



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.94 OF 2002**

AHMED TELEVISION SERVICES ..... APPELLANT

VERSUS

BENSON MUTISYA MWILU ..... 1ST RESPONDENT

WAMBUA MWILU ..... 2ND RESPONDENT

MUSILI MULA ..... 3RD RESPONDENT

MUTISYA MWAMBETU ..... 4TH RESPONDENT

**RULING**

Notice of Motion dated 1st August 2002 is seeking an order that this Court stays the orders of the Business Premises Rent Tribunal as made on the 31st May 2002 in Business Premises Rent Tribunal Case No.26 of 1996 (Consolidated with Case No. 28 and 38 of 1996) until the appeal preferred therefrom has been heard and determined. It is also seeking that there be an order for costs. There are two grounds of application and these are first that the Applicant herein has already preferred an appeal from the judgment/decreed of the Business Premises Rent Tribunal Court dated 31st May 2002 which appeal is arguable with good prospects of success, and secondly that unless stay is granted as sought, the applicant shall be dispossessed of the suit premises, thereby rendering the said appeal nugatory with substantial loss to the Applicant.

The application is supported by an Affidavit sworn by Ahmed Ishak Haji who alleges to be sole proprietor of the Applicant firm and the same Affidavit states mainly that the appeal he has filed is meritorious and has overwhelming chances of success as the relevant Notice to terminate was addressed to a person who had passed away in 1970, and thus was not a tenant at the material time as the Appellant had been carrying out business in the same premises under the firm name as he had been registered as coproprietor with his father on 28.10.1970 but his father died on 25th December 1970; that the intention stated in the notice to give vacant possession is negated by the then existence of a number of vacant shops which the Respondent did not occupy; and that he had been duly recognised as the trader in the suit premises; that he has been trading in the same premises for several years and has built up considerable customer and good will and all these would be lost if execution was to proceed and his appeal would be rendered nugatory, and that he has not been able to obtain similar premises in the vicinity of his present location. The same Affidavit had several annexures to it.

The Respondent opposed the application and filed eight grounds of opposition together with an Affidavit sworn by the same Respondent. The Affidavit also had several annexures to it. The brief summary of the

grounds of opposition is that the Application is based on an incompetent Affidavit contrary to Section 2 of the Evidence Act and Section 20 of the Registration of Business Names Act; that the Applicant is an imposter and a trespasser who has no right to commence the appeal; that the application is not available under Order 41; that the applicant is not the legal representative of the tenant in respect of the suit premises; that the applicant is guilty of non-disclosure of material facts and is not a proper person for discretionary remedy, and lastly that there are no grounds for stay of the order.

In the Affidavit sworn by the first Respondent Benson Mutisya Mwilu, the Respondents stated that the Applicant had all along until about 3 years ago presented himself as Mr. Essak Haji and he filed the reference in the name of Essak K. Ahmed; that the reference filed in Business Premises Rent Tribunal case No.28 of 1996 (Mombasa) was dismissed for being incompetent having been filed by an imposter. That applicant is not telling the truth that he filed Reference in Business Premises Rent Tribunal Case No. 26 of 1996; that the Applicant is not coming out clear when he says he was a co-proprietor of Ahmed" T.C. Service before the death of his father in 1970 and that he registered change of particulars on 11th May 1982.he Respondent further states that the Applicant has preferred an Appeal against a non-existent order or judgment; that the Applicant is not honest even as to his relationship with the deceased as at one time he said he was the deceased brother and later he said he was son of the deceased and also his correct name has not been given and lastly that the applicant, being an imposter and a trespasser, cannot suffer any damages or loss if he gives up vacant possession.

The General principles of law applicable in a case such as this one where the applicant is seeking stay of execution pending the hearing and determination of appeal filed into this court against the decision of the subordinate court or Tribunal is now well settled. The Applicant must show that the appeal he has filed is arguable and secondly he must also show that if it succeeds eventually then the results will be rendered nugatory if the stay was not granted.

Further in cases such as the one before me which is essentially a possession suit, the legal position is well coded in the case of **Mbogo vs. Mugora (HCCC No.106 of 1994)** where Shah J. (as he then was) stated as follows:

*“It is settled law that in possession suits stay ought to be granted as otherwise a successful appeal will be rendered nugatory.”*

Thus unless, I do find that the appeal is not arguable, in possession cases such as this, stay of execution should normally be granted. However, in my mind, one aspect must be added to these legal expositions. That is that as stay of execution is a discretionary remedy, the applicant must deserve the same remedy i.e He must come to court with clean hands. It is with all the above in mind that I do now proceed to consider the application.

First the Application states that it is brought under Order “XLI Rules 4, L Rule 1. Those are proper provisions to be invoked in such an application but as the order sought to be stayed were orders of a subordinate court, and as the ground relied on for seeking the same order was that the appeal had good chances of success, the decision appealed from should have been annexed to enable this court have an informed opinion as to whether the appeal being preferred is arguable or not. I do agree that in law that is not a necessary and that the case of **Ngovi-Latengo Co -op. Vs. A. Oswan (1959)E.A. 577** to which I was referred by Mr. Kimani, the learned counsel for the Respondent, is not relevant here as that was dealing with the competency or otherwise of an appeal in the absence of a decree or an order appealed from whereas here, the application is for stay of execution and is not dealing with final appeal itself, yet when one is telling the court in so many words that he wants the successful party in the court below to stop any action to realise the fruits of the sweet judgment on grounds that the appeal he (Applicant) has filed has good chances of success, the court is clearly and in my mind obviously enjoined to peruse the proceedings or the judgment to see for itself whether indeed the appeal is truly arguable. The court may also look at the Affidavit and what are deponed to form such an opinion, but in this case the Appellant’s Affidavit is so heavily contradicted and rebutted in so many material aspects that one cannot see to what extent the appeal is arguable. In such a case, Tribunal’s judgment or decision would have been of immense importance. Further the matters are not made easier by the fact that whereas this application is

