



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 55 OF 2013

COAST ACCIDENT & GENERAL

INVESTIGATION LTD APPLICANT

V E R S U S

1. NAZERALI HASSANALI

2. MULLA MANSURALI

**3. KARIMBAHI HASSANALI as Administrators of
HASSANALI KARIMJEE DOSSAJEE**

**4. ZAINABHAI H. Y. KADABHAI administrators
YUSUFALI TAYABALI CHAKERA**

**5. ISMAIL AHMEDALI CHAKERA administrator of
AHMEDALI TAYEBALI CHAKERA**

**6. AMIRUDDIN AKBERALI CHAKERA & SUGRABHAI KARIMJEE ESSAJEE
administrators of AKBERALI TAIYEBALI CHAKERA**

**7. BATUL AMIRUDDIN CHAKERA & AMIRUDDIN A. CHAKERA
Administrator of KARIMJEE ABBASBHAI CHAKERA**

**8. HATIM CHAKERA administrator of
ABDULRAHIM BADRUDDIN CHAKERA RESPONDENTS**

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 56 OF 2013

AJESHKUMAR AGRAVAT &

HASMIYA AGRAVAT T/A AGRAVAT & CO. APPELLANT

V E R S U S

1. NAZERALI HASSANALI

2. MULLA MANSURALI

3. KARIMBAHI HASSANALI as Administrators of

HASSANALI KARIMJEE DOSSAJEE

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7. BATUL AMIRUDDIN CHAKERA & AMIRUDDIN A. CHAKERA

administrator of KARIMJEE ABBASBHAI CHAKERA

8. HATIM CHAKERA administrator of

ABDULRAHIM BADRUDDIN CHAKERA RESPONDENTS

RULING

1. The above two files relate to the same landlords and the premises are the same as well as the issues that are raised. The only difference is that the tenants who are the Appellants are different. The learned Counsel for the parties presented oral submissions in **HCCA No. 55 of 2013** and requested that those submissions be considered in respect of both files. It is because of that that I will deliver one Ruling in respect of both files.
2. In both files the appeals has been filed by the Tenants of premises **Mombasa/Block 177/III/XXX**. The Respondents are the landlords of those premises.
3. It is not denied that the landlord issued the tenants three separate notices intending to alter the rent. Those notices were issued as provided under Section 4(2) and (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301.
4. The first of such notice was dated 9th July 2012. The landlord by its letter dated 12th July 2012 withdrew that notice. The second notice was dated 27th September 2012. It too was withdrawn by a letter dated 1st October 2012. The third notice was dated 1st October 2012. The later was

not withdrawn by the landlord and it is the subject of this appeal.

5. The Appellants filed an application before the Business Rent Tribunal (BRT) which was dated 15th March 2013. They sought by that application that they be granted leave to file their reference as per Section 6 of Cap 301 out of time. By the Tribunal's Ruling dated 26th April 2013, the Chairperson dismissed the tenant's application. That dismissal is the subject of these two appeals.
6. The Tenants have by their Notice of Motion dated 14th May 2013 sought the stay of execution of that Ruling and stay of the landlords notice dated 1st October 2012.
7. The Tenants argue that unless stay is granted the landlord will increase the rent by 466.6% and 275.30% respectively as per the notice. They submitted that such an increase would lead to substantial loss as envisaged in Order 42 rule 6(2) of the Civil Procedure Rules 2010. That such an increase of rent the Tenants businesses would not be able to sustain it and would lead to loss on their part. In this regard they relied on the case **Butt -Vs- The Rent Restriction Tribunal Civil Appeal Nai 6 Of 1979** where it was held-

“The Court will grant a stay where special circumstances of the case so require, per Lopes, L.J., in the Attorney-General –Vs- Emerson and Others 24 Q.B.D. (1889) 56 at page 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties, and the appellant has an undoubted right of appeal. Proceeding on this narrow basis, that is to prevent the appeal, if successful, from being nugatory, I would grant the stay asked for pending determination of the appeal by this Court against the decision dated the 9th January, 1979.”

