



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 182 of 2009

SAIDA IBRAHIM YUSUF

[as Administrator ad litem

For estate of]

IBRAHIM YUSUF DADA t/a IBRAHIM'S CAFÉ' ....APPELLANT/APPLICANT

-VERSUS-

KULSUMBAI BUX.....RESPONDENT

RULING

The appellant/applicant moved the Court by Notice of Motion dated

**16<sup>th</sup> October, 2009** 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 application carried the following main prayers:

- 1 ***that there be a stay of execution of the order made by the Business Premises Rent Tribunal in BPRT No. 157 of 2005 delivered on 18<sup>th</sup> September, 2009, until the appeal filed by the appellant in the High Court is heard and determined;***
- 2 ***that consequently, the landlady's notice dated 30<sup>th</sup> September, 2009 be stayed.***

The grounds in support of the application were as follows:

- (a) ***the Business Premises Rent Tribunal had ordered a rental increase for the suit premises by over 200%;***
- (b) ***the tribunal has backdated the rental increase to take effect from 1<sup>st</sup> May, 2005 and this creates backdated arrears – and the same are in dispute;***
- (c) ***the tribunal has ordered that the landlady serve a new Notice for the increase of rent immediately, and the landlady has already done so;***
- (d) ***unless the tribunal's ruling is stayed, the tenant will suffer substantial and irreparable loss, as she will be compelled to pay the increased rent immediately or face distress, and will expect to receive a new notice of increase of rent, apart from being compelled to vacate the suit premises and thereby losing her rights to a controlled tenancy;***
- (e) ***the appeal has good chances of success;***
- (f) ***the appeal will be rendered nugatory if stay is not granted.***

The evidence to support the application is contained in the affidavit of the applicant dated **15<sup>th</sup> October, 2009**; and in the respondent's replying affidavit dated **3<sup>rd</sup> November, 2009** it was deponed that the backdated arrears were caused by the appellant's refusal to comply with the landlady's notice which had been given in 2005 and had been upheld by the BPRT judgment of 18<sup>th</sup> September, 2009. The respondent deponed that the rent increment allowed by the tribunal "was the most reasonable and just under the circumstances".

The respondent denied the contention that the applicant has an arguable appeal, and states that the applicant has not demonstrated good faith by proposing a security that she will give as a basis for the orders sought.

Learned counsel for the applicant, **Mr. Kasmani** submitted that the application entailed two main questions: (i) whether a substantial loss will be caused to the appellant; and (ii) what security should the appellant provide?

As regards "substantial loss", it was submitted, on the basis of the evidence, that the landlady has, within the space of only a few days, demanded payment of Kshs. 418, 710/=, and has then threatened to take legal steps for recovery: and it was now open to her to execute the BPRT order, levy distress, and terminate the tenancy on the ground that there is outstanding rent. If such distraint and termination of tenancy were to take place, it was urged, then the business of the deceased tenant would be ruined, as it would be forced to close down – and that this should be treated by the Court as a substantial loss.

Counsel urged that the amount claimed by the landlady, Kshs. 418,710/=, is disputed by the tenant who states in the supporting affidavit that the correct amount should be Kshs. 307,875 – and this is not denied in the replying affidavit.

Learned counsel submitted that the amount, Kshs. 310,000/=, would be sufficient security, and that this could be held in an interest-earning account in the joint names of the two advocates, and with Bank of India; the tenant could be required at the same time to deposit in the same account, at the end of each month, the sum of Kshs. 12,315/=, this being the difference between current rent and new rent as assessed; and that the rent of Kshs. 7,160/= be paid each month to the respondent's advocates.

Counsel submitted that the appeal as filed, which states 12 grounds, is not frivolous and has "excellent chances of success". One of the grounds of appeal is that the landlady was granted leave by the tribunal to serve fresh notice within the statutory period of two years, and she had already served notice, making it effective as from 1<sup>st</sup> December, 2009: and the applicant had challenged that order on appeal.

Learned counsel urged that the order to serve a fresh notice was highly prejudicial to the applicant; the question of fresh notice had not been canvassed during the hearing, but was merely put forward (with objections from counsel for the appellant herein) in counsel's closing submission. Such a notice, it was submitted, takes away the applicant's statutory rights – and so is a substantial loss to the applicant. It was urged that unless stay is granted, the appeal on service of such fresh notice would be rendered nugatory.

