

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.84 OF 2002

**HASSAN AWADH SALIM t/a SUEZ PROVISION STORES.....
APPELLANT**

=V E R S U S=

ABDALLA SAID BARAKAT

BARAKAT SAID BARAKAT.....RESPONDENTS

R U L I N G

The Applicant applies for stay of execution under Order 41 rule 4. He says he has a good appeal with good chances of success. Indeed he argues that the chances are overwhelming. He further argues that the Notice of termination was issued by two people one of whom was not a landlord. In my view if this is the state of facts, then the Tenant did not get prejudiced as he could ignore the part of the person who was not a landlord and rely on the part of the proper landlord. The Applicant does not say there was no notice and does not further say that the notice did not impart to him the correct import of the same i.e. termination. This is not an arguable ground in the appeal.

But he may have a good ground on the ground that he never parted with possession and that the Notice covered a period which is not supported by evidence. He accordingly has arguable grounds.

It is also likely that the tenant who stands to lose possession, and cease his business at the premises thereby will likely suffer irreparable loss and/or damage. I also from the arguments find that the appeal if successful eventually, will be rendered nugatory if possession is parted with before the appeal is determined. It is not likely that possession will be easily returnable or business lost easily recoverable after they have ceased to be. Unfortunately the application under which the relief of stay is sought is incurably defective. It is not based on any grounds. In a similar application where a Notice of Motion was not based on any grounds, i.e. National Bank of Kenya Ltd -vs- Ndungu Njau, Court of Appeal Civil Appeal No.211 of 1996 – the Senior Judges held that failure to base a Notice of Motion on no grounds, was a fatal omission. I do agree, more so because the authority binds me.

Accordingly, I find that this application is incurably defective. I strike it out. Since I am convinced that the application, otherwise had some merit, I allow the Applicant to file a fresh application within the next 7 days. It is so ordered.

Costs to the Respondent.

Dated and delivered at Mombasa this 18th day of June, 2002.

D. A. ONYANCHA

J U D G E