



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

MISC. APPLICATION NO. 288 OF 2010

ROY SPARES & HAULIERS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

NEW OCEAN TRANSPORT CO. LTD.RESPONDENT

RULING

The applicant came before the Court by Notice of Motion dated **13th July, 2010**, brought under ss.3A, 63(e) and 79G of the Civil Procedure Act (Cap.21, Laws of Kenya) and the earlier edition of the Civil Procedure Rules, Orders XLI [Rule 4(1)], XXI [Rule 22(1)], L [Rule 1], XLIX [Rule 5]. The application carries two main prayers:

- (i) *THAT, pending the hearing and determination of the intended appeal, the applicant be allowed to continue paying the current rent of Kshs.23,330/= and the respondent be restrained, prohibited, barred and/or stayed from charging the applicant the new rent of Kshs.38,000/=;*
- (ii) *THAT, the Court be pleased to allow the applicant to lodge its appeal out of time against the Business Premises Rent Tribunal Ruling and/or Order of 28th December, 2009 in Tribunal Case BPRT No. 90A of 2006.*

The application is founded on the following grounds:

- (a) *the Tribunal has without good cause, refused to apportion rent payable per tenant residing on the suit premises;*
- (b) *the landlord has now threatened to take unspecified action to recover the unlawful rent any time, should the applicant fail to remit the new rent and/or obtain restraining Orders;*
- (c) *despite numerous attempts to persuade the Tribunal to rectify, vary and/or reconsider its decision, the Tribunal has refused and/or failed so to do;*
- (d) *it is only fair and just that this Court do make and issue the orders sought, so as to maintain the status quo pending the hearing of the intended appeal.*

Shemir Yakub, the applicant's Operations Director, swore a supporting affidavit on **13th July, 2010**,

deponing that the applicant is a co-subtenant on premises known as Plot No. 194, situate along Chaani Road, off Airport Road, Mombasa; the three tenants equally share an open parking yard, measuring in whole, 4047 sq. ft.; these tenants also share overheads in respect of rent, electricity bills, water bills, security bills. It is deponed that sometime in mid-2006, the respondent (head-tenant) served the applicant with notice to increase rent, from Kshs.23, 330/= to Kshs.45, 000/= per month. The one-third of total rented area occupied by the applicant measures 1,349 sq.ft. As the applicant was aggrieved by the said notice, the applicant referred the matter to the Business Premises Rent Tribunal, in BPRT No. 90A of 2006. After the several parties were asked to submit their written submissions, the Tribunal proceeded to deliver Judgment on **18th September, 2009**, holding that the rent payable per square foot was Kshs.12.36, and this brought the global rent for the suit plot to Kshs.50,020/=. However, as the landlord had staked his rent-claim at Kshs.45, 000/=:, the tribunal adjusted the level to that sum.

The applicant's gravamen is that the figure of Kshs.45, 000/= per month overlooked the valuers' specific recommendation that "any rent assessed by the Tribunal should be discounted by 15% because the suit premises is situate along a side-road"; and, at the instance of the applicant, the Tribunal, on **28th December, 2009** varied and reviewed its earlier decision, setting the level of rental at Kshs.38,000/= per month, as from the date of the notice of increased rent. The applicant, thereafter, wrote to the respondent seeking an apportionment of the rent among the three tenants.

The applicant had thought the refusal by the Tribunal to apportion the rent was on account of oversight, and so a second petition was lodged before the Tribunal; but this was refused – and it is the reason for the intended appeal, which would have to be made out of time.

In its Ruling of **4th June, 2010** the Tribunal dismissed the applicant's complaint with costs; and the applicant now seeks leave to make a belated appeal (the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301, Laws of Kenya) does not allow automatic appeal to the High Court, without leave).

The deponent pleads circumstances that have delayed his efforts to lodge an appeal up to now; and he avers that the applicant has now received a demand letter for a sum in excess of Kshs.800,000/=:, as arrears of rent since the notice of enhancement of rent was first issued.

The applicant apprehends that if the orders sought are not granted, the respondent may proceed to levy distress on the applicant's property, and this would ground the applicant's transport operations and also undermine the applicant's priceless goodwill.

