REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC APPEAL No. 23 OF 2020

TERESIAH NJERI KAMAU.....APPELLANT

VERSUS

GEOFFREY MUKINYA MBUKU.....RESPONDENT

(Being an appeal from the judgment of the Business Premises Rent Tribunal at View Park Towers

(Hon. Mbichi Mboroki, Chairman) delivered on 25th October 2019

in Tribunal Case No. 29 of 2017 (Naivasha))

RULING

1. This ruling is in respect of Appellant's Notice of Motion dated 14th October 2020, wherein the following orders are sought:

1. [Spent]

2. [Spent]

3. That pending the hearing of the intended appeal, there be a stay of execution of orders made by the Chairman of Business Premises Tribunal in the Judgment dated 25th October 2019.

4. That costs of this application be provided for.

2. The application is supported by an affidavit sworn by the appellant. She deposed that the tribunal delivered its judgment on 25th October 2019 and gave her up to 31st December 2020 to vacate the suit premises. That she operates an entertainment business with pool tables and gaming machines within the suit premises and that she had to close the business from 20th March 2020 to September 2020 following government orders aimed at combating the COVID 19 pandemic. That notwithstanding that she did not earn any income from the business premises during the closure, she had to pay rent for the entire period. She added that she had hoped that by the time the period given by the tribunal lapses, her appeal against the judgment would have been heard and determined but the appeal was caught up by the closure of the courts due to the pandemic. That it is now apparent that the period given by the tribunal to move out of the premises might lapse before her appeal is heard, thus greatly prejudicing her.

3. The respondent opposed the application through grounds of opposition in which he contended that the applicant has not approached the court with clean hands and that the application is aimed to perpetuate her stay in the premises, that there is no appeal upon which this court can grant the orders sought since the applicant has failed to prepare the record of appeal as ordered by the

court.

4. Additionally, the respondent filed a replying affidavit in which he deposed that he filed notice to terminate the applicant's tenancy on 18th April, 2017 and that the applicant served him with notice dated 22nd May 2017 indicating that she was not ready to comply with the notice to terminate or alter terms of tenancy. The applicant followed up by filing a reference dated 28th June, 2017. The matter went through hearing culminating in the judgment delivered on 25th October, 2019 wherein the applicant was given one year and two months to prepare and vacate the premises.

5. The respondent further deposed that upon filing this appeal, directions were given by the court on 20th February, 2020, wherein the applicant was ordered to file and serve the record of appeal but she has so far neither filed nor served the record of appeal. That there is nothing on record to show that the applicant has applied for or paid to be provided with certified copies of proceedings and judgement of the tribunal. Regarding the applicant's statement as to the effects of the pandemic, he countered that those allegations are neither here nor there as he has also been affected by the pandemic.

6. The application was canvassed through oral submissions. Ms Waitere, learned counsel appearing for the applicant, argued that the appeal has not been heard up to now owing to reasons beyond the applicant's control such as the effects of the pandemic on the court process. She argued that the applicant filed record of appeal but when asked to state date of filing and to provide a court fees receipt she was unable to do so.

7. In response, Mr Gichuki, learned counsel for the respondent, argued that the court is not seized of any appeal since no record of appeal has been filed and that in the absence of a record of appeal this court has no appeal in which it can grant the orders sought. Further, that no prejudice will be occasioned to the applicant even if stay is not granted since her prayers can be argued in the appeal. He also argued that considering that the applicant was given notice to vacate on 31st March 2017, she has had over 4 years to vacate. He urged the court to dismiss the application.

8. I have considered the application, the affidavits, grounds of opposition and the submissions. This court's jurisdiction to grant stay pending appeal is guided by **Order 42 rule 6 (1)** and **(2)** of the **Civil Procedure Rules, 2010** which provides 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—

(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

(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. The upshot of these provisions are that an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to her if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

10. The respondent argued that there is no appeal before this court since no record of appeal has been filed. Pursuant to **Section 16A** of the **Environment and Land Court Act**, as read with **Order 42 rule 1** of the **Civil Procedure Rules**, any appeal from the subordinate courts, including tribunals, to this court must be filed within a period of thirty days from the date of the order appealed against, in the form of a memorandum of appeal. It follows therefore that so long as a memorandum of appeal has been filed, the absence of record of appeal is not a bar to an application for stay of execution pending appeal. That said, an applicant must still

satisfy the requirements applicable to such an application.

11. It is important to add that while applying the test under **Order 42 rule 6 (1)** and **(2)** of the **Civil Procedure Rules**, the court must bear in mind the overriding objective under **Section 3** of the **Environment and Land Court Act**, **Sections 1A** and **1B** of the **Civil Procedure Act**. Thus, an application for stay of execution pending appeal will hardly succeed if the orders sought therein run counter to the just, expeditious, proportionate and accessible resolution of the matter before the court. Odunga J. emphasised as much in **Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR** where he stated:

… To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. According to section 1A(2) of the Civil Procedure Act "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

12. The sole reason advanced by the applicant under the head of substantial loss is that if stay is not granted, the grace period given by the tribunal will lapse and she will have to vacate before determination of her appeal. She blames the Covid 19 pandemic for the delay in having her appeal heard and determined before expiry of the grace period of up to 31st December 2020, given by the tribunal.

13. There is no denying that the pandemic has caused untold suffering here within our borders and beyond, indeed to the whole of humanity. The pandemic is one common foe currently facing the global community. The pandemic itself may not be entirely taken aback if it did not get a balanced treatment from man. But in court, even the devil himself must get justice. For all its misdeeds all over the place, the pandemic is being unfairly accused by the applicant, and the record herein will readily testify in the pandemic's favour.

14. The applicant filed this appeal on 22nd November 2019. The matter was mentioned on 20th February 2020 when the applicant was ordered to file the record of appeal before 7th April 2020. The matter was later mentioned on 10th April 2020, 16th July 2020 and 21st September 2020. There was no appearance for the applicant on all those three occasions. I have perused the record herein and 10 months down the line, there is no record of appeal filed. If there is any single reason for the appeal not having been heard so far, it certainly is not the pandemic but the applicant's own failure to file record of appeal and to proactively prosecute the appeal. In those circumstances, I am not persuaded that the impending expiry of the grace period of up to 31st December 2020 and any attendant consequences of that expiry constitute any substantial loss to the applicant.

15. The other requirement is that an application for stay pending appeal should be made without unreasonable delay. The judgment appealed against was delivered on 25th October 2019 while this appeal was filed on 22nd November 2019. The applicant filed the present application on 1st December 2020, more than a year after delivery of the judgment and less than a month to the expiry grace period she was given by the tribunal. I have no doubt in my mind that delay of over one year is unreasonable delay. Further, the delay, for which the applicant is solely responsible, is contrary to the overriding objective under **Section 3** of the **Environment and Land Court Act**, **Sections 1A** and **1B** of the **Civil Procedure Act**. Overall, the applicant has failed the test requiring her to bring the application without unreasonable delay.

16. For all the foregoing reasons, I find no merit in Motion dated 14th October 2020. I dismiss it with costs to the respondent.

Dated, signed and delivered at Nakuru this 18th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Waitere for the Appellant/applicant

Mr Gichuki respondent/respondent

Court Assistants: B. Jelimo & J. Lotkomoi