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| Case Number:                 | Environment And Land Case 137 of 2017                                       |
| Date Delivered:              | 18 Dec 2018   |
| Case Class:                  | Civil   |
| Court:                       | Environment and Land Court at Nakuru  |
| Case Action:                 | Ruling  |
| Judge:                       | Dalmas Omondi Ohungo  |
| Citation:                    | Julia Wangare & another v Grace Mukuha & another [2018] eKLR                |
| Advocates:                   | Mr Karanja Mbugua holding brief for Mr Otieno for the appellants/applicants |
| Case Summary:                | -   |
| Court Division:              | Environment and Land  |
| History Magistrates:         | -   |
| County:                      | Nakuru  |
| Docket Number:               | -   |
| History Docket Number:       | -   |
| Case Outcome:                | -   |
| History County:              | -   |
| Representation By Advocates: | -   |
| Advocates For:               | -   |
| Advocates Against:           | -   |
| Sum Awarded:                 | -   |

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**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**HCA NO. 137 OF 2017**

**JULIA WANGARE.....1<sup>ST</sup> APPELLANT**

**PHARES NDUNGU CHEGE..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**GRACE MUKUHA.....1<sup>ST</sup> RESPONDENT**

**LINET WAIRIMU MUKUHA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By Notice of Motion dated 30<sup>th</sup> October 2017, the appellants sought the following orders:

*1. Spent*

*2. Spent*

*3. There be a stay of execution of the ruling in Nakuru Rent Restriction Tribunal Case Number 33 of 2017 and the consequential orders thereto pending the hearing and determination of the appeal filed in relation thereto.*

*4. The costs of this application be in the cause.*

2. The application was supported by an affidavit sworn by Phares Ndungu Chege, the 2<sup>nd</sup> appellant. He deposed that the tribunal made a ruling on 25<sup>th</sup> September 2017 in which it dismissed the 1<sup>st</sup> appellant's application and directed that rent be paid and in default, distress for rent be levied against the 1<sup>st</sup> appellant. He added that unless stay is granted, the appeal will be rendered nugatory.

3. The respondents opposed the application through a replying affidavit sworn by the 2<sup>nd</sup> respondent on 10<sup>th</sup> November 2017. She deposed that the 1<sup>st</sup> appellant owed rent of KShs 250,000 as at the date of swearing of the replying affidavit and that the 1<sup>st</sup> appellant last paid her monthly rent of KShs 25,000 on 21<sup>st</sup> January 2017. She therefore urged the court to order that the defendant pays rent as a condition for any stay.

4. The application was heard by way of written submissions. The applicants filed submissions on 15<sup>th</sup> January 2018 while the respondents filed theirs on 5<sup>th</sup> February 2018. I have considered the application, the affidavits and submissions.

5. The principles to be considered while dealing with an application for stay of execution pending appeal emerge from **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides:

*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.*

6. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

*It is usually a good rule to see if order XLI 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.*

7. A litigant seeking stay pending appeal must therefore satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. Needless to state, an appeal ought to have been filed.

8. In this case, following the decision of the tribunal on 25<sup>th</sup> September 2017, the appellants filed Memorandum of Appeal on 17<sup>th</sup> October 2017 in the High Court. The matter was later transferred to this court but was not reassigned an ELC Appeal number. The appellants also filed the present application on 30<sup>th</sup> October 2017. I therefore find that the application was filed without unreasonable delay.

9. What about the question of substantial loss" A perusal of the order of the tribunal made on 25<sup>th</sup> September 2017 shows that the 1<sup>st</sup> appellant was ordered to pay rent for February 2017 to September 2017 within 30 days and to pay rent from October 2017 on or before the 10<sup>th</sup> of each month in advance. In default, the respondents were free to levy distress. It is therefore manifest that distress for rent would only follow if the appellants failed to pay rent as ordered. Whereas the right of appeal should always be safeguarded, I do not see how the appellants will suffer substantial loss if stay is not granted. The 2<sup>nd</sup> appellant has described himself in his supplementary affidavit sworn on 8<sup>th</sup> December 2017 as a man of means who cannot fail to pay the respondents any amount of money if ordered to do so. The appellants should just pay the rent as well as the arrears as they await the determination of the appeal.

10. Having failed to surmount the test of substantial loss, Notice of Motion dated 30<sup>th</sup> October 2017 cannot succeed. It is dismissed with costs to the respondents.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of December 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Karanja Mbugua holding brief for Mr Otieno for the appellants/applicants

No appearance for the respondents/respondents

Court Assistants: Gichaba & Lotkomoi



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