sup>th</sup> April 2015 and the appeal herein filed on 4<sup>th</sup> May 2015 within 30 days followed by this application for stay of execution of the judgment of 23<sup>rd</sup> January 2015 on 18<sup>th</sup> May 2015 by an application dated 15<sup>th</sup> May 2015. In my view, the application was not brought after undue delay as it was ten days after filing the appeal.

The applicant has also offered security as may be ordered by this court.

On whether the applicant shall suffer substantial loss if the stay is not granted is debatable, given that the respondent also alleges that it has suffered loss of rental income since September 2014 when all other tenants vacated the premises and the appellant herein resisted. Further, that it is unable to develop the premises.

The respondent also contends that there are no special circumstances that would warrant the applicant to remain in the premises since all tenants were issued with termination notices and they complied and that the monthly rent collected from him is too little to compensate the Landlord for the loss of income for all this time.

What is not in dispute is that the applicant has been a tenant for the respondent for a considerably long period of time and that when the Landlord issued him with termination Notice to take effect on 1<sup>st</sup>

September 2014, he challenged that Notice as being defective. The Tribunal overruled him and he sought a review of that decision which review was also rejected then he filed this appeal.

A review is one of the alternatives to an appeal, for as long as a party satisfies the court or Tribunal on the conditions for review. An appeal also lies from an Order of review therefore I find no fault in the appellant opting to apply for review instead of filing an appeal against the judgment of 23<sup>rd</sup> January 2015.

The judgment being sought to be stayed is not a money decree. The respondent was the successful party which means, it is free to evict the appellant/applicant from the premises unless restrained from doing so by the court and since it intends to develop the said premises, the next cause of action would be to demolish the said premises. It therefore follows that even if the applicant is successful on appeal, his bid to challenge the termination of tenancy will be futile and hence the appeal herein will be rendered an academic exercise. The law was never intended that courts act in vain otherwise the rule of law would be subjected to disrepute.

Judicial discretion must be exercised in the interest of justice to both parties. Such discretion is unlimited for as long as it is exercised rationally, reasonably and not capriciously or whimsically. The balancing act in such cases as this is for the court to assess on what terms it should grant a stay. Weighing the pros and cons of granting the order, and in order to accord the appellant an opportunity to ventilate his grievances on appeal and not to prematurely oust him from the judgment seat which in effect will be curtailing his constitutional right of accessing justice, and having regard to the circumstances of this case as a whole, the court is inclined to grant stay taking into account factors such as the need for expeditious disposal of the appeal, the prima facie merits of the intended appeal which it has not been demonstrated at this stage that it is a sham or frivolous and therefore not arguable, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously ( See **Global Tours and Travels Ltd** case.

Since execution in this case would give rise to eviction and demolition of the suit premises and possibly the recovery of costs, I am satisfied that eviction is an ultimate result which if effected would subject the appellant to substantial loss and the appeal if successful shall be rendered nugatory.

Consequently, I would grant the applicant herein stay of execution of the judgment of the Tribunal delivered on 23<sup>rd</sup> January 2015 pending hearing and determination of this appeal conditional upon

1. The appellant depositing in this court security of kshs 300,000/- within 30 days from the date hereof.
2. The appellant to continue to promptly and without default, paying the monthly rent as and when it falls due to the respondent.
3. The appellant to prepare file, and serve upon the respondent a record of appeal within the next 30days from the date.
4. In default of any of the conditions given herein, unless the timelines are extended by the court, the respondent shall proceed with execution of judgment on 23<sup>rd</sup> January 2015.
5. Costs of this application shall be in the appeal.

I further order that the applicant to follow up with the Rent Tribunal to ensure the record thereof as requisitioned by the Deputy Registrar's letter of 13<sup>th</sup> May 2015 is availed to this court within 60 days from the date hereof to facilitate admission of this appeal and the giving of directions for the appeal to be heard and determined expeditiously.

Mention on 2<sup>nd</sup> March, 2016 to confirm compliance.

**Dated, signed and delivered in open court at Nairobi this 17<sup>th</sup> day of December 2015.**

**R.E. ABURILI**

**JUDGE**



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