



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 8 OF 2003**

*(From the original Civil Suit No. BPRT 109 of 2001)*

**OXYGEN LIMITED .....APPELLANT**

**VERSUS**

**GATAKAINI INVESTMENT CO. LTD. ....RESPONDENT**

**RULING**

This application dated and filed in this court on 10th January 2003 is for stay of execution of the decision of the Business Premises Rent Tribunal in case No. 109 of 2001 dated 13th December, 2002 at Nairobi; pending the hearing and final determination of the appeal filed herein.

The application is supported by the grounds set out on the body thereof and the supporting affidavit deponed to by one Mike Ruraya, the Director of the appellant sworn on the date of filing the application.

The grounds on the body of the application are that the appellant is the tenant of the respondent in the premises situated at L.R. No. 209/8245 – Nairobi, that judgment was delivered by the court on 31st December 2002 and the appellant was ordered to hand over vacant possession of the appellant's business premises to the respondent within 30 days, that the appellant has filed an appeal against the said judgment; that it would take some considerable period before the said appeal is heard by this court, that the applicant has good and valid grounds of appeal against the said judgment; that unless a stay is granted forthwith the appellant's appeal shall be rendered nugatory in the event that the appeal succeeds.

That the appellant stands to suffer substantial loss unless stay of execution of the Tribunal court's order is granted and that the application herein has been made without unreasonable delay.

The supporting affidavit is in similar manner as the grounds on the body of the application except to deny that the applicant had defaulted in payment of rent for 2 months when it was issued with termination notice and that on receipt of the notice to vacate the premises the applicant had filed a reference. And also that the applicant and family all depend on the income derived from the said business premises and that unless stay of execution is granted the applicant would suffer severe consequences.

In this court on 14th March 2003 counsel for the parties appeared to submit on the application with counsel for the appellant repeating that the appeal has arguable grounds.

According to counsel, though notice was given for default of payment of rent for two months, he had exhibited receipts showing rent had been paid up to March 2003.

That if there were rent arrears then the court would order these to be deposited in court.

According to him, there was another matter pending in the tribunal over rent increase which was not yet

determined.

That since issue of rent increment is still pending in court, this was a good case for status quo being maintained. Counsel stated that the applicant was not in court in bad faith because he was up to date with payment of current rent.

According to him the respondent continues to accept Kshs.55,000/= as rent though it is supposed to have been increased by Kshs.45,000/= effective. 1st October 2002 and that it is only fair that the applicant be granted stay and that the court should exercise its discretion to grant the same.

Counsel for the respondent opposed the appeal and said the appellant has been in the habit of defaulting in its payment of rent or making late payments. And to demonstrate this counsel said she received a cheque for rent for December 2002 on 6th March 2003 while cheques for rent for January and February 2003 – Kshs.110,000/= were received on 13.3.03.

That though cheques for the three months had been received, counsel could not say rent had been received until the same had been presented and paid by the bank because the appellant was known to issue cheques for rent which when presented to the bank for payment, were returned unpaid as in case of cheque numbers 600572, 600590 and 600595 for Kshs.55,000/= each being rent for August, 2002, December 2002 and January 2003.

Counsel stated that the notice the subject to the case giving rise to this appeal was issued because the appellant had defaulted in payment of rent for 2 months after such rent had fallen due.

That at the time the notice to terminate was served the rent was 3 months in arrears.

That in view of these facts there was no arguable appeal by the applicant because even as of today he is still in arrears of rent.

That during the hearing in the tribunal the applicant admitted he had sublet the suit premises to third parties and that if stay order is granted it will be the respondent to lose.

As regards rent increase the appellant was served with notice to this effect to take effect on 1.12.2002 but that up to that date no reference had been made hence the new rent had taken effect – from 55,000/= to Kshs.100,000/= per month.

That the application at the tribunal now is for leave to file such reference out of time and this is the application not yet heard.

The applicant does not show that the new rent will not be refunded if the appeal succeeds; hence the question of the appeal being rendered nugatory if the order of stay is not granted does not arise.

That the appellant does not show why the courts discretion should be exercised in his favour. She prayed that the application should be refused.

These are the submissions of counsel for the parties which have been recorded and considered.

What comes out in the case subject to this appeal is that the appellant has not always paid rent in time and this is demonstrated by the fact that a cheque for rent for the months of January and February 2003 was received on 13th March 2003 while rent for December 2002 was received on 6th March 2003. The appellant did not dispute this.

There has also been revelation during the submissions that at times the appellant has issued cheques for rent which have bounced. Counsel for the respondent gave the example of cheque numbers 60072, 60092 and 60095 being rent for August, December (2002) and January 2003. This too the appellant counsel did not dispute.

The implication here is the appellant is not a reliable tenant.

In fact notice to give vacant possession was issued due to rent default for 2 months. The appellant does not deny this but says nonetheless, that rents, though late have been received by the respondent.

There would be no proper reason for the landlord to refuse rent properly due to him once paid. If they had been refused, the appellant would still have raised this as justification probably for nonpayment of rent.

When an application for stay of execution is made, it must be backed by the demonstration that the applicant will suffer substantial loss, if the same is not granted.

In this case, for instance, the applicant should show that if the order is not granted and eviction carried out the applicant cannot get suitable premises to successfully carry out his business. No such plea has been given either in the grounds stipulated on the body of the application, the supporting affidavit and/or the submissions on this appeal.

And in view of the submissions made herein one cannot say with certainty that there is a prima facie appeal with the probability of success.

The order sought in this application is at the discretion of the court but in the present case I do not feel I should exercise this discretion in favour of the applicant.

I dismiss the application with costs to the respondent.

Delivered and dated this 20th March 2003.

**D.K.S. AGANYANYA**

**PRINCIPAL JUDGE**