REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 339 OF 2012

LILIAN WANJIKU MACHARIA. ..... PLAINTIFF

VERSUS

CHARITY MUKAMI NJAGI. ..... DEFENDANT

R U L I N G

This application dated 18th June, 2013 and filed by the Appellant seeks a stay of execution order until the matter is heard and determined.

The brief facts show that the Plaintiff leased the premises, to the Defendant with a clause in the Tenancy Agreement that the Defendant was at liberty to construct additional permanent structures on the adjacent vacant space to the extent the Defendant's business would require. The business run on the premises is a bar and lodging premises. It would appear that the Defendant developed a first phase in accordance with the Tenancy Agreement and without interference.

It was when the Tenant sought to construct a second phase that the Landlord/Plaintiff/objected. There is evidence that the Tenant notwithstanding the Landlords objection, started construction of a further extension which presently is half-done. There appears to be no agreement as to what extent and what new space, the Tenant was allowed to develop new constructions. As a result, the Landlord was averring that the Tenant was constructing new buildings to areas he was not authorized to cover, while the tenant took the opposite position.

There is also the deponement by the Landlord that the Tenant/Respondent filed an application at the lower court seeking a mandatory injunction compelling the Landlord/Appellant to allow the Tenant to continue constructing additional development which was refused by the lower court but that a similar application filed later before a different magistrate, was granted, leading the Appellant to file this appeal. The Applicant finally also argued that the current construction by the defendant is a construction not authorized by the County Building Authorities.

The Appellant/Applicant has deponed that her appeal has raised substantial issues which have a high chance of success. That if an injunction order sought is not granted, the Respondent/Tenant will proceed to construct additional premises not authorized by the County Government and not approved by the Appellant who is the owner of the land. That this will lead to a substantial loss and will render a successful appeal, nugatory.

I have carefully considered the application for stay after perusing the documents on the record including the Lease Agreement, the interpretation of which led to the differences that led to the suit. I am of the view that on the face of things as they look in the file, there is a likelihood that if the stay is not granted the construction of new permanent structures will indeed defeat the result of the appeal if

successful and will cause substantial loss as they cannot be reversible except by demolition.

It is also noticeable that the terms of the Lease Agreement may not be so compact, clear and ascertainable. However, any development costs so far can be easily valued and can t

herefore, be refundable in case the tenancy ceases to function.

In the above circumstances the court is persuaded that a stay of execution of the lower court order would be issuable on the following conditions.

ORDERS

1. **Stay is granted until appeal is determined.**

2. **Appeal shall be prosecuted within the next 7 months in default of which, the stay shall stand automatically discharged.**
3. **Any rents payable in the meantime with effect from 1st February, 2014, shall be deposited in court until the appeal shall be determined.**

Dated and delivered at Nairobi this 2nd day of April 2014.

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D A ONYANCHA

JUDGE