seeking stay of the orders of Business Premises Rent Tribunal made on 31st day of May 2002 in Business Premises Rent Tribunal Case No.26 of 1996 (consolidated with Case No.28 and 38 of 1996), the Memorandum of Appeal dated 19th June 2002 and filed on the same date shows that the appeal (which forms the substratum of this application is an Appeal from the determination or judgment of the Business Premises Rent Tribunal at Mombasa in its Reference (Case No.38 of 1996 delivered on 31st May 2002 and whereas the Reference a copy of which was filed is Tribunal No.28 of 1996. An Amendment was made to the Memorandum of Appeal but still one is not certain as to why the Reference No.26 is being used in the case as Reference in Tribunal Case No.26 of 1996 is irrelevant. All these make it difficult for the court to find that an arguable appeal does exist.

The other point that makes it difficult to allow this application is the conduct of the Applicant. As I have stated hereinabove the remedies being sought are discretionary remedies. The court can only exercise its discretion in favour of a party that deserves the discretionary remedy. Order 41 Rule 4 (2) makes it clear that an application such as this one is supposed to be filed without any delay. From the records, the order of which execution is sought to be stayed was delivered on 31st May 2002. Memorandum of appeal was filed on 19.6.2002 and the first application for stay (which was struck out) was filed on 25th June 2002. Applicant's explanation for the delay is that he had earlier on been represented by another counsel but he later opted for another counsel and so it took sometimes for his present counsel to get the relevant file from the first counsel. That was in effect a delay caused by himself in deciding to get another counsel and that cannot be a good reason for the delay as he could have anticipated that his action in changing his counsels would result into a possible delay.

Secondly, the main thrust of the Applicant's application is that he has an arguable appeal on grounds that the Notice to Terminate was issued against a dead person. He claims that that dead person was before his death his partner in the business. The Tribunal seems to have decided inter alia that the applicant gave evidence as if he was the tenant whereas he was not the tenant and so ordered him to vacate the suit premises. That indeed means that in order to decide whether the appeal is arguable, I need to see the proceedings as well (even if in chairman's own handwriting). The Applicant has not availed the same and not only that, but he has throughout the record not annexed anything to show that he was a partner in the business firm of Essak K. Ahmed t/a Ahmed T.V. Services since 28th October 1970. Annexure F in the Affidavit of the Applicant says that the business Ahmed's T.V. Services was registered on 28th October 1970 and change of particulars was registered on 11th May 1982. My reading of the same annexure cannot confirm the allegation made by the Applicant at paragraph 5(b) of his Affidavit where he states:

*“(b) That the said notice was addressed to a person who was not the tenant; at the material time as I had been carrying on business in the name of Ahmed T.V. Services solely since the demise of my father and previous co -proprietor, ESSAK Haji Ahmed with whom I was on the 28 th October 1970 registered as co -proprietor but died on 25th December 1970. I annex hereto Ex.F relevant documents thereto.”*

I do not read in the annexure F certificate of registration of a change of name that the Applicant was the one registered together with another as partners in the business of Ahmed's T.C. Services. All I do read in that document is that with effect from 11th May 1982, one Ahmed Issac was the one authorised to carry on the business of Ahmed's T.V. Services as a result of change of particulars. One cannot ascertain as to why the Applicant has preferred not to come out clear on what really happened. Thirdly, the applicant's name is Ahmed Ishak Haji. The name in Annexure F Certificate of Registration of Change of Particulars says the person who was registered as a result of change of particulars is Ahmed Issac whereas the original was Essak K. Ahmed. All these confusions tend to show that the Applicant is not coming to court with clean hands. In any case why had he failed to inform the Landlords of the true position which according to him is that the original tenant died in December 1970 and he has all along been the real tenant carrying out the business under his own name. Why did he prefer not to regularise the tenancy.

All the above lead me into a finding that the Applicant is not coming to court with clean hands. I am fully aware that the question as to whether he is the right person to file an appeal against a decision of the tribunal is a matter for the court to decide on appeal and not at this stage and if that was the only matter raised against the application I would not have entertained it, but here, I do not have any proper material

before me to enable me decide whether the appeal is arguable and further I have a situation which as I have stated above leaves me with a feeling that the Applicant through his conduct does not deserve discretionary remedy and further there is also delay in bringing the application. All these put together makes it impossible to allow this application. I have considered the possible loss and whether the results of appeal would be rendered nugatory should the appeal eventually succeed.

That consideration would have been only possible if the Applicant had availed material to demonstrate that the appeal stood chances of success for it is that aspect which needs to be considered first and only if the appeal is arguable would the court proceed to see if the results would be rendered nugatory. Here, it has not been possible to decide that aspect due to the failure of the Applicant to provide material for such a consideration. Application is dismissed, costs to the Respondents. Orders accordingly.

**Dated at Mombasa this 19th Day of September 2002.**

**J.W. ONYANGO OTIENO**  
**JUDGE**