



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 365 OF 2004

SILVER CROWN MERCHANTS LIMITED APPELLANT

VERSUS

AGRICULTURAL & INDUSTRIAL

HOLDINGS LTD RESPONDENT

RULING

This is an application under Order XLI rule 4 of the Civil Procedure Rules. In it, the Appellant seeks the following orders:

“2. That execution of the Judgment and decree of the Business Premises Rent Tribunal dated 6 th October, 2003 be stayed pending appeal

3. (Costs)”.

The matters leading to the application are set out in the supporting affidavit of Abdullahi Sheikh Dahir, a Director of the Appellant, sworn on 31st May, 2004 and the Replying Affidavit of Michael K. Wandegwa, the General Manager of the Respondent, sworn on 16th June, 2004. I will summarise them as follows.

The Respondent let out its property known as L R No 209/111/13374 to the Appellant for a period of 3 years. Before the end of the tenancy, the Appellant applied to the Respondent for extension of the lease. The request was rejected. The Appellant, however, requested the Respondent to be allowed to stay on for a period of 5 months to enable them “collect” their debts and relocate to another place. However, the Appellant did not vacate after the expiry of the additional period. The Respondent filed a suit in this court to recover possession of its property but that suit was later withdrawn. The Respondent then gave the Appellant notice to terminate the tenancy. The Appellant did not support the notice and filed a reference in the Business Premises Rent Tribunal. In its decision of 6th October, 2003, the Tribunal decided against the Appellant but allowed it about nine months to vacate.

According to the affidavit of Mr. Wandegwa, Mr. Dahir made verbal representations to him on behalf of the Appellant that the Appellant was willing to vacate at the expiry of the period allowed by the Tribunal. He was, therefore, surprised that only days to the eve of the expiry of that period, the Appellant filed this appeal and the application before the court. He also complained that the Appellant had defaulted in the payment of rents which had prompted the proclamation of its goods on one occasion for outstanding rent in excess of Kshs.2,000,000/=. Mr. Dahir on his part deponed that his company stood to lose an income

of close to Kshs.1,000,000/= per month if the order for stay pending appeal was refused.

Mr. Wamae for the Respondent took issue with the competency of the Appeal arguing that it was incompetent for having been filed out of time and that the Memorandum of Appeal was not accompanied with the decree appealed from. The first objection is serious as it is quite obvious that the appeal was indeed filed out of the thirty (30) day period allowed by Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301). However, I do not think that it is safe for this court to summarily reject the appeal on that ground since the Appellant is given grace in the proviso to the subsection which allows the court to extend the time for filing of an appeal. The argument of Mr. Kamaara who appeared for the Appellant that time for filing an appeal began to run when the proceedings and Judgment were made available is not correct. The Act is clear that an appeal should be brought “within thirty days after the date of ... (the determination or order of the Tribunal).”

There is nothing in the Act that says that a party should wait for proceedings and Judgment before filing his appeal. As to the objection in respect of failure to file the Memorandum of Appeal with the decree, I do not agree with Mr. Wamae that that was fatal. Order XLI Rule 1A of our Civil Procedure Rules is clear that a decree or order appealed from may be filed after the filing of the Memorandum of Appeal. The portions of Mulla on Civil Procedure cited by Mr. Wamae are, therefore, not useful for our circumstances which are clearly defined by statute. Having dealt with the preliminary matters, let me now proceed to decide the application on merit. The jurisdiction of the court in considering an application for stay of execution pending appeal is governed by Order XLI Rule 4 (2) which sets out the conditions for stay. These are summarized as follows:

(a) The Applicant must show that he stands to suffer substantial loss if the Order for stay is refused and that he makes his application without unreasonable delay; and

(b) Security for the stay is given.

What amounts to substantial has been the subject of judicial interpretation on many an occasion. It means that one must show that he stands to incur loss which cannot be compensated by an award of damages. The Appellant through its Director stated that it was ready and willing to provide security as the court would order. That is satisfying one of the conditions. However, it is upon an Applicant to satisfy both conditions before he can expect to enjoy an order for stay.

The Appellant through its Director stated that it generated a monthly income of Kshs.1,000,000/= from the Respondent's property yet it could not pay the monthly rents of Kshs.100,000/= to the Respondent on time. The Appellant was also not forthright in its application that its initial tenancy had expired through effluxion of time and that it sought more time which was granted and which had expired. After the expiry of the original lease since July 2000, the Appellant has continued in occupation of the Respondent's property by manipulating the judicial process. There is evidence that the Appellant entered into agreements with the Respondent and was granted indulgence which it abused by engaging the Respondent in this litigation which has played to the advantage of the Appellant but unfairly. That aside, the Appellant has itself quantified its possible loss if the stay is refused. In my view, if the Appellant were to succeed in its appeal, it may claim damages from the Respondent in the sum of the income it claims to receive per month.

The Appellant has therefore, not fulfilled both conditions to entitle it to the order of stay as sought.

In fairness to counsel and for the conclusiveness of record, I would like to state that I have read all the authorities cited by them and I do not think that any of them would affect the decision I have come to.

I, therefore, dismiss the Appellant's application dated 31st May, 2004 with costs.

Dated and delivered at Nairobi this 19th day of July, 2004.

ALNASHIR VISRAM

JUDGE