



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 65 OF 2013**

**FEISAL AMIN JANMOHAMMED T/A DUNYIA  
FORWARDERS.....APPELLANT/APPLICANT**

**-V E R S U S-**

**SHAMI TRADING CO. LTD..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellant/Applicant has made a Notice of Motion Application dated 10th June 2013 (“**the Application**”) under Order 42 Rule 6(1) & (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking 5 prayers. Two of those prayers are spent leaving out three prayers for the following orders:
  - i. **That there be a stay of execution of the ruling delivered by the Business Premises Rent Tribunal in BPRT Case No. 124 of 2012 on 31st May 2013, until the appeal is heard and determined.**
  - ii. **That there be a stay of execution of the judgment delivered by the Business Premises Rent Tribunal in BPRT Case No. 124 of 2012 on 25th April 2013, until the appeal is heard and determined.**
  - iii. **The costs of this application be provided for.**
2. The brief history of this case is that, following a notice to increase rent issued by the Respondent, the Appellant/Applicant filed a reference in the Business Premises Rent Tribunal (BPRT), being BPRT Case No. 124 of 2012, challenging the same. On 5th December 2012 when the reference came up for hearing before the BPRT, the Respondent had filed its valuation report but the Appellant/Applicant was yet to file his. The Appellant/Applicant, through his advocate, sought more time to enable him file his valuation report. The matter was adjourned to 22nd April 2013 and the Appellant/Applicant was directed to file his valuation report before the said date.
3. On 22nd April 2013, neither the Appellant/Applicant nor his advocate attended the BPRT for the scheduled hearing. The Appellant's/Applicant's valuation report had also not been filed. The Chairperson of the BPRT proceeded and reserved the matter for judgment on 25th April 2013.

4. On 25th April 2013, the Chairperson delivered a judgment in which she increased the monthly rent from Kshs. 45,000/= to Kshs. 109,000/= with effect from 1st January 2013 (“**the judgment**”), without the Appellant/Applicant's valuation report.
5. Subsequent to the judgment, the Appellant/Applicant instructed the firm of Mogaka Omwenga & Mabeya Advocates to file an application seeking to rescind the judgment delivered by the BPRT on 25th April 2013. That Application was heard by the BPRT on 17th May 2013 and a ruling delivered on 31st May 2013 (“**the Ruling**”) dismissing the same with costs. Aggrieved by the ruling, the Appellant moved to the High Court and filed this appeal against the same.

### **The Appellant's/Applicant's Case**

6. The Appellant/Applicant is seeking stay of both the ruling and the judgment. The Appellant's/Applicant's case is that unless the stay orders are granted, the pending appeal will be rendered nugatory. That if stay is not granted, the Appellant/Applicant will suffer substantial loss because he risks massive increase in rent which he cannot sustain. That he risks collapse of his business and a loss of livelihood.
7. The Appellant/Applicant submitted that this Application was filed without delay and that he is ready and willing to deposit any reasonable security that the court may deem fit.
8. The Appellant/Applicant further submitted that the Respondent is a company and may undergo winding up at any time and therefore there is fear that it will not be able to compensate the Appellant or pay damages should the appeal succeed.

### **The Respondent's Case**

9. The Respondent opposed the Application. The Respondent submitted that the appeal is only against the BPRT order of 31st May 2013 and not the judgment of 25th April 2013. As such, this court cannot order stay of the judgment, which has not been appealed against. According to the Respondent, the ruling of 31st May 2013 only dismissed the Appellant's/Applicant's application to rescind the judgment and therefore there is nothing to stay.
10. The Respondent submitted that it is apprehensive that should the appeal fail, the Appellant will not be able to pay the accumulated rent arrears which as of November 2013 stood at Kshs. 704,000/=. The Respondent stated that the fear emanated from the Appellant/Applicant's own admission in his affidavit and submissions that he may not cope with the increased rent. The Respondent's case is that it is entitled to the market rent which the BPRT already assessed.
11. The Respondent denied that the Appellant/Applicant was likely to suffer business collapse and loss of livelihood as he did not annex any evidence to prove the same.

### **ISSUES FOR DETERMINATION**

12. The parties submitted on other issues including; whether the appeal is proper having been filed by an advocate who is not properly on record, whether mistake of counsel (failure to diarise the hearing date before the BPRT) should be visited upon the client and whether the Appellant's failure to file valuation report should have led to the setting aside of the judgment. In my view, these are not issues for determination at this stage. The same should be reserved for the main appeal. The issue for the court's determination is whether the Appellant/Applicant has established a case to enable this court grant him the stay orders sought.