8. In regard to its substantial loss the Tenants submitted that they feared that since they did not know the financial standing of the landlord they would suffer if the appeal was successful. The learned Counsel for the Appellants drew the Court's attention to the fact that the landlords were all administrators of Estates of deceased persons who held shares in the premises. They were therefore fearful that the landlords would be unable to refund the increased rent incase the appeal was successful. When a party raises such a concern it has been stated that the burden to prove otherwise shifts to the other party. This was stated in the Court of Appeal case **ABN Amrobank, N.V. -Vs- Le Monde Foods Ltd Civil Application No. Nai 15 OF 2002** where it stated-

“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.”

9. The Tenants also submitted that they are willing to deposit any reasonable security if the Court so orders as required under Order 42 rule 6(2)(b).
10. The application was opposed by the landlords. The landlords stated

that following the notice dated 1st October 2012 the tenants were informed by correspondence that the new rent had taken effect. The date of that correspondence was 20th February 2013. The

landlords therefore argued that they were entitled in law to give a distress for rent to the tenants. They argued that the tenants were abusing the Court process by obtaining stay orders and had failed to show by documentary proof that they would suffer substantial loss. That since the notice dated 1st October 2012 had taken effect as provided under Section 6 of Cap 301 the law did not permit this court to grant the orders of stay.

11. I have considered the application, the affidavits and the submissions of

the parties. It is clear to me that what is before me is an application for stay pending appeal. The guiding provisions for such an application are to be found in Order 42 rule 6(2). That rule provides as follows-

“No order for stay of execution shall be made under subrule (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.”

12. The Tenants have submitted that they will suffer substantial loss if stay

is not granted because the increase in rent would spell doom to their businesses. On the other hand they have submitted that the landlords may not be in a position to refund the increased rent if these present appeals did succeed. Both parties' submissions are that it is the other party who is required by law to prove either that they would suffer substantial loss or that they were in a position to refund the rent if the appeals were successful.

13. The Tenants have been paying rent of Kshs. 4,500/- and Kshs.

6,050/- respectively. They deponed that an increase of Kshs. 466.6% and 330.26% would cripple their business. It does not require a magnifying glass to see that the increase proposed by the landlords is colossal in terms of what the tenants are presently paying. A business that has to bear such an increase would and undoubtedly suffer substantial loss. It is after all that very increase that tenants wish to challenge by reference if they succeed in this appeal.

14. However on the other side when the tenants submit that they are unaware of the landlords assets and are therefore fearful that the landlords would not refund the increase rent if the appeal was successful as found in the case of ABN AMROBANK (supra). In that case the Court stated that the evidential burden shifted to the other party to show that they had assets that would suffice if they were required to refund the rent. The landlords did not meet that burden of proof on a balance of probability.

15. Before ending this Ruling let me dissuade the landlords learned

Counsel on his submissions that the notice of 1st October 2012 having taken effect as per Section 6 of Cap 301 that this Court could not grant stay. That is not the correct position. The tenants having exercised their undoubtedly rights of appeal clothed this Court with a power to grant stay as provided under Order 42 rule 6. It therefore follows that that argument is rejected.

16. I do appreciate the position of the landlords when they stated that if there is a delay in hearing of this appeal it may be detrimental to them if the increased rent was to accrue to

unmanageable levels for the tenants. With that in mind I will give a mention date at the reading of this Ruling to enable this court monitor the progress of this appeal.

17. I grant the following orders-

- a. **The landlords notice dated 1st October 2012 is stayed pending appeal in Mbsa HCCA Numbers 55 & 56 of 2013.**
- b. **The Costs of the Notice of Motion dated 14th May 2013 in both those appeals shall abide with the outcome of the appeals.**
- c. **A mention date shall be fixed at the reading of this Ruling to enable this Court to monitor this appeal.**

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE