



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 53 of 2007

DEEPAK SHAH T/A AZO SALES.....APPELLANTS

VERSUS

DHAVINDER SINGH REHAL

AVTAR SINGH REHAL T/A MANJIT BUILDING CONTRACTOR....RESPONDENT

R U L I N G

This application is made under Civil Procedure Order 41 rule 4 and order 50 rules 1 & 2 of the Civil Procedure Rules as well as section 3A and 63 (c) and (e) of the Civil Procedure Act and is for the basic order that there be a stay of execution and/or further execution in Kisumu Business Premises Rent tribunal case No. 33 of 2005 pending the hearing and determination of the intended appeal by the applicant/appellant.

The grounds in support of the application are those contained in the body of the notice of motion and are further supported by the applicant's supporting affidavit dated 20th June 2007.

The grounds are opposed by the Respondents on the basis of the facts contained in the replying affidavit by the first Respondent dated 13th July 2007.

The grounds in support and in opposition to the application were argued on behalf of the applicant by learned Counsel, Mr. Gichaba and on behalf of the respondents by learned Counsel, Mr. Wachira.

Order 41 Rule (4) of the CPR pronounces the legal position regarding stay of execution pending appeal.

Under Rule 4 (2), no order for stay of execution shall be made under sub rule (1) unless:-

- a) The court is satisfied that substantial loss may result to the application unless the order is made and that the application has been made without unnecessary delay. And**
- b) Such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

With regard to the first condition herein above, learned Counsel for the applicant argued that the application has been made without unreasonable delay.

The application was filed on the 20th June 2007 while the memorandum of appeal was filed on 15th June 2007.

The judgment appealed against was delivered on 31st May 2007. This application was therefore made without unreasonable delay.

On the issue of substantial loss, Mr. Gichaba argued that if stay is not granted the applicant will suffer substantial loss in that his goodwill would be lost and incapable of being quantified having operated business from the suit premises for the last 22 years.

The learned counsel for the respondents contended that the applicant has failed to demonstrate the loss he would likely suffer and has failed to quantify the loss likely to be incurred. In any event, the loss that may be incurred is capable of being compensated by way of damages.

Counsel relied on the decisions in the cases of **Silver Crown Merchants Ltd –VS- Agricultural & Industrial Holding Ltd High Court Civil Appeal No. 365 of 2004 (Nbi) and G4S Security (K) Ltd – VS- Group Four Security Ltd Civil Appeal No. 19 of 2007 (CA)10.** to fortify the foregoing contention.

A loss which is capable of being quantified and compensated by an award of damages may not be considered substantial.

The question that may be asked in view of the applicant's contention that he shall suffer loss of goodwill is "what is goodwill and is it capable of being quantified and compensated".

According to the **8th edition of Black's Law Dictionary**. Goodwill is "**a business's reputation, patronage and other intangible assets that are considered when appraising the business especially for purchase, the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets**".

From the aforementioned definition, it is clear that goodwill is capable of being quantified and compensated by way of damages.

Then again, in the present context, the question of goodwill would not arise. The dispute between the applicant and the respondent is in relation to a landlord/tenant relationship which is governed by specified terms and conditions. If therefore, a party breaches a condition of the agreement he cannot be heard to invoke the concept of goodwill to prevent the other party from exercising his rights under the agreement.

It is the view of this court that the applicant has failed to fully fulfill the first condition for grant of a stay order pending appeal.

Consequently, the application is not merited. It must and is hereby dismissed with costs.

[Read and Signed at Kisumu this 15th day of May 2009].

J.R. Karanja

J U D G E

J.R.K/va