### **ANALYSIS/ DETERMINATION**

13. The application is for two separate stay orders; stay of execution of the judgment delivered on 25th April 2013 and stay of execution of the Ruling delivered on 31st May 2013.

## **Stay of Execution of the Ruling**

14. The ruling declined to allow the Appellant's application seeking to rescind or set aside the judgment. The ruling, in my view, has nothing positive to be executed or acted upon, save to the extent of costs. The ruling did not order any party to do or refrain from doing anything capable of being stopped. It is trite law that negative orders are incapable of execution hence cannot be stayed. In the case of **Kanwal Sarjit Singh Dhiman –Vs- Keshavji Jivraj Shah [2008] eKLR**, the Court of Appeal, while dealing with stay of a negative order, held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.”**  
(emphasis mine)

15. Save for the issue of costs, execution of the ruling cannot be stayed because there is nothing to execute. The evidence and submissions of the Appellant show that what he is after is stay of payment of the increased rent. This, he can achieve if stay of the judgment is ordered. The only stay order that this court should deal with, therefore, is of execution of the judgment.

## **Stay of Execution of the Judgment**

16. The Application is founded on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of 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.”**

17. In the case of **Peter Ondande t/a Spreawett Chemis –Vs- Josephine Wangari Karanja [2006] eKLR**, L. Kimaru, J. stated as follows:

**“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the**

**application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.” (emphasis mine)**

18. It is trite law, therefore, that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security.
19. I will start by considering the last two conditions of unreasonable delay and security. The judgment was delivered on 25th April 2013 and the ruling on 31st May 2013. The Application was filed on 10th June 2013, about 10 days after the ruling. The Application was therefore filed promptly and there was no unreasonable delay by the Appellant/Applicant in filing the same.
20. Although the Appellant/Applicant has not adduced any evidence, he has stated on oath that he is ready and willing to furnish reasonable security should this court so order. That fact does not seem to have been disputed by the Respondent and the court has no reason to doubt the Applicant. However, the requirement as to security is the third condition that the Applicant only needs to comply with after he has met the conditions as to unreasonable delay and substantial loss. This now leads me to the third condition which is whether the Appellant/Applicant has satisfied the court that he will suffer substantial loss should the prayer for stay be declined.

### **Substantial Loss**

21. This appeal is against the refusal by the BPRT to set aside its judgment of 25th April 2013. The Appellant's prayer in the Memorandum of Appeal dated 6th June 2013 is that the judgment be set aside and the Respondents (I believe this should be the Appellant) be allowed to file in the tribunal his valuation report for re-evaluation of the rent. Therefore, should the appeal succeed, the parties would go back to the BPRT for re-evaluation of rent. However, should the appeal fail, the Appellant would be bound to pay the increased rent.
22. Learned Counsel for the Appellant relied on the Court of Appeal case, **Civil Application No. Nai 15 of 2002 ABN AMRO BANK, N. V –V- LE MONDE FOODS LIMITED** and argued that the Respondent was unlikely to refund the payment of the increased rent if the appeal was successful. The Court of Appeal in that case had this to say-

**“We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”**

23. The Court proceeded in that judgment to state that it was only the Respondent who could counter the

submission that it would be unable to refund the judgment amount if the appeal was successful. In this case Appellant deponed in his affidavit that the Respondent Company was unlikely to refund the increased rent because it may undergo Winding Up. This deposition was not responded to by the Respondent. Instead the Respondent left it to its Learned Counsel to state at bar that the Appellant similarly should show it is likely to pay the backdated increased rent if the appeal did not succeed. That statement could not be responded to by Appellant having been made from the bar when parties were agitating the application for stay. I do therefore find that the Appellant has shown on a balance of probability that he would suffer substantial loss if stay was not granted.

24. Appellant as stated before offered security as a condition of stay. I am of the view that it would be reasonable to require Appellant to file in this Court a bank guarantee to pay Kshs. 1 million to the Respondent if this appeal failed.

25. The Court therefore makes the following orders-

- a. **There shall be a stay of execution of the judgment of Business Premises Rent Tribunal in Case No. 124 of 2012 delivered on 25<sup>th</sup> April 2013 on condition that Appellant files into this Court a bank guarantee of Kshs. 1 million in this Court within thirty (30) days.**
- b. **The Costs of the Notice of Motion dated 10<sup>th</sup> June 2013 shall abide with the outcome of this appeal.**

**DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of MARCH, 2014.**

**MARY KASANGO**

**JUDGE**