



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appeal 127 of 2010**

**SALEH AWADH SALIM [administrator of the estate of]**

**HASSAN AWADH (Deceased) .....APPELLANT/APPLICANT**

**-AND-**

**1. ABDALLA SAID BARAKAT**

**2. BARAKAT SAID BARAKAT.....RESPONDENTS**

**RULING**

The appellant proceeded under Order XLI [Rule 4] of the old Civil Procedure Rules, and S.3A of the Civil Procedure Act (Cap.21, Laws of Kenya) to file an application by Notice of Motion dated **27<sup>th</sup> June, 2010**. The application carries one main prayer:

***“THAT there be a stay of execution of the Judgment/decree of the Business Premises Rent Tribunal dated 31<sup>st</sup> May, 2010 in BPRT 142/08, Mombasa, pending the hearing and determination of the appeal preferred therefrom.”***

The application rests on two grounds: that the applicant has filed an arguable appeal from the Order of the Tribunal; and that *“the applicant shall stand to suffer substantial loss in the event the stay sought [is] not granted.”*

**Saleh Awadh Salim**, the appellant, swore a supporting affidavit on **28<sup>th</sup> June, 2010** averring that: the deceased, at the time of his death was a tenant on the respondents’ premises; on **31<sup>st</sup> May, 2010** the Business Premises Rent Tribunal, sitting at Mombasa, made a determination upon a reference by the deponent, requiring him to hand over vacant possession of the tenancy premises as at **1<sup>st</sup> July, 2010**; the deponent has already filed an appeal against the said BPRT decision; the business conducted on the suit premises is part of the deceased’s estate, and he has been applying the proceeds to education for the deceased’s children in a University abroad.

The deponent, upon advice by counsel whom he believes, expresses his belief that the pending appeal is meritorious and has reasonable chances of success – and that the same is in danger of being rendered nugatory if stay as herein sought, is not granted.

The deponent avers that if the BPRT Order appealed from is executed, then he stands to suffer substantial loss, as *“not only will [the appellant’s] power to retain possession be removed beyond recall,*

*but...the business, which has been [conducted on] the premises since 1980, would stand to lose all the custom and goodwill painstakingly built over the years, the merits of [the] appeal notwithstanding.”*

On behalf of the respondents, **Abdalla Said Barakat** (1<sup>st</sup> respondent) swore a replying affidavit on **6<sup>th</sup> July, 2010**, deponing, for the material part, as follows:

(i) the appellant already has several applications pending, *“all designed to restrain and stay execution...of decrees obtained by [the respondents]”*;

(ii) the appellant is using the right of stay of execution mischievously to frustrate the respondents and *“bar [them] from realizing the fruit of [their] Judgment”*;

(iii) the appellant has many businesses in various parts of Mombasa town;

(iv) there is no evidence that the appellant is educating the deceased’s children in Universities abroad;

(v) the respondents have sought since 1995 to lawfully evict the appellant’s brother, **Saleh Awadh** who occupies the premises in his deceased brother’s name, but to no avail;

(vi) the appellant uses *“his enormous wealth to institute cases all the time”*;

(vii) the appellant has not shown that there is sufficient cause for stay of Orders of the Tribunal.

Learned counsel, **Mr. Mwakisha** for the appellant, submitted that the Court should take into account the basic conditions for grant of stay of execution pending appeal: the Court being satisfied that substantial loss may result to the applicant in the event stay is not granted; the application being made without unreasonable delay; the applicant giving security for due performance of the decree such as may later be found binding upon him.

Counsel submitted that the applicant was not guilty of any unreasonable delay: the orders were made on **31<sup>st</sup> May, 2010**, and the application for stay was filed on **24<sup>th</sup> June, 2010**.

On the issue of *“substantial loss,”* counsel submitted that the business he runs on the suit premises is part of his deceased brother’s estate, and that *“he has been using the proceeds thereof to educate his brother’s children, one of whom is in [a] University in the Sudan.”*

Counsel submitted that, failing the Orders sought, the applicant would suffer substantial loss. He invoked several authorities as supporting the argument that the applicant should not be removed from a shop he has occupied for long and on which he has established goodwill: **Sonia Arts Ltd v. Safari Lodge Properties of Kenya Ltd t/a Serena Beach Hotel**, Mombasa HCCC No. 48 of 1996; **Shah Ramji Kanji v. Maherali Hirji & Co. & Another** 21 EACA 66; **Shariff Omar Maulana v. Abdalla Mbarak**, Mombasa H.C. Misc. Civ. Appl. No. 89 of 1986.

Counsel urged that his client be not denied a right of appeal only because the respondents would be prejudiced; and on the contention that the applicant has other businesses, whereas the respondents are in a state of deprivation, and so they pray to be allowed to partake of business opportunities at the suit property, counsel urged:

***“.....we...submit that a distinction is to be drawn between what are the applicant’s own businesses [and] the estate of his late brother, and the business being carried on in the suit premises which business is exclusively part of the estate of the said deceased. The benefit accruing from this business goes not to the applicant, but to the estate whose interests he represents and the beneficiaries thereof, including the daughter attending University in the Sudan.”***

Learned counsel, **Mr. Hayanga** for the respondents, submitted that the Business Premises Rent Tribunal

had made an Order on **31<sup>st</sup> May, 2010** to the effect that the applicant (tenant) herein was to yield possession to the landlords/respondents on **1<sup>st</sup> July, 2010**. On the suit premises, an old, earthen Swahili-type building, the applicant is holding tenancy by virtue of being the legal representative of the estate of his brother who died in Saudi Arabia in **2007**; the deceased had rented the building in 1980 and there, the applicant now carries on, through others, a trade in groceries.

