



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL APPEAL NO. E018 OF 2022**

**SATYA ANAND**

**T/S SATYA HOTEL LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**DR AJIT KUMAR BARUAH**

**(THE EXECUTOR OF THE ESTATE OF THE**

**LATE MALTI DVI BACHAN SINGH, DECEASED).....RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated 16<sup>th</sup> March 2022, the Appellant/Applicant has sought for the following Orders;

*a. ....(Spent).*

*b. There be a Stay of Execution of the Ruling delivered by the Business Premises Rent Tribunal in BPRT CAUSE NO 945 OF 2016 delivered on the 15<sup>th</sup> February 2022, and all consequential orders thereto pending the hearing and determination of this Application.*

*c. There be a Stay of Execution of the Ruling delivered by the Business Premises Rent Tribunal in BPRT CAUSE NO 945 OF 2016 delivered on the 15<sup>th</sup> February 2022, and all consequential orders thereto pending the hearing and determination of the Appeal.*

*d. Costs of the Application be provided for.*

2. The subject Application is based and/or premised on the grounds contained in body thereof and same is further supported by the affidavit sworn by one, Dipka Anand sworn on the 16<sup>th</sup> March 2022 and in respect of which same has annexed three annexures in support thereof.

3. Upon being served with the subject Application the Respondent proceeded to and filed a Replying Affidavit, wherein same has challenged and/or otherwise opposed the Application. For clarity, the Respondent has contended that the Applicant herein is not disposed to suffer any Substantial loss, either as alleged or at all.

**DEPOSITIONS BY THE PARTIES:**

**DEPOSITION BY APPELLANT/APPLICANT:**

4. Vide Supporting Affidavit sworn by one, Dipka Anand, sworn on the 16<sup>th</sup> March 2022, the deponent has averred as hereunder;

5. That same is a Director of the Appellant/Applicant and in this regard, same is duly apprised of the matters touching on and/or concerning the subject dispute between the company and the Respondent.

6. Besides, the deponent has also averred that same is authorized by the Company to swear the subject affidavit in support of the Application.

7. On the other hand, the deponent has averred that the Appellant/Applicant herein had lodged a Reference before the Business Premises Rent Tribunal, whereby same challenged a Notice by the Respondent, in respect of which the Respondent had sought to vary and/or increase the Rent from the sum of Kshs.6, 000/= Only, per Month to Kshs.50, 000/= Only, per Month.

8. Further, it is averred that the Reference before the Business Rent Tribunal was heard and thereafter a Ruling in respect thereof was rendered and/or delivered on the 15<sup>th</sup> February 2022, whereby the Vice chairperson of the Tribunal assessed and certified the New Rents in the sum of Kshs. 71, 860/= Only, payable with effect from the 1<sup>st</sup> January 2022.

9. Other than the foregoing, the deponent has averred that the Vice chairperson also ordered and/or directed that the new rent was to escalate at the rate of 5% after every two years and that the Appellant/Applicant was obliged to commence the payment of the said rents.

10. Be that as it may, the deponent has averred that upon the delivery of the Ruling, the Appellant/Applicant felt aggrieved and/or dissatisfied and therefore same proceeded to and filed the subject Appeal, challenging the entire of the Ruling and decision of the Vice chairperson of the Tribunal.

11. Other than the foregoing, the deponent has averred that on the 9<sup>th</sup> March 2022, same received a Letter from the Respondent's Advocates, whereby the Respondent was demanding payment of the new Rents, as well as the costs which had been awarded at the foot of the Reference.

12. It has been averred that the new rents were erroneously assessed and/or arrived at and that the payment of the new rents, shall occasion and/or inflict Substantial loss upon the Appellant/Applicant, in various ways, including culminating into closure of the suit premises, given that the Appellant/Applicant may not be able to pay and/or liquidate the monthly rents, based on the meagre returns.

13. Besides, the deponent has also averred that the Respondent herein is only the executor of the Estate of the landlord and in any event, same is resident outside the country. In this regard, it has been contended that there is a likelihood that the Respondent may not be able to refund the excess monies, paid on account of rents, should the appeal herein succeed.

14. Finally, the deponent has also averred that the Appellant/Applicant is ready and willing to offer security for the due performance of the decree that may arise and/or that may ultimately ensue upon the determination of the Appeal.

15. Premised on the foregoing, the deponent has proposed that same is willing to provide and/or deposit with the Deputy Registrar a logbook in respect of a motor vehicle or better still, deposit into court 50% of the new assessed rents, pending the hearing and determination of the Appeal.

