

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

Civil Appeal 483 of 2005

ELITE STUDIOS LIMITED 1ST APPELLANT

PANA RATILAL SHAH T/A CONTINENTAL OUTFITTERS ... 2ND APPELLANT

VERSUS

INTERCONTINENTAL HOTELS LIMITED..... RESPONDENT

RULING

The Chamber Summons herein, dated 10/1/06 under Order 49 rule 5 of the Civil Procedure Rules seeks enlargement of time within which to file and conclude the appeal herein; extension of stay of execution orders, issued on 20/9/05, pending appeal.

The application is supported by an Affidavit of Charles Goi, and is on the grounds, *inter alia*, that: On 20/9/05, this Court, vide Visram J., issued a stay of execution for four (4) months within which to obtain proceedings from the Business Premises Tribunal and prosecute the appeal; that that period proved to be inadequate as the proceedings were not available until 7/11/05, and the Record of appeal filed on 24/11/05; the original file from the Tribunal was not available, and that is required before directions by the court, under Order 41 Rule 8B of the Civil Procedure Rules. If the orders of stay of extension are not extended, then there will be eviction which will render the appeal nugatory. Finally, the delay in filing the appeal was beyond the appellant's control.

In opposition, the Respondent avers that applicant applied for the stay of execution on 8/7/05 which application was heard and granted on 20/9/05 on condition that the appeal be prosecuted within 4 (four) months from 20/9/05, that the applicant violated court orders and did not live up to the above condition; that the issue of stay of execution was dealt with, and under Section 7 of Cap. 21, Laws of Kenya, it was RES JUDICATA; that the applicant did not request for the proceedings from the Tribunal until 10/1/06, which was barely 10 days prior to expiry of the time given by this court.

Having perused the pleadings herein, and heard learned counsel for both sides, I have reached the following findings and conclusions.

The basic question, and point of dispute in the application, is whether having failed to live up to the time stipulated by this court, vide Visram J, on 20/9/05, the applicant should be granted the extension now sought.

The chronology of the events clearly shows that the applicant did all within his power, but the time given, of four months, was not adequate to process the appeal matter. The difficulties in obtaining the proceedings from the Tribunal, a duty placed on this court, rather than the applicant, clearly illustrate the optimism in the order of 20/9/05.

I find and conclude that the delay was not of the applicants' making.

On *res judicata* doctrine, that is clearly misconceived. The application is not seeking a re-opening of the litigation that was dealt with by Visram J. The application seeks enlargement of the period within which to file the appeal under, order 49 rule 5 of the Civil Procedure Rules. This court has the power,

under the above order and rule, to enlarge such time as was stipulated by Visram J, even when that period has lapsed.

The prayer for the extension of the stay of execution order, pending appeal, has to be understood within the context of the case herein. Execution here would mean eviction of the applicant from the premises and that would reduce the appeal to an empty shell devoid of any meaning.

All in all, and for reasons given above, I grant the application herein, as prayed, and enlarge the time within which to file and prosecute the appeal, by six (6) months from today's date. I also extend the stay order of execution until the appeal is heard and finally determined.

No order as to costs for this application or alternatively costs to abide the appeal.

DATED and delivered in Nairobi, this 6th Day of December, 2006.

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O.K. MUTUNGI

JUDGE