**Mr. Hayanga** submitted as wanting in merits, the contention made for the applicant: that he has many businesses in Mombasa but these are personal, in contrast to the one at the suit property which is in the name of the deceased. Counsel submitted that, though the applicant contends that the business at the suit premises belongs to the deceased's estate and he applies its proceeds in the education of the deceased's children, the applicant's depositions have made reference to "*one daughter, the niece, as being in [a University], and there is no [evidence regarding] any other student.*" Moreover, counsel urged, "*there is no evidence that a particular income comes from the business and that, as a fact, it is paid for anyone's education*"; "*the applicant should have annexed a statement of audited accounts to show receipt of income and disbursement and, more particularly, receipts to show that the University as [an] institution of learning received fees paid on behalf of the student.*" In aid of this argument, counsel cited the persuasive authority of **Zanzibar Insurance Corporation v. Chacha** [2006] 2EA 364 in which the Court of Appeal of Tanzania, in a similar application, held that (p.365):

***"If the applicant wanted the Court to give serious consideration to the claim that the applicant is an organization with a small turnover which would collapse if stay of execution is not granted, it should have annexed a statement of audited accounts which would give a more reliable picture of its financial standing. Bare statements of a generalized and vague nature will not suffice to persuade the Court to grant stay of execution."***

Counsel submitted, in the instant case, that such focused evidence was required as part of the applicant's case.

Learned counsel contested the applicant's contention, that if a stay order is not granted, the appeal will be rendered nugatory: "*this is not true...[for] the subject-matter is a tenancy and what the respondents require is a mere change of user*"; counsel urged that if the appeal succeeds, "*there will be no loss as the premises will still be there.*" The Tribunal, moreover, had provided security for the applicant by thus directing:

***"The tenant is advised to keep an eye on the premises and should the landlord part with the premises he is at liberty to move this Tribunal under s.31 of the [Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301)], upon which the tenant will be awarded as the Tribunal deems fit."***

Counsel contested the claim that the applicant stood to lose **goodwill**: for goodwill "*is a commodity that will remain with the customers and [is] only attached to the business for managerial skills....Secondly, the shop is just a small grocery kiosk which must be serving [only] a few people within the neighbourhood...*"

Counsel submitted that the grounds put forward by the applicant – reliance on proceeds to educate deceased's children; the prospect of the suit premises going beyond recall; there being an arguable appeal; the prospect of substantial loss being suffered – are not tenable. Counsel urged that the applicant has failed to prove that the estate of the deceased stands to suffer substantial loss, unless orders of stay are granted.

It emerges in this matter that the applicant is endeavouring to affirm tenancy interests in the suit property, not for himself in a direct sense, but in the name of his deceased brother; and in this regard he avers that he is educating children of the deceased using the proceeds of the business which he is running at the suit premises. However, just as the respondents have submitted, no formal evidence is produced as to the relationship between the grocery business in question, and issue of the deceased. In any event, are the social arrangements in respect of the deceased's family, the proper basis for managing commercial

affairs at a property where the deceased was, once-upon-a-time, a tenant? This Court takes judicial notice of the commercial setting in which land in the city of Mombasa would be managed: and on this basis I will hold that the special relationship which had prevailed as between the deceased as tenant and the respondents as landlords, is not likely to remain constant. The landlords must have the liberty to re-arrange the management and tenancy in respect of their property, on the basis of free contract, with the administrators of the deceased's estate.

From the evidence, it is clear that there have been several Business Premises Rent Tribunal cases between the parties in the past, and whenever the Tribunal has concluded such matters by issuing certain Orders, the applicant has consistently secured a stay of the same: this was the case with BPRT No.63 of 1996; BPRT No.180 of 2006; and BPRT No.142 of 2008. It is contended that the applicant herein, after securing Orders of stay, has consistently wallowed in them, without pursuing any course of having *inter partes* claims settled through appeal: and consequently, the respondents have suffered injustice.

It is clear from the facts of the case that this matter concerns small-scale grocery interests which, however, occupy landed property upon which the respondents have always had alternative business preferences. At this moment, the respondents are only seeking a change of user of the suit property, and thus, no threat is posed to the applicant's business interests.

Upon reading the application papers and responses, and upon bearing in mind the submissions of counsel, I have come to the conclusion that even if the applicant may have an arguable appeal, he is not likely to suffer substantial loss in the event of stay not being granted; he runs no risk, but only has the personal obligation of prosecuting his appeal; the more diligently he does so, the more fruitful too will it be for the respondents, who not only have the fruit of the Tribunal's Orders in suspense, but are anxious to have this matter resolved with finality. This position inclines the Court's discretion in favour of the respondents, and against the applicant. I will make the following Orders:

***(1)The applicant's main prayer by Notice of Motion of 27<sup>th</sup> June, 2010 is refused.***

***(2)The applicant shall bear the costs of this application.***

***(3)The Registry shall hold together two files, Civil Appeal No. 127 of 2010 and Civil Appeal No. 180 of 2009; and shall list the same for mention and with special reference to Order No. 2 of the Ruling of 12<sup>th</sup> February, 2010 in Civil Appeal No. 180 of 2009.***

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 15<sup>th</sup> day of December, 2011.**

**H.M. OKWENGU  
JUDGE**