#### **RESPONSE BY THE RESPONDENT:**

16. Upon being served with the Application, the Respondent herein filed Grounds of opposition dated the 1<sup>st</sup> April 2022 and in respect of which the Respondent made the following averments;

17. Firstly, the circumstances of the instant suit do not fall within the limits of Order 40 (*maybe 42*) Rule 1 of the Civil Procedure Rules and therefore the issue of interim orders of stay of the execution of the ruling delivered by the Business Premises Rent Tribunal in BPRT CASE NO. 945 of 2016, on the 15<sup>th</sup> February 2022 is not warranted.

18. The Appellant/Applicant has not demonstrated its satisfaction of the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules 2010, which conditions are the pre-requisite to being granted an Order of Stay pending hearing and determination of the Appeal.

19. It is a principle of Natural Justice that a successful Party is entitled to the Fruits of his Judgment or any decision of the court giving him success at any stage and therefore it is right and just in the instant circumstances for the Respondents to be allowed to enjoy the fruits of the ruling of the Business Premises Rent Tribunal that resulted from a prolonged litigation spanning a period of over five years.

20. The Application is misconceived and mischievous as the Applicant has admitted her incapability of satisfying the ruling and therefore if the order of stay of execution is granted, same will serve to occasion a prejudice on the Respondent as he will not be able to readily recover the unpaid Rents in the event that the appeal is dismissed.

#### **SUBMISSIONS:**

21. The subject Application came up for hearing on the 4<sup>th</sup> April 2022, when it was ordered and or directed that the Application under reference, namely, the Application dated the 16<sup>th</sup> March 2022, be canvassed by way of oral submissions.

22. Pursuant to the foregoing directions, the Parties herein proceeded to and ventilated the subject Application, with either side, seeking to persuade the court to grant or refuse the orders of stay of execution pending the hearing and determination of the Appeal.

23. On her part, the Appellant/Applicant submitted that same has been a tenant in the suit premises since the year 1992, when same took over the management of the suit premises from his Parents and that upon taking over the management from his Parents, same has been paying the sum of Kes.6, 000/= only to the Respondent.

24. It was further submitted by the Applicant that on or about 2016, same was issued and/or served with a Notice to increase rents over and

in respect of the suit premises by the Respondent/Landlord, whereby the respondent, sought to vary the rent from Kes.6, 000/= Only, to Kshs.50, 000/= only per Month.

25. Be that as it may, the Appellant/Applicant submitted that upon receipt of the Notice to vary and/or alter the Monthly Rents, same proceeded to and filed a Reference before the tribunal, which Reference was ultimately heard and disposed of vide Ruling delivered on the 15<sup>th</sup> February 2022.

26. Further, the Appellant/Applicant has submitted that vide the Ruling under reference, the Tribunal has proceeded to and reviewed the monthly rents upwards from the sum of Kshs.6, 000/= Only, to the sum of Kes.50, 000/= only, per Month and as a result of the said variation, or alteration, same has been aggrieved.

27. It is further submitted that as a result of the foregoing ruling, the Appellant/Applicant is now required to raise and pay the new rate of Monthly rents, which is said to be excessive and in this regard, it was contended that the Appellant/Applicant shall be exposed to suffer Substantial loss.

28. On the other hand, the Appellant/Applicant also submitted that the Respondent herein is resident outside the Republic of Kenya and hence same may not be able to refund and/or pay back any excess monies ( *read Rents*), paid to and in favor of the Respondent, based on the Ruling and/or decision of the tribunal.

29. Finally, the Appellant/Applicant has also submitted that same is ready and willing to avail and deposit security, on such terms and conditions that the court may order. For clarity, the Appellant/Applicant proposed to deposit Logbook of a designated motor vehicle or even to pay half of the assessed Rents in court.

30. On his part, the Respondent herein relied on the Grounds of opposition dated the 1<sup>st</sup> April 2022, and submitted that Appellant/Applicant herein has not met and/or satisfied the conditions for the grant of the orders of Stay of execution pending Appeal.

31. Secondly, the Respondent has further submitted that what is before the court is a Monetary Decree, in the nature of Rents, which are due and payable to the Respondent, by virtue of being the landlord of the premises, and hence any variation arising from the appeal would be easily recovered by way of refund or adjustment on account of Rents.

32. On the other hand, the Respondent has also submitted that the Respondent herein is the one entitled to reversionary interest over and in respect of the suit property and therefore same is property and has means, upon which any payments made on account of rents, subject to the appeal, can be realized or recovered.

33. Thirdly, the Respondent also submitted that the Appellant/Applicant has shown that same is a person of no means, by deposing her inability to meet the current rents and hence it is apparent that if the orders of stay are granted the Appellant/Applicant may not be able to pay the accumulated rents, should the Appeal be ultimately dismissed.

