

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 6 OF 2020

PARKWAY INVESTMENT LIMITED.....APPELLANT

VERSUS

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY..... RESPONDENT

RULING

The Appellant brought the application dated 18/2/2020 seeking stay of execution of the order and decree issued on 7/2/2020 in Milimani Chief Magistrates Court Case No. 3812 of 2018 pending hearing of the appeal it lodged against that decision. The Appellant averred that it applied for stay of execution when the judgement was delivered and was granted stay of execution for 30 days. It contended that its appeal would be rendered nugatory if execution proceeded and that it stood to suffer substantial loss.

The application was supported by the affidavit sworn by the Appellant's Managing Director, Mr. Anthony Mwangi Ndungu, who deponed that the Appellant had an arguable appeal and stood to suffer substantial loss because the premises were not returned to their original state by the Respondent who it is claimed left the premises when it had rent arrears. He averred that the