Learned counsel invoked past judicial decisions in favour of grant of stay of execution, in certain circumstances. In **Butt v. Rent Restriction Tribunal** [1982] e KLR the Court of Appeal held that:

***"The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal";***

and that:

***"The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal".***

Counsel relied on another Court of Appeal decision, **E. A. Building Society Limited v. A.C.A. D'Souza Abdulshakoor Khandwalla**, Civil Appeal No. 124 of 1997 to support the applicant's proposal regarding security to be given by her; the relevant passage thus reads:

***"The tenants (respondents) are individuals whereas the appellant is an established building society. We think the balance of convenience lies in favour of the respondents ....On [the] one hand the respondents claim protection [under] the Rent Restriction Act. On the other hand the appellant claims that the premises are decontrolled. In the particular circumstances of this case, the interests of justice would be met by ordering the tenants to deposit into a joint account in the names of the advocates of the parties, the difference between the original and the assessed rent. Such deposit plus future extra rent must be made within the next sixty days and we leave the arithmetic and the choice of the bank to counsel. The effective date for the purposes of such deposit is 1<sup>st</sup> September, 1993."***

Learned counsel, **Mr. Hamza**, for the respondent, submitted that the application was misconceived, because "there is no execution process meaning that a stay is incapable of being granted under Order **XLI**, rule 4"; and Order **XLI**, rule 4 provides for stay of execution. Counsel contended that the application was premature: because the matter was not yet ready for execution, as the tribunal judgment had not yet been taken to the Resident Magistrate Court for filing and eventual execution. Counsel urged that "the fact that the respondent asked for new rent to be paid is in itself insufficient to be called an execution process".

On the question of the tribunal authorizing the respondent to give the tenant a new notice before the expiration of the two-year period, learned counsel submitted that s. 9(3) of the governing statute empowers the tribunal to specify a shorter period than two years.

Counsel asked that the application be dismissed, for being based on mere speculation, and on the basis that even the appeal itself lacks proper grounds – and so cannot form the basis of an application for stay of execution.

On “substantial loss” as a consideration in this kind of application, **Mr. Hamza** urged that the same was being suffered by the landlady, rather than by the tenant: the landlady had not received any rent increase since 2005, the rent-level stagnating at Kshs. 7,160/=; the landlady had “not had an economic return on her investment for five.....years”. Counsel contested the claim made for the tenant, that her business stands to fall to ruin and closure if new rent was paid – for there was no evidence to support this claim. Counsel submitted that the ruin-scenario put forward for the applicant was not factual; for the shop in question, located along Makadara Road opposite the General Post Office, right at the city-core, is in a prime business location offering great scope for profits, and for which the landlady ought to be getting market rent.

Counsel submitted that in the event the appeal takes another several years to be heard and determined, it will have been some seven-to-eight years during which the landlady will not have received fair rent for her property; and that this would not be just or fair.

The issues in dispute, in the application, clearly emerge. Payment of controlled rent for the landlady’s property situated right at the City centre, has over time, given advantages and rights to the tenant, while rendering it difficult for market rates to benefit the landlady. So the landlady dealt with such rights of the tenant by lodging a cause with the Business Premises Rent Tribunal, which found in the landlady’s favour and made appropriate orders. The tenant has lodged an appeal, seeking to restore her rights associated with controlled tenancy. The tenant believes her appeal has good chances of success, though the landlady has doubts. The tenant apprehends that the entry into force of the tribunal’s judgment will cause her irreparable loss; and so she comes before the Court seeking interlocutory orders.

Although the applicant has an undoubted right of appeal and has indeed lodged an appeal, for as long as the appeal remains pending, the respondent will be prejudiced, especially in the event it turns out that the appeal is unsuccessful. In an application such as the instant one, a critical factor is the mode of application of the judicial discretion: **Butt v. Rent Restriction Tribunal** [1982] e KLR. In the exercise of this discretion, I would hold the balance as between the claims of the applicant and those of the respondent, by making specific orders as follows:

- (1) The respondent is hereby restrained from taking any action leading to the execution of the judgment of the Business Premises Rent Tribunal of 18<sup>th</sup> September, 2009 pending the hearing and determination of the applicant’s appeal.**
- (2) In the meantime, the applicant shall pay on a regular basis the old rent, directly to the respondent.**
- (3) The full amount of the increased rent shall be paid by the applicant into a bank account set up in the joint names of the advocates for the applicant and the respondent following the procedure described in this Order:**

- (a) any such amount of the increased rent falling due for each month shall be paid during the first fourteen (14) days of the relevant month;**
- (b) all unpaid arrears of such increased rent shall be computed, and taken notice of by both parties;**
- (c) all such unpaid arrears shall be paid by the applicant into the said joint account, at the rate of Kshs. 20,000/= by the end of each month, as from 1<sup>st</sup> July, 2010.**
- (4) The costs of this application shall be costs in the cause.**

**DATED and DELIVERED at**

**MOMBASA** this 11<sup>th</sup> day of June, 2010.

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Appellant/Applicant: *Mr. Kasmani*

For the Respondent: *Mr. Hamza*