



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 661 of 2008

ASANTE DESIGNS.....APPLICANT

VERSUS

BERMUDA HOLDINGS LTD.....RESPONDENT

(CONSOLIDATED WITH)

CIVIL APPEAL NO. 662 OF 2008

VENUS LIMITED.....APPLICANT

VERSUS

BERMUDA HOLDINGS LTD.....RESPONDENT

CIVIL APPEAL NO.663 OF 2008

AACHI ENTERPRISES.....3RD APPLICANT

VERSUS

BERMUDA HOLDINGS LTD.....RESPONDENT

CIVIL APPEAL NO.664 OF 2008

KING PRINTING PRESS (1965) LTD.....4TH APPLICANT

VERSUS

BERMUDA HOLDINGS LTD.....RESPONDENT

R U L I N G

1. Asante Designs, Venus Ltd, Aachi Enterprises Ltd and the King Printing Press (1965) Ltd, (hereinafter referred to as the 1st, 2nd, 3rd, and 4th applicants respectively), are all tenants of Bermuda Holdings Ltd, (hereinafter referred to as the respondent), in respect of premises known as LR No.209/6403 Cameo Building.

2. Pursuant to notices issued to each of the applicants by the respondent under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments), Act Cap 301, each of the appellants filed a reference to the Business Premises Tribunal i.e. Tribunal Case Nos.380, 381, 382 and 383 of 2007, objecting to the notice. The references were heard by the Tribunal which made orders on 28th November, 2008, allowing the notices, directing that the tenancy between the parties be terminated and directing further that the Tenant to vacate the premises within one month to pave way for construction.

3. Being aggrieved by that order, each of the tenants moved to this court and filed an appeal on 2nd December, 2008. These were HCCA Nos.661 of 2008, 662 of 2008, 663 of 2008 and 664 of 2008. Each of the applicants filed simultaneously with their appeal, a notice of motion under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking an order staying execution of the orders made by the Tribunal on 28th November, 2008 pending the hearing and determination of their appeal.

4. Each of applicants swore an affidavit in support of the motion. By an order made by Sitati J. on 26th January, 2009, the 4 appeals filed by the applicants were consolidated to be heard together.

5. In support of the application, Mr. Enonda who appeared for the applicants submitted that if the orders of the Tribunal were not stayed, the applicants would be forced to move from the suit premises, and this would render their appeal nugatory as the premises will no longer be available for them. Urging the court to grant the orders sought, Mr. Enonda cited the following cases:

- ***Milson K. Njuki vs Edward Ileri Mugo HCCA No.38 of 2004.***
- ***David Irungu vs Richard Wachira HCCA No.42 of 2006(Nyeri).***
- ***Fidan Gathumbi Njuguna vs Mungai Njuguna HCCC No.410 of 1999 (Nakuru).***

6. The respondent objected to the application through a replying affidavit sworn by its Managing Director Martha Vincent. She contends that a valid notice to vacate the premises was served on the applicants as the respondent required possession of the suit for reconstruction of the premises. She further deponed that the premises were structurally unstable and in dangerous condition hence the need for reconstruction.

7. Mr. Thiongo who appeared for the respondent urged the court to reject the application contending that the applicants were procrastinating the matter to avoid vacating the suit premises. He maintained that the building was hazardous and appropriate notices have been issued by the City Council and the Public Health Department. He therefore urged the court to dismiss the application.

8. I have carefully considered the application before me, the affidavits filed in support and in reply thereto as well as the submissions made by counsel. Under Order XLI Rule 4(2) of the Civil Procedure Rules, the Court can grant an order for stay of execution pending appeal provided it is satisfied that the applicant will suffer substantial loss if the order of stay of execution is not issued, and the application has been made without undue delay. The applicant must also be ready to provide security as may be ordered by the court for the due performance of the decree.

9. In this case, the applicants will have to vacate the suit premises unless an order of stay of execution of the Tribunal Order of 27th November, 2008 is granted. Under normal circumstances, the premises being business premises, I would have concurred that it would cause unnecessary substantial loss to the applicants to cause them to vacate the premises before they exhaust their right of appeal. However, in this case, it is apparent that the premises are required by the respondent for reconstruction.

10. There is contentious information as to whether the premises are structurally sound. However, given the undisputed fact that a canopy of the building collapsed, this court has to weigh the risk of loss to life and property against the possibility of substantial loss to the applicants. While loss of life is

irrecoverable, the loss suffered by the applicants in giving vacant possession of the premises though substantial can be recovered in a suit for damages, if the applicants are successful in their appeal. Moreover, since the premises will be under reconstruction, the applicants can still obtain an order for repossession after the reconstruction if they are successful in their appeal.

11. For the above reasons, I decline to grant an order for stay of execution of the orders of the Tribunal issued on 28th November, 2008 pending the hearing of the appeal. Costs shall be in the appeal.

Orders accordingly.

Dated and delivered this 29th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Enonda for the applicants

Advocate for the respondent absent