



JACKSON MAHINDI GIITOMBA t/a

MACBONES HOTEL..... APPELLANT/APPLICANT

VERSUS

ANDREW KIMANI.....1ST RESPONDENT

JOSIAH MWANGI.....2ND RESPONDENT

WANJOHI WATHEKA.....3RD RESPONDENT

RULING

1. By a Notice of Motion dated 22nd July 2009, Jackson Maindi Giitomba t/a MacBones Hotel, seeks an order of stay of execution of the judgment entered against him in the Business Premises Rent Tribunal Case No. 555 of 2008, pending the hearing and disposal of the appeal.

2. The application is anchored on the following grounds stated on the face of the application:

(i) The appellant has plausible reasons that this appeal has high chances of success.

(ii) That the appellant will suffer irreparable loss if this application is not allowed and this appeal will be rendered nugatory.

(iii) That this application is brought timeously.

(iv) That the appellant is ready and willing to deposit reasonable security in Court as a sign of good gesture as the Court may direct.

3. The application is also supported by an affidavit sworn by the applicant. In the affidavit the applicant explains that the judgment increased rent for his business premises from Kshs.80,000/= to Kshs.253,000/= per month with effect from 1st July, 2009.

4. The application is opposed by respondents. Grounds of opposition have been filed contending that the application is misconceived, incompetent, lacking in merit and substance, and that the application does not meet the test for granting orders of stay of execution. A replying affidavit has also been sworn by Josiah Mwangi, in which he depones that the application is only calculated to hinder or delay the respondent from realizing the fruits of the judgment, given by the Tribunal. Without prejudice, Mwangi depones that the applicant did propose a sum of Kshs.155,000/= in his rent assessment and valuation report submitted to the Business Premises Rent Tribunal and that he should therefore be ordered to pay this amount monthly to the respondent.

5. I have carefully considered this application. Under Order XLI Rule

4(2) of the Civil Procedure Rules, an order for stay of execution pending appeal can only issue on the following conditions:

(i) Where the court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued;

(ii) That the application has been made without unreasonable delay;

(iii) That the applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.

6. In this case, the judgment of the Tribunal, hiked the rent for the business premises from Kshs.80,000/= to a sum of Kshs.253,000/=. I find that the applicant will suffer substantial loss as his business will be adversely affected. I find it fair and just that in the interim period pending the hearing of the applicant's appeal, the order of the Tribunal be partially stayed to the extent that the applicant shall pay only an enhanced rent of Kshs.155,000/= monthly, until the appeal is heard and disposed of.

7. The order for stay of execution is further anchored on the following conditions:

(i) The appellant shall file and serve a record of appeal within 90 days from the date hereof.

(ii) The appellant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.

(iii) Costs of this application shall be costs in the appeal.

Dated and delivered this 29th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Achoki for the appellant/applicant

Gachimu holding brief for Mugo for the respondent

Eric, court clerk