

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 251 of 2009

DOGLAS MAINA.....APPLICANT

VERSUS

NDUNGU NDOME.....RESPONDENT

RULING

A reference to the Business Rent Tribunal was decided in favour of the respondent. The tenancy between the applicant and the respondent was terminated, applicant was ordered to vacate the premises and the respondent authorized to levy distress. The applicant being aggrieved sought, from the lower court, orders of stay of execution pending appeal, which application was dismissed hence this application for similar relief. The application is premised on the following grounds. That the respondent is about to evict the applicant in view of the Tribunal's orders yet the applicant has challenged those orders in this court on appeal; that the applicant is willing to provide security.

The applicant's counsel has cited, in support of the application, the following two authorities:

Oceanic View Hotel Limited Vs. **Kenya Commercial Bank** (2002) 2 KLR 338 and **Kenya Shell Ltd.** Vs. **Kibiru & Another** (1986) KLR 410.

In reply, the respondent has averred that following the award of the Tribunal and the ruling by the court below, the applicant sought for time to vacate the suit premises which he did after payment of arrears in rent. Save for one heavy machinery entrenched on the floor, the applicant cleared out all his goods.

I have considered the application, the foregoing submissions and the two authorities. The last authority **Kenya Shell** (supra) lays down the jurisdiction of this court and that of the Court of Appeal in an application for stay of execution. This court exercises that jurisdiction pursuant to **Order 41 rule 4** of the **Civil Procedure Rules**, while that of the Court of Appeal is provided for under **Rule 5(2)(b)** of the **Court of Appeal Rules**.

In respect to applications for stay in this court, the applicant must satisfy the following conditions

- (i) that substantial loss may result to the applicant unless the order of stay is made
- (ii) that the application for stay has been brought without unreasonable delay, and
- (iii) that the applicant is ready to provide security as may be considered

The applicant has not specifically stated what substantial loss he stands to suffer if the order of stay is not granted. He has however averred that the respondent may execute the orders of the Tribunal and evict him. Even then, the question remains - what loss will he suffer? It has been deposed by the respondent that apart from one machine fixed on the premises, the applicant has for all intents and purposes vacated the premises and even paid outstanding rent. That averment has not been challenged. I find that the applicant has failed to demonstrate substantial loss. Having failed this condition, I find no purpose in considering the other two conditions. This application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 30th day of April, 2010.

W. OUKO
JUDGE