



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appeal 174 of 2008**

**NEW OCEAN TRANSPORT CO. LTD. ....APPELLANT**

**VERSUS**

**M.A. BAYUSUF & SONS .....RESPONDENT**

**RULING**

New Ocean Transport Company Ltd, the appellant herein, applied to have the order made by the Business Premises Rent Tribunal made on 26<sup>th</sup> September 2008 vide Business Premises Rent Tribunal case No. 194 of 2007 stayed pending the hearing and determination of this appeal. The application is by way of a motion filed under order XLI rule 4 of the Civil Procedure Rules. It is supported by the affidavit of Asif Jetha sworn on 21<sup>st</sup> October 2008. M.A. Bayusuf & Sons Ltd., the Respondent herein, opposed the motion by filing the replying affidavit of Yusuf M. Bayusuf sworn on 31<sup>st</sup> October 2008. Learned advocates appearing in this matter filed written submissions to dispense of the same. I have taken into account the material placed before me and the aforesaid submissions. There is no doubt that the chairlady, Business Premises Rent Tribunal delivered her judgment on 26<sup>th</sup> September 2008 vide B.P.R.T. case No. 194 of 2007 in which she ordered for the tenancy between the appellant and the Respondent to be terminated. The appellant being dissatisfied has preferred this appeal. Pending the hearing and determination of this appeal, the appellant has urged this court to stay the execution of the aforesaid order. In dealing with applications for stay pending appeal under Order XLI rule 4 of the Civil Procedure Rules there are three conditions which have to be taken into account viz: First, the application must be filed without undue delay. Secondly, the applicant must show that it would suffer substantial loss if the order is denied. Thirdly, what form of security should be given? Let me apply the aforesaid principles in this case. The order sought to be upset on appeal was given on 26<sup>th</sup> September 2008. The memorandum of Appeal was filed on 17<sup>th</sup> October 2008. The notice of motions the subject matter of this ruling was filed on 22<sup>nd</sup> October 2008. I am convinced the motion was timeously filed, hence the application satisfies the first condition.

The next principle to be considered is whether or not the applicant would suffer substantial loss. The Business Premises Rent Tribunal issued an order seeking for the eviction of the tenant from the demised premises with effect from 1<sup>st</sup> November 2008. The tenant has been carrying out its business on the suit premises for many years. I agree with the submissions of the appellant's counsel that if the order is not stayed, the appellant would be evicted from the demised premises. The resultant loss of business and premises in my humble view is substantial. Furthermore, if the eviction order is carried out before the appeal is heard and determined, the appeal will obviously be rendered nugatory. Again I am convinced the applicant has shown that it would suffer substantial if the order of eviction is not stopped by an order of stay. Having come to the above decision, the remaining issue is what form of security should be given for the due performance of order upon the final determination of the appeal. The applicant states that it is ready to abide by any form of security ordered by this court. The Respondent proposes that the appellant be ordered to deposit as security a sum of Kshs.1,680,000/- in an interest earning account in the joint names of the advocates appearing in this matter. The aforesaid sum is 12 months advance rent at the rate of Kshs.140,000 per month. It is not denied in this appeal that there is need to provide security to cushion the landlord in the event that the tenant loses this appeal. It would appear from the proceedings of the tribunal that the landlord wanted to use the space occupied by the tenant to expand its business. It is difficult to estimate the kind of loss in monetary terms if the landlord's anticipated expansion is halted pending appeal. Perhaps it would lose revenue on anticipated profits or that there would be increased in prices of construction materials. In the circumstances of this case I will fix a conservative figure of Kshs.500,000/- as security. In the end I grant the applicant a stay of execution pending appeal on condition that the appellant deposits in an interest earning account in the joint names of the advocates appearing on record within 30 days from the date hereof. In default the motion shall automatically stand dismissed. Costs of the motion to abide the outcome of the appeal.

**Dated and delivered at Mombasa this 8<sup>th</sup> day of April 2009.`**

**J. K. SERGON**

**J U D G E**