



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

Civil Appeal 466 of 2008

AVENUE FRESH PRODUCE LIMITED.....APPELLANT

VERSUS

VIJAY KUMAR SHAMJI PATEL.....RESPONDENT

R U L I N G

A preliminary objection has been raised to the hearing of the appellant's motion dated 2nd September, 2008 on the following grounds: -

- (1) That the appellant has not sought the leave to file the present appeal as is required by law and therefore the appeal herein is a nullity and void *ab initio*.
- (2) That the appellant has disguised its application whose main objective is to execute an order of the Tribunal which jurisdiction is not vested in this appellate court, and therefore the said application is an abuse of the court process and should be dismissed forthwith.
- (3) That the appellant has not attempted to seek a stay of execution in the Tribunal and therefore is not legally allowed to seek the same before this appellate court.
- (4) That there is no order capable of execution and therefore there cannot be ordered a stay of execution where there are no such orders in the first place.
- (5) That the application has no valid affidavit supporting it and therefore the same cannot stand.

It is submitted that an appeal from an order of the Tribunal under the Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301, has to comply with Section 75(1) and Section 76(1) of the Civil Procedure Act. Therefore, since orders from the Tribunal are not included in Section 75(1) of the Civil Procedure Act as orders from which appeal lies as of right, leave of the court must be obtained, otherwise the appeal is void *ab initio*. It is also submitted that the main objective of the applicant's motion appears to be to execute the order of 2nd September, 2008 issued by the Tribunal which it is submitted this court has no jurisdiction to do. It is maintained that execution of Tribunal orders is vested in the subordinate court of first class as provided under Section 14(1) of the Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301. This court cannot therefore in its appellate jurisdiction exercise original jurisdiction by dealing with execution proceedings. It was further submitted that the appellant cannot apply for an order of stay of execution pending appeal from this court, without first making such an application to the Tribunal. In this regard Order XLI Rule 4(1) of the Civil Procedure Rules was relied upon. Moreover, it was submitted that the appellant has not filed a copy of the order of

the Tribunal in the subordinate court in accordance with Section 14(1) of Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301 to facilitate the execution proceedings. It was therefore maintained that there was no order capable of execution and an order of stay of execution pending appeal cannot issue as the same will be in vain. It was also submitted that the affidavit sworn in support of the motion was defective as it was sworn on the 3rd September, 2008 a day after the date of the motion which is dated 2nd September, 2008. The court was therefore urged to dismiss the motion.

For the appellant, the court was urged to overrule the preliminary objection. It was submitted that under Order XLII Rule 3 of the Civil Procedure Rules, the Tribunal order being conclusive on the determination of the rights of the parties, the appellant had a right of appeal as of right and no leave was required. It was maintained that there were no orders issued by the Tribunal on the 2nd September, 2008 capable of being executed. It was maintained that the Tribunal had only given a ruling clarifying the position.

With regard to the application for stay of execution, it was submitted that Order XLI Rule 4(1) of the Civil Procedure Rules, does not make it mandatory for the applicant to first apply for stay of execution in the original court before applying for stay of execution in the appellate court. It was therefore maintained that this court has jurisdiction to issue an order for stay of execution. It was submitted that the Tribunal orders sought to be stayed provided for a thirty days stay of execution with effect from 29th August 2008. The appellant was now seeking an order for stay of execution pending hearing and determination of the appeal. It was submitted that Section 14(1) of the Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301 was not mandatory but merely discretionary. With regard to supporting affidavit, the court was referred to Order L Rule 14 of the Civil Procedure Rules which provides that all application are deemed to have been made on the date of filing. It was submitted that the notice of motion having been filed on 3rd September, 2008 it is deemed to have been made on the same date as the supporting affidavit. In response to the submissions made on behalf of the respondent it was submitted that Order XLII Rule 3 of the civil Procedure Rules being a subsidiary legislation cannot override the statutory provisions provided under Section 75 and 76 of the Civil Procedure Act.

I have considered the preliminary objection. It is evident that all the issue raised relates to matters of law and therefore have been properly raised as a preliminary objection. With regard to the competence of the appeal which is pending before this court, Section 15 of the Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301 provides as follows: -

“(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

In my considered view, the appeal before this court, being an appeal against the judgment of the Business Premises Rent Tribunal, with regard to a reference before it, either party was at liberty to file an appeal within 30 days and no specific leave of the court was necessary. The appellant having filed his memorandum of appeal only a few days after the judgment of the Business Premises Rent Tribunal the appeal was properly before this court. Neither Section 75 nor Section 76 of the Civil Procedure Act takes away the automatic right of appeal provided under Section 15 of the Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301. It is evident from the notice of motion filed on 3rd September, 2008, that the appellant seeks *inter alia*, orders of temporary injunction restraining the respondent from “evicting or otherwise whatsoever interfering with the appellant’s quiet occupation, possession and/or enjoyment of the premises, namely LR.No.904/242 off North Airport Road Embakasi”. Apparently, the respondent views the order of temporary injunction as an attempt to enforce the orders of the Tribunal dated 2nd September, 2008 in which the Tribunal stated that “any attempt to harass the tenant before the expiry of 30 days is contrary to the provisions of Cap 301 and the Landlord must accordingly be restrained”. First, the order of the Tribunal as above quoted is not an order capable of execution. Secondly, I find nothing unusual with the prayers for temporary injunction. Indeed, this court has powers

under Order XLI Rule 6 of the Civil Procedure Rules to grant orders of temporary injunction in its appellate jurisdiction provided the procedure for instituting an appeal from a subordinate court or Tribunal has been complied with. In this case, the appellant has an appeal which is properly before this court and this court has therefore jurisdiction to hear and grant such an application for temporary injunction pending appeal.

With regard to the application for stay of execution, it is apparent from the order, subject of the appeal that the Tribunal stayed its order for a period of 30 days as the appellant was required to vacate the premises within 30 days from the date of the Tribunal's Order. The execution process could therefore only have taken place after the 30 days. Notwithstanding this, there was nothing to prevent the appellant having filed his appeal from coming to this court to seek an order of stay of execution. Indeed, it would have been prejudicial for the appellant to await the commencement of the execution proceedings. Further I have considered Order XLI Rule 4(1) of the Civil Procedure Rules, which states as follows: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

My understanding of this rule is that, although the court appealed from has powers to make an order for stay of execution, the rule does not make it mandatory for an application for stay of execution to be first made to the court appealed from, before it can be made to the appellate court. The fact that no application for stay of execution may have been made in the Tribunal is therefore inconsequential.

Finally, as concerns the affidavit sworn in support of the motion, I concur with counsel for the appellant that under Order L Rule 14, the motion is deemed to have been made on the date of filing which is 3rd September, 2008. The affidavit having been sworn on the same date, the respondent's objection in this regard cannot hold.

For the above reasons, I find no substance in the preliminary objection. I overrule the objections and order that the notice filed on 3rd September, 2008 shall proceed to hearing.

Those shall be the orders of this court.

Dated and delivered this 24th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Muigai for the appellant

Onyango for the respondent