Asif Jetha, a director of the landlord-company, swore a replying affidavit on **16th July, 2010** denying that there was a rental-sharing between the plaintiff and other tenants; and averring that "*the applicant raised concerns with the [Tribunal] chairperson during the delivery of the ruling but the chairperson advised the applicant's counsel to appeal if aggrieved, but the applicant chose not to appeal.*"

The deponent contests the rationality of the applicant's case for a sharing of the rental amount between tenants; he avers: "*the relationship between the applicant and the respondent is that of a landlord and a tenant and it beats all logic for rent payable to be shared between the parties.*"

From the content of the two affidavits, it is evident that the true position about a fundamental fact has not been placed before the Court: whether the landlord is the proprietor of one common parking area in respect of which several tenants (including the applicant) make separate rental contributions for the global sum. If yes, then, clearly, equity requires proportionate rental-burden allocation to each tenant; if no, then other considerations may come into play. And, if yes, then the applicant's case for a right of appeal would be plausible – and so would be a basis for granting leave to lodge an appeal as prayed.

Learned counsel, **Mr. Nyangena** for the applicant submitted that his client's gravamen relates to the Tribunal's refusal to allow apportionment of rentals, as between the several tenants of the single parking yard. That refusal by the Tribunal is the reason underlying the instant application; in the words of counsel: "*the chairperson [of the Tribunal] in her ruling refused to go to the merits of the applicant's*

complaint...but instead proceeded to disqualify herself on [the] misconceived ground that she had no jurisdiction; she instead advised the applicant to seek the High Court's intervention, thus leading to the filing of this application to be allowed to prefer an appeal out of time."

Counsel submitted that the application before the Tribunal for a review had been decided on **28th December, 2009**, and the same had been brought under s.80 of the Civil Procedure Act (Cap.21, Laws of Kenya) as read with Order XLIV of the earlier edition of the Civil Procedure Rules (relating to review). He submitted that decisions taken under the cited provisions are appealable to the High Court as a matter of right (s.75(1)(h) of the Civil Procedure Act, as read with Order XLII, Rule 1 (aa)). Counsel submitted that s.15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301) also gives an aggrieved party the right to appeal to the High Court within 30 days of the making of an order.

Learned counsel urged that there were reasonable grounds for the delay in lodging an appeal by the applicant herein: in the first place, time had passed while the applicant sought a review before the Tribunal; some more time passed while an amicable solution was being sought, in accordance with the Tribunal's advice; in the search for a solution, the applicant did not show lack of due diligence.

On the basis of the limitation of jurisdiction to the High Court, in this matter, by virtue of s.15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, counsel urged that his client be accorded this last opportunity, and that if any inconvenience is occasioned to the respondent the matter may be accommodated in an award of costs.

Learned counsel, **Mr. Hamza** for the respondent, urged that the applicant should not be excused for the delay in filing an appeal; and that even if the orders sought were granted, it would be of no consequence, *"as the applicant does not even have the required leave to file an appeal."*

Counsel submitted that *"the appellant is using the process of this Court to frustrate the respondent by refusing the rent awarded to the respondent by the Tribunal."* He urged that already, the accumulated rent-arrears stands at Kshs.84,868/80, and that *"any further delay would...expose the respondent to irreparable loss and/or damage."* Counsel, in his final submission, thus stated: *"the appellant's application is premature, without merit and irregular and should therefore be dismissed with costs."*

In extracting the essence of this matter, and addressing the issues of merit herein, I have formed the impression that there are questions contentious enough to call for a proper determination by the Court, after a more substantial hearing. It is the obligation of the Court to avail itself to hear and determine issues of merit, that will resolve contending claims of rights. While, in my perception, the applicant lays on the table potentially meritorious claims, the respondent has laid more weight on alleged past rentals being claimed, and on the technicalities of the law which should foreclose the applicant's prayer for a belated filing of appeal.

Since I am clear in my mind that this matter should be resolved on merits, I cannot uphold the respondent's position. I take this position against the background of the **Constitution of Kenya, 2010, Article 159(2)** of which provides:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

....

(e) justice shall be administered without undue regard to procedural technicalities..."

I will make Orders as follows:

(1)Leave is hereby granted to the applicant to file a memorandum and record of appeal within 14 days of the date hereof.

(2)Pending the hearing and determination of the appeal, the applicant shall continue paying this current rent and shall be fully paid up as from the time of the Tribunal's decision sought to be appealed against, in BPRT No. 90A of 2006, to-date.

(3)The applicant shall bear the costs of the instant application.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 21st day of November, 2011.

**H.M. OKWENGU
JUDGE**