



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 192 OF 2010

(Being an appeal from the Judgment of Hon. Chairperson of the Business Premises Tribunal – Mochache D.

in BPRT Case No. 217 of 2009 delivered on 19.08.2010 at Mombasa)

**DAYALAL RAMJI t/a RAMJI
ELECTRONICS.....APPELLANT**

VERSUS

**SALIM H. ANJARWALLA & Y
OTHERS.....RESPONDENTS**

R U L I N G

The Appellant in this application under the provisions of inter alia, Order 41, Rule 4, 1 & 2 of the Civil Procedure Rules seeks an order that the Honourable Court be pleased to stay execution of the Judgment of Mochache D, Chairperson of the Business Premises Rent Tribunal delivered on 19.08.2010 in Mombasa Business Premises Rent Tribunal (BPRT) Case No. 217 of 2009 pending the hearing and final determination of the Appeal herein.

The Tribunal delivered judgment on 19th August 2010. The Appellant filed the Appeal herein on 13th September, 2010. The Record of Appeal was filed on 30th September 2010.

In the Judgment the Tribunal assessed the new rent and increased it from 6,000/- to Kshs.18,500/ with effect from 1st December 2009. The Appellant as tenant was aggrieved by this decision and filed this

appeal.

I have considered the application, the Replying Affidavit and written submissions.

Under sub-Rule 2 of Rule 4 of Order 41:-

“No order of stay of execution shall be made under sub-rule (1) unless

(a) The court is satisfied that a substantial loss may result to the Applicant unless order is made and the application has been made without unreasonable delay; and

(b) Such security as the Court Orders for due performance of such decree as may be ultimately binding on him has been given by the Applicant.

The Applicant states that he has never dealt with the Respondents directly nor are their whereabouts known to him. That because of this situation if payment were to be made he may not be in a position to recover this money in the event of success as any necessary action would have to be instituted against the Respondents themselves. That the Respondents have not disclosed their residences in the said replying affidavit.

With respect, the aforesaid submissions is not comprehended by the court and cannot be based on any reasonable justification or logic. The Appellant does not dispute that the Respondents are his landlord and the property either belongs to them or at the very least are entitled to receive rents therefrom. I agree that the whereabouts of the landlords is immaterial. The Appellant is premises that belong to the Respondents going by the record. The building is a known asset upon which recovery execution can be enforced. Also the Appellant can recover any monies paid by obtaining on order of set-off against future rents, as he has not shown that he intends to vacate the premises in the near future. This argument is therefore rejected by this court.

To the contrary, the principle for security works out in the converse as a Respondents are decree-holders who are entitled to the fruits of judgment.

The filing of a written undertaking was to constitute a security for the ex parte orders granted. The said undertakings are separate and destruct from the security envisaged under Order 41, Rule 4.

In my view, considering the increase of rent from Shs.6,000/- to Shs.18,500/-, the Appellant/Applicant may face some hardships for obvious reasons. The Applicant will have to pay three (3) times, the amount of rent he is used to pay. This may put some pressure on his liquidity and business. But can this be said to be “Substantial Loss?” I am not quite sure in this case, as the Applicant has not submitted that he is unable to pay the amount decreed. He does not state the impact on his business and income. Substantial loss must be explained and supported by some facts. The court cannot imagine or assume it as the Applicant appears to suggest by remaining silent on this aspect. Instead he has gone to purport to protect himself with regard to recovery of any amounts paid to an “unknown landlord with no fixed abode”! It does not work out that way,

I do hold that the filing of an appeal by itself does not confer on an appellant a right to an order of stay of

execution. Substantial loss must be demonstrated by facts and evidence. In this case there is no submission that the substantial loss will result or even the existence of hardship.

The net result is that I am not inclined to exercise the court's discretion in favour of the Applicant as this is conditional and there must be on a balance, demonstration of the likelihood of substantial loss.

The issue of mode of recovery or execution of the decree of the Tribunal is not before me and is not a consideration in the application for stay. The law surely must have provided for the lawful means to recover these amounts and the procedure.

I therefore do hereby dismiss the application for stay of execution pending appeal with costs to the Respondents. For the avoidance of doubt, the interim orders are now discharged.

Dated and delivered at Mombasa this 13th day of May 2011.

M. K. IBRAHIM

J U D G E

Coram:

Ibrahim, J
Court clerk – Kazungu
Mr. Muhuni for the Appellant
Mr. Njoroge h/b for Y. Ali for the Respondent

Ruling delivered in their presence.

Ibrahim, J