



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**CIVIL APPEAL NO 3 OF 2017**

**SARAH N. SAKWA.....APPELLANT**

**VERSES**

**1. ELIZABETH WAMWANYI T/A NAMUKHOSI LTD.....1<sup>ST</sup> RESPONDENT**

**2. NAIROBI HOMES (MSA)LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion Application dated 25<sup>th</sup> January 2017, and brought under, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, the Appellant is seeking orders:-

**1. THAT this matter be certified as urgent and be heard ex-parte in the first instance.**

**2. THAT pending hearing and determination of this Application there be a stay of execution of the orders of the Rent Restriction Tribunal issued on the 6<sup>th</sup> December 2016 in Rent Restriction Case No.6 of 2016.**

**3. THAT pending the hearing and determination of the Application dated 9<sup>th</sup> January 2017 seeking to file an appeal out of time there be a stay of orders of the Rent Restriction Tribunal issued on the 6<sup>th</sup> December 2016 in the Rent Restriction Case No.6 of 2016.**

**4. THAT pending hearing and determination of the Appeal, there be a stay of execution of the orders of the Rent Restriction Tribunal issued on 6<sup>th</sup> December 2016 in Rent Restriction Case number 6 Of 2016**

**5. Costs of this application be provided for.**

2. The Application is based on the grounds on the face of the Notice of motion and supported by the Affidavit of Sarah N. Sakwa, the Applicant sworn on 25<sup>th</sup> January 2017. It is deposed that the Applicant who is a tenant of the 1<sup>st</sup> Respondent was served with a letter to vacate from the rental premises. The Applicant filed case No.6 of 2016 in the Rent Restriction Tribunal at Mombasa to challenge the Respondents action and to restraint them from evicting her. After hearing the case the Tribunal in its judgment dated 6<sup>th</sup> December 2016 ruled that the Applicant had failed to prove her case on a balance of

probability and ordered her to deliver vacant possession within 30 days. Being dissatisfied with the said decision, the Applicant filed an application dated 9<sup>th</sup> January 2017 seeking leave to file appeal out of time which application was, by consent of the parties, allowed on 2<sup>nd</sup> February 2017. The Applicant is therefore seeking for order of stay of execution of the orders of the Tribunal pending the hearing and determination of the appeal herein.

3. The Application is opposed by the Respondent through a Replying Affidavit sworn by Solomon Mutugi on 3<sup>rd</sup> March 2017. The Respondents aver that the Application is bad in law, frivolous and an abuse of the Court Process. The Respondents further aver that it would not be in the interest of justice to grant the orders as the Respondents stand to lose other tenants who are not comfortable with the Applicants continued stay in the Suit Premises. The Respondents state that the Application has not met the pre-requisite for the granting of stay pending appeal and that the Applicant has not come to court with clean hands as she has stopped paying rent upon getting interim orders for stay.

4. The Application was prosecuted by way of Written Submissions. It was submitted by the Applicant that she would suffer substantial loss and the appeal would be rendered nugatory as she stands to be evicted from the Suit Premises unless the orders sought are granted. The Applicant has also submitted that the Application has been made without unreasonable delay. It is also the Applicant's submission that the case involves non-monetary issue hence the need for security does not arise.

5. On their part, the Respondents have submitted that the Applicant has not met the threshold set for stay of execution pending appeal. That the Applicant has not demonstrated to the Court what substantial loss she will suffer if the orders of the Tribunal are executed. It is the Respondents submissions that the Applicant does not deserve the orders sought because she stopped paying rent upon obtaining interim orders for stay. They urged the Court to dismiss the Application.

6. I have carefully considered the Application, the Affidavits on record, the submissions filed and the authorities cited as well as the relevant law. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows:

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 decisions 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-

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.

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.

9. It is clear from the provisions of order 42 Rule 6 that the Applicant must satisfy the following conditions, namely; a) that substantial loss may result to her unless the order is made, b) the Application has been made without undue delay and c) security has been given by the Applicant.

8. The relief sought is discretionary, but as it has been said often, the discretion must be exercised judicially, that is, judiciously and upon defined principles of law, not capriciously or whimsically. Therefore stay of execution should only be granted where sufficient cause has been shown by the Applicant.

9. The order appealed from was made on 6<sup>th</sup> December 2016 and the Application was filed on 25<sup>th</sup> January 2017. This is a period of about 1 ½ months. In my view, the Application was made timeously given the fact that the Applicant had been granted a grace period of 30 days within which to give vacant possession.

10. The other condition the Applicant must satisfy the Court under Order 42 Rule 6 of the Civil Procedure Rules is that of substantial loss. In the case Of **Kenya Shell Limited –Vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) iKAR 1018**, the Court of Appeal stated that:

*“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”*

In **James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2013)eKLR**, Gikonyo, J stated that:

*“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....”*

In the case of **Mukuna –vs- Abuoga (1988)KLR 645**, the Court of Appeal referring to the exercise of discretion by the High Court and the Court of Appeal in granting stay of execution under Order 42 of the Civil Procedure Rules and Rule 5(2)(b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

*“... 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”*

11. While considering the issue of substantial loss, the court ought to take into account the two competing interests of the parties, that is, Respondent’s right to enjoy the fruits of the judgment and the Applicant’s right of appeal which must be safeguarded from being rendered nugatory.

12. In the judgment appealed against, the Tribunal dismissed the Applicant’s case and granted the Applicant a period of 30 days in which to look for alternative accommodation and deliver vacant possession of the Suit Premises subject to payment of outstanding rent. In her Application, the Applicant is apprehensive that she risks being evicted by the Respondent which action will render the appeal nugatory. The question is whether the Applicant has demonstrated that substantial loss will occur unless an order for stay of execution is issued. After considering all the rival arguments herein, I am of the view that substantial loss would befall the Applicant if the execution is levied. The judgment being executed requires the Applicant to give vacant possession. If the Applicant is evicted, the appeal would be rendered nugatory. The right of appeal is a constitutional right that actualize the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory for anything that renders the appeal nugatory impinges on the very right of appeal.

13. The case in the Tribunal was not about rent. This being a non-monetary decree, the condition of security for due performance of the order does not arise. Refer to the case of **Praxades Okutoyi –v- Medical Practitioners and Dentists Board (2008)eKLR** where Visram, J (now JA) stated that:

“As this is not a monetary decree, no financial obligations are involved on either side, the issue of security does not arise...”

14. From the foregoing, the court is satisfied that the Applicant has demonstrated that she stands to suffer substantial loss. Consequently, the court exercises its discretion and grants stay of execution of judgment of the Tribunal delivered on 6<sup>th</sup> December 2016 in case No.6 of 2016 pending hearing and determination of the Applicant’s appeal.

I make no order as to costs.

**Ruling dated, signed and delivered at Mombasa this 29<sup>th</sup> day of November 2017**

**C. YANO**

**JUDGE**



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