REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT NAIROBI

Civil Suit 426 of 2004(1)

RELISA HOUSING CO-OPERATIVE SOCIETY LTD…
PLAINTIFF

VERSUS

GRACE ATIENO OKELO

JAMES OKELO ONYANGO

T/A JOO FASHION MAKERS &

GENERAL AGENCIES……DEFENDANT

RULING

The Applicant applies for a stay of execution of orders of this court and execution of the decree herein pending the determination of an intended appeal.

The Applicants alleged they will suffer irreparable damage if they are evicted from the suit premises.

No substantial loss is alleged in the Application. However the Applicant says an appeal would be rendered nugatory if the application is not granted. Mrs. Guserwa relied on the case of Niazen Kenya Ltd & Others versus National Industrial Credit Bank Limited. C. Appeal No. Nairobi 102 of 2001 and Oraro & Rachier versus Co-operation Bank of Kenya Ltd Civil Appeal No. Nairobi 238 of 1999 in which the Learned Court of Appeal determined that the appeals in these cases would be rendered nugatory if a stay was not granted. This however is not a criteria in this court.

Under Order 41 rule 4 the criteria to be considered by the court in granting a stay are:-

1. Sufficient cause shown

2. That it is just to do so

3. The court is satisfied that substantial loss may result.

4. There has been no unreasonable delay and

5. In an appropriate case security to be ordered for the due performance of the decree.

Mrs. Guserwa submits that substantial loss would occur if the stay is not granted as the business carried in by the applicant in the suit premises is their only source of income. Also they would lose the good will

attached to the premises.

Mr. Tiego opposed the application submitting that no substantial loss had been shown and any damage could be compensated for by damages. He further submitted that the Applicants carried on a business of selling fish and chips, which breached the term of the lease. The user clause states

"Permitted usage of the leased premises – the tenant shall not

convert the use of the office space without knowledge and

consent of the landlord"

He further submitted that the applicant was breaching clause IV and X relating to the burning of fires and doing anything which would increase the fire premium.

In the Replying affidavit of Michael Sande Dallah is annexed a letter from Alico alleging the chips cafe (the Applicant shop) poses a great hazard leaving them with no option but to cancel the fire policy.

These matters are periferal to the main consideration namely substantial loss.

The fact that the business is the sole source of income for the Applicant is not in my view sufficient. There is no reason why they should not locate their business elsewhere. It has not been shown that the business is their sole source of income and that the suit premises has same special characteristic which distinguishes if from other premises in which their business can be carried on. In the circumstances I am not satisfied that the Applicant has shown substantial loss. Further so far as the policy if this case is concerned it would be putting an intolerable burden on the Defendant to allow the Applicant to carry on the business of a chips shop resulting in the loss of its fire policy. In the result I dismiss this application with costs to the Respondents.

Dated and delivered at Nairobi this 9th day of December 2004

P.J. RANSLEY

JUDGE