



REPUBLIC OF KENYA
IN THE HIGH COURTR AT NAKURU

CIVIL APPEAL 86 OF 2006

[Formerly Nairobi HCCA No. 220 of 2006]

JAMES N. NJOROGE.....APPELLANT

VERSUS

KANYOTA FARM LTD.....RESPONDENT

RULING

The appellant, **James Njoro** filed the memorandum of appeal against the judgment by Honourable Mrs. N. A. Owino, the chairman of the Business Premises Rent Tribunal, Nakuru in case **No. 15 of 2003** on the 15th April 2006. The appeal was filed in the first instance in Nairobi but following an order by **Honourable Mutungi, Judge** made on 25th may, 2006, this appeal was transferred to Nakuru High Court for hearing and determination.

Simultaneously, with the filing of the memorandum of appeal, the appellant filed this Notice of Motion in which he has sought for orders of stay of execution of the judgment and order of the tribunal delivered on 16th March, 2006. The application is premised on the grounds that the appellant has an arguable appeal with a high likelihood of success. That the appeal would be rendered nugatory if the order of stay of execution is not granted and finally, the appellant would be prejudiced and would suffer irreparable harm, damage and great inconvenience if the application for stay was not granted.

The above grounds are expounded in greater detail by the affidavit in support of the application sworn on 20th April, 2006 by the appellant.

In further arguments, counsel for the appellant submitted that the appellant has duly complied with the requirements set out under **Order 41 Rule 4 (ii) of the Civil Procedure Rules** and set out to show that the applicant would suffer substantial loss if stay is not granted. Counsel submitted that the appellant has been carrying out business in the suit premises from 1981 and this is the only business where the appellant relies upon for his livelihood.

On the issue of security, counsel submitted that the appellant is ready to give any security as this court may deem convenient and the appeal was also filed within a reasonable time. This application was strongly opposed by the respondent, who relied on the replying affidavit by **Mwangi Muchemi** which was sworn on 4th May, 2006. According to the respondent, the present application is defective for failure to annex the proceedings or the order that the appellant is appealing from. Failure to annex those vital documents has also denied this court an opportunity to get an insight of the appellant's case before the tribunal. Thus, this court will not know the nature of the appellant's case. The memorandum of appeal is also defective as it purportedly relates to a tribunal case in Nyahururu when indeed there is no such a

tribunal case.

Counsel also submitted that the appellant is guilty of non disclosure of another **Civil Appeal No. 131 of 2005** which is pending before this court between the same parties and the appellant has not taken any steps to prosecute this appeal and the present application is merely tailor made to allow for a continued stay of the appellant in the demised premises, without legal basis.

On the issue of substantial loss, counsel for the appellant submitted the appellant has not demonstrated how he would suffer loss by giving the details of the business that he carries on or the kind of damages he is likely to suffer. The appellant has also not deponed that he is going to give security as required by the rules. Counsel put forward an authority in the case of **Kwa Hola Pharmacy Vs Copy Cat Ltd [2002] 2 KLR page 269** where the High Court in a similar application held that:

“It is the responsibility of the applicant to establish that he has an arguable appeal. That cannot be done unless and until he placed before the court sufficient material to enable the court determine that point. In this case in the absence of the proceedings and judgment, there is material before the court on which it can decide whether or not the applicant’s appeal is a good appeal or that it may have good chances of success or that it has arguable issue”.

This being an appeal from the tribunal’s judgment, when determining the application for stay, the appellant must demonstrate that he has an arguable appeal amongst other requirements. For this court to appreciate the nature of the appellant’s grievances with the tribunal’s judgment, the appellant should have annexed the copies of the judgment from the said tribunal. Failure to do so, this court has been denied an opportunity to appreciate the appellant’s case. I agree with the holding in the above judgment that when this court is exercising its jurisdiction as the appellate court, the proceedings and judgment being appealed from should form an integral part of this application for stay, to enable the court examine the merits or lack of it in the appeal.

Secondly, on the issue of whether the applicant has demonstrated that he would suffer substantial loss, no material was placed before this court to show the substantial loss except just an averment that the appellant carries on business and derives an income from the said premises.

This issue was denied by the respondent who deponed that the appellant owns his own property within Nyahururu Municipality and therefore cannot be inconvenienced or rendered destitute. Moreover, the appellant in his supporting affidavit did not give any security or undertake to give such security in the event that the appeal would be unsuccessful.

The other matter that I have put into consideration is the fact that the appellant did not disclose to this court the existence of a similar appeal between the same parties being **Civil Appeal No. 131 of 2005** which was filed in July, 2005 and in which no action has been taken.

This state of affairs lends credence to the submission by counsel for the respondent that the appellant has come to this court with dirty hands.

In view of the above analysis, I find no merit in this application which I hereby dismiss with costs to the respondent.

It is so ordered.

Ruling read on 4th May, 2007.

M. KOOME

JUDGE