



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Appeal 180 of 2009**

SALEH AWADH SALIM *as administrator of the estate of*

HASSAN AWADH.....APPELLANT/APPLICANT

VERSUS

ABDALLA S. BARAKAT.....RESPONDENT

**RULING**

The appellant filed a Notice of Motion dated 15<sup>th</sup> October, 2008 and brought under Order *XLI*, rule 4 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The appellant was seeking stay of execution of an order of the Business Premises Rent Tribunal (dated 18<sup>th</sup> September, 2009) pending the hearing and determination of an appeal.

The applicant states in his general grounds that the pending appeal is an arguable one, and that the appeal “will be rendered nugatory unless the stay sought is granted, with resultant substantial loss to the applicant who is a small-scale trader”.

The applicant has set out supporting evidence in the form of an affidavit sworn on 16<sup>th</sup> October, 2009; and to this, the respondent swore a replying affidavit on 26<sup>th</sup> October, 2009.

The material placed before the Court has been analysed by the respective counsel; and *Mr. Mwakisha* for the applicant submits that he comes before the Court under s.6 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301, Laws of Kenya) challenging the respondent’s notice seeking to increase rent from Kshs. 6,500/= per month to Kshs. 10,000/= per month – which notice the said Tribunal had upheld, in its ruling of 18<sup>th</sup> September, 2009.

It was contended that the Tribunal had erred, in disregarding the applicant’s valuation report; it was also contended that the respondent’s notice to increase rent was itself defective. Of the alleged defect, learned counsel submitted that though the notice purported to increase rent payable from Kshs. 6,500/= per month to Kshs. 10,000/= per month, the rent-amount in fact being paid at the time of issuance of the notice was Kshs. 6000/= per month – and this fact though brought to the Tribunal’s attention, did not move its chairperson to guide the proceedings appropriately.

Counsel submitted that a small-scale trader was, in this case, required to pay a sum of money in excess of Kshs. 112,000/= in back rent – since the new rent was stated to take effect from 1<sup>st</sup> January, 2007 (the effective date of the notice). The emergence of this back rent, and the Tribunal’s failure to assess how it arose, counsel urged, was one of the grounds of appeal. As counsel stated: “The applicant will argue in his appeal that the effective date of the new rent, if at all, ought to have been the date of the ruling/order appealed from”.

*Mr. Omwenga*, learned counsel for the respondent, urged that “the applicant has not shown at all what irreparable loss he will suffer in [the] event the orders he is seeking are not granted” – and so “on that ground alone his application should fail”.

Counsel submitted that “the nature of the applicant’s application requires that security be provided and the applicant has not provided any”. Counsel urged that the applicant should have deposited security in the sum of Kshs. 360,000/= being the assessed rent for a three-year period at the rate of Kshs.10, 000/= per month. It was submitted that the respondent, as the successful litigant, should have his interests weighed against those of the applicant.

Counsel for the respondent submitted that “the applicant will not suffer any loss, prejudice [or] damage as [the applicant] has not

said that the respondent is not in a position to refund the amount assessed by the Tribunal in [the] event the appeal succeeds”.

Among other things, the applicant questions factual issues going into the validity of the rent-increase notice which the Tribunal upheld, in favour of the respondent. The applicant is also challenging the basis of computation of the dues he would have to pay, under the rent-increase notice. Such questions, in my opinion, go to the merits of the appeal, and I believe it to be the case, that the appeal is an arguable one. If so, then the demands of justice are that the appeal be given a chance to be heard; the appeal is not to be rendered nugatory through a full implementation of the rent-scales approved by the Tribunal.

If justice requires that the appeal be heard, then the respondent’s case for a security equivalent to the value of the proposed new rent, considerably loses its justification.

Consequently, I shall make orders as follows:

1. *There shall be a stay of execution of the order of the Business Premises Rent Tribunal dated 18<sup>th</sup> September, 2009 pending the hearing and determination of the appeal lodged against the said Tribunal decision.*
2. *The applicant shall see to the businesslike prosecution of the appeal, and dates for the appeal proceedings shall be given on priority.*
3. *Costs shall be in the cause.*

*Orders accordingly.*

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**J. B. OJWANG**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 12<sup>th</sup> day of February, 2010.**

**Coram:**

**Court Clerk: *Ibrahim***

**For the Applicant/Appellant:**

**For the Respondent:**