



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 149 OF 2012

SARODENA HOTEL LIMITED..... APPLICANT/APPELLANT

VERSUS

FAIRVIEW INVESTMENTS LIMITED..... RESPONDENT

RULING

The application before me is a Notice of Motion dated 29th March, 2012 seeking an order of stay pending the hearing and final determination of the appeal. Under the application the applicant also seeks restraining injunction and directions for payment of rent during the pendency of the appeal.

The facts leading to this appeal, as gathered from these proceedings, are simple. The Applicant/Appellant herein entered into an Agreement dated 4th December, 2008 to lease certain premises belonging to the Respondent herein. The lease period was five years and one month. The parties were to enter into a registrable lease, thereafter. The Respondent's Advocates prepared such lease which they sent to the Applicant/Appellants on 4th December, 2008 for execution and return. It would appear that despite several reminders, the Applicants/Appellants failed to execute and return the lease until the period of lease expired. In the meantime the Landlord/Respondent served a notice on the Applicant to vacate the premises at the end of the lease period as contained in the Agreement of Lease.

The Applicant on being served with the vacation notice filed a complaint with the Business Premises Rent Tribunal and obtained eviction restraining orders on 24th January, 2012. On 23rd March, 2012 the Tribunal, nonetheless, dismissed the Applicant's complaint and discharged its earlier order of injunction. That is what led to this appeal under which this application for stay of execution pending the hearing of the said appeal is brought.

The Appellant/Applicant avers that it will suffer substantial loss unless the stay is granted. It argues that it had been operating a hotel business before and during the whole period of lease, employing more than ten employees. It has no alternative premises to which it will move. It will accordingly, suffer great loss if evicted including the payment of Ksh.37,200/- costs ordered to be paid by the Tribunal.

The Applicant also argues that if evicted now, it will be difficult or impossible later when it wins the appeal, to be reinstated, as a third party will have taken the premises. That will render the victorious result of the appeal nugatory, it further argued.

The Applicant also argued that the grounds of appeal in the Memorandum of Appeal disclose an arguable appeal with high chances of success and that they should be given a fair chance to be ventilated. It also argued that the balance of convenience lay in favour of a stay being granted since the Appellant still regularly pays the standing monthly rents and can be directed to pay for any months in respect of

which rent has not been paid so far, including June to September, 2012.

I have carefully perused all the documents filed in favour and against the application for stay of execution, inclusive of the written submissions by each side. I am satisfied that this application was timeously filed in court.

As touches security, for stay, if it is required to be provided in this case, a deposit of current payable monthly rents as well as deposit of due and future costs would be called for.

The main issue to be considered however, is the substantial loss that the applicant might incur if the stay sought is not granted. Loss has been defined as “... **any loss great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal**”

In this case the applicant argued that it will incur a substantial loss if the orders of the Tribunal made against it for eviction on 23rd March, 2012 are executed since it will lose not only the premises but will be forced to pay the ordered costs of Ksh.32,200/-.

In the view of this court, there is no doubt that the Applicant will indeed suffer much inconvenience if evicted. That issue should accordingly, be weighed together with whether the Applicant’s appeal has high chances of success. A quick glance of the facts leading to the dispute would clearly confirm that the Applicant who entered into an agreement for a lease was under a legal obligation to enter into a proper registrable lease which would tabulate the nitty-gritty details of termination of the lease and also whether the lease is a controlled tenancy or not. While the court would avoid going into the merits of the appeal at this stage, it cannot however, avoid noting the undisputed fact that the Applicant/Appellant had deliberately refused/failed to create a lease under whose spelt-out terms and conditions, it would be protected.

In the above circumstances the Tribunal saw no way of protecting the Applicant. Hence it deliberately ordered an eviction of the tenant/applicant at the end of the period of the Lease Agreement notwithstanding the likely consequences. This court accordingly, does not see much substantial loss likely to arise to the Applicant, if stay is not granted. What the court sees is an inconvenience to the Applicant, an inconvenience which the Applicant ought to have foreseen coming and which he might be wise to confront by making alternative arrangements.

Finally, there is the issue of the appeal result being rendered nugatory if it chances to succeed. What this court can say as at the present time is that the Appeal grounds do not confirm a high chance of success of the appeal.

In conclusion, therefore, this application for stay of execution does not show much merit. It is hereby dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 19th day of September, 2012.

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D. A. ONYANCHA

JUDGE