34. In terms of security, the Respondent herein has submitted that in the event the court has inclined to grant an order of stay of execution pending the hearing and determination of the appeal, either in the manner sought or at all, then the court should consider to compel the Appellant/Applicant to deposit Monetary security and not Logbook as proposed by the Appellant/Applicant.

#### **ISSUES FOR DETERMINATION:**

35. Having reviewed the Notice of Motion Application dated the 16<sup>th</sup> March 2022, the Supporting Affidavit thereto, the Grounds of opposition, as well as the Oral submissions made by the Parties, the following issues do arise and are germane for determination:

*a. Whether Sufficient Cause and/or basis has been established by the Appellant/Applicant.*

*b. Whether the Appellant/Applicant is disposed to suffer any Substantial Loss if the orders sought are not granted or otherwise.*

*c. What kind of Security ought to issue in the event that the court is persuaded to grant Stay of Execution pending Appeal.*

#### **ANALYSIS AND DETERMINATION**

##### **ISSUE NUMBER 1**

***Whether Sufficient Cause and/or basis has been established by the Appellant/Applicant.***

36. From the ruling rendered by the Business Premises rent tribunal, which is the basis of the Appeal before this court, it is apparent that the Applicant tenant was known as Satya Anand t/a Satya Hotel Ltd.

37. On the other hand, the same person, who filed and/or lodged the Reference before the Business Premises Rent Tribunal, is the one that has moved this court and filed the Appeal as well as the subject application. However, the difficulty that I find myself in is ascertaining whether the Appellant/Applicant herein is one person or same two separate legal entities.

38. Consequently, the other legal quagmire is whether an ordinary human being, which is a natural person can trade as a Company, knowing

too well that a Limited liability Company is a separate and distinct legal person incorporated under an Act of Parliament and therefore separate and distinct from her promoters, shareholders, members and/or Directors.

39. Perhaps, before venturing to address the issue further, it is important to take cognizance of the Decision in the case of **Moir V. Wallersteiner**[1975] 1 ALL ER 849atp. 857, as follows:

***“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which it alone is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle[1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.***

40. Based on the foregoing, the question is who between Satya Anand and the company is the tenant and who then is the complainant, who has been wronged vide the impugned ruling, to warrant approaching this court. Is it, Satya Anand or is it the company. Certainly, it must be one or the other, but not both.

41. Suffice it to say, that if it is the company that has been wronged vide the impugned ruling, then only the company, suing in own name and not otherwise, can commence and/or originate the appeal. However, that is not the case in respect of the subject matter.

42. From the foregoing, it is apparent that a shareholder and a director is separate and distinct from the company and in this case Satya Anand, who contends to be a director of the company, cannot by himself file and/or commence the subject Appeal, allegedly for and on behalf of the company.

43. Secondly, assuming that the subject appeal has been filed and/or commenced by the company, (*unfortunately which is not the case*) the deponent to the supporting affidavit, would require a resolution and/or authorization of the company, to enable same to depose to and/or execute the affidavit on behalf of the company. However, no such authorization, has been exhibited and/or attached to the supporting affidavit or otherwise supplied to the court.

44. In respect of the requirement and/or necessity to avail and/or supply the authorization to sanction the filing of an affidavit and/or a performance of an act, it is important that an authorization be availed, but however none has been supplied and/or displayed.

45. Be that as it may, the point that I am making is that even though a Memorandum of Appeal has been filed or lodged before the court, it is difficult to understand who has lodged the Memorandum of Appeal or better still, if the Memorandum of Appeal is competent.

46. In view of the foregoing, I am unable to find and hold that the Appellant herein has established and/or exhibited a Sufficient cause and/or basis, to premise the Application for Stay of execution pending the hearing and determination of the Appeal.

## **ISSUE NUMBER 2**

### **Whether the Appellant/Applicant is disposed to suffer any substantial loss if the orders sought are not granted or otherwise.**

47. The Appellant/Applicant herein has contended that same is disposed to suffer Substantial loss, if the new rents assessed in the sum of kes.71, 860/= only vide ruling rendered on the 15<sup>th</sup> February 2022, is not stayed and/or otherwise suspended.

48. For the avoidance of doubt, the Appellant contends that the Substantial loss is likely to accrue and/or arise from three aspects, namely, that the Respondent may not be able to refund the excess portion and/or percentage of the rents that shall have been paid unto him, during the pendency of the appeal, by the time the appeal ultimately succeeds.

49. Secondly, the other aspect that has been impleaded by the Appellant to anchor the claim of Substantial loss is that the Respondent herein is resident outside the country and thus same has no known means, out of which the recovery of any excess rents can be made. Consequently, it was contended by the Appellant that the fact that the Respondent is resident outside the Jurisdiction of the court should be considered and taken into account.

50. Thirdly, the Appellant submitted that since 1992 when same took over the management of the café from his parents, the Appellant/Applicant has employed and maintained employment of four employees, who are likely to loose employment if the orders of stay sought are not granted.

51. Based on the foregoing, the Appellant therefore sought that the court be pleased to grant the orders of stay of execution pending the hearing and determination of the Appeal.

52. On his part, the Respondent submitted and correctly so, that the decree before the court is a monetary decree touching on and/or concerning payments of rents to which the respondent is entitled to by virtue of being the reversionary interest holder or the executor of the Estate of the deceased.

53. By virtue of being a Monetary decree, the Respondent herein submitted that same shall be in a position to refund whatever portion and/or percentage of the rents that the court may decree to be due and refundable, subject to any adjustment arising from the ultimate decree.

54. On the other hand, it was also submitted that whatever adjustment on the rents, that may arise as a result of the decree from this appeal,

same can be spread over and/or otherwise be treated as advanced rents in favor of the Appellant.

55. In the premises, it was the Respondent's submissions that the Appellant has not established and/or proven any perspective of substantial Loss, that may arise and/or ensue, in the event that the orders of stay are not granted.

56. I must point out that substantial loss in its various perspective and/or nuances, is the cornerstone to granting an order of stay of execution pending the hearing and determination of an appeal and without proof of substantial loss, an order of stay of execution, cannot issue or be granted.

57. On the other hand, a claimant and/or applicant seeking to attract and/or accrue an order of stay of execution must plead and/or depose to evidence of substantial loss in the supporting affidavit, with necessary clarity and specificity and must not leave such evidence to speculation.

58. In respect of the subject matter, I must state that the Appellant/Applicant herein has not availed or deposed with clarity, the evidence of substantial loss that same is disposed to suffer.

59. However, what I hear the Appellant to be saying, which is loud and screaming is that unless the orders of stay of execution are granted, same may not be able to pay the rents as well as the salaries of the 4 employees and in this regard, the 4 employees may be rendered jobless.

60. I am afraid that impecuniosity on the part of an Applicant, by itself, cannot constitute and/or form a basis to grant an order of stay of execution. For clarity, assuming that an order of stay is granted on the basis of impecuniosity or inability to pay for now, what then shall happen to the assessed rents, if, the appeal ultimately fails.

61. Suffice it to say, that the Appellant herein has neither established nor exhibited evidence of substantial loss and in this regard, I find and hold that an order of stay of execution pending the hearing and determination pending appeal cannot issue in favor of the Appellant/Applicant.

62. To underscore the importance of substantial loss, it is important to revisit and restate the holding in the case of **Kenya Shell Limited v Benjamin Karuga Kibiru and another [1986] eKLR**, where the Court of Appeal stated as hereunder;

*'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.'*

### **ISSUE NUMBER 3**

#### **What kind of Security ought to issue in the event that the court is persuaded to grant Stay of Execution pending Appeal.**

63. Pursuant to the provision of Order 42 Rule 6 (2) of The Civil Procedure Rules 2010, the first appellate court dealing with an application for stay of execution pending appeal, is obliged to consider various conditions, namely the existence of sufficient cause, occurrence of substantial loss and provision of reasonable security by the Appellant/Applicant, the latter, in the event the court is minded to grant the order of stay.

64. While considering the nature, kind and security to grant, the court is called upon to calibrate on several issues and/or circumstances, but nevertheless, it must be noted that in deciding what kind of security to decree and/or direct, the court is no doubt, exercising a discretion.

65. Be that as it may, it must be noted that in calibrating the kind of security to decree, the security must be one that is capable of being realized and/or capable of satisfying the decree that may ultimately arise and/or ensue upon the determination of the appeal.

66. In support of the foregoing observation, I take cognizance of the holding in the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**, where the court held as hereunder;

*"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."*

67. Based on the foregoing, I would have been minded to order and/or direct payment of half of the assessed rents to and in favor of the Respondent and thereafter deposit of the remainder in an Escrow account in the Name of the Advocates of the respective Parties, that is, had I found and held that the Appellant/Applicant was entitled to the orders of stay of execution.

68. Nonetheless, while dealing with issues number 1 and 2 hereinbefore, I came to the conclusion that the Appellant/Applicant has not satisfied me on the said pre-requisite conditions.

69. In the premises, I am disinclined to grant the orders of stay.

### **FINAL DISPOSITION:**

70. In conclusion, I find and hold that the Application dated the 16<sup>th</sup> March 2022, is not meritorious.

71. Consequently and in the premises, same be and is hereby Dismissed with costs to the Respondent.

72. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>th</sup> DAY OF APRIL 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula Court Assistant**

**N/A for the Appellant/ Applicant.**

**Mr. Kinuthia for the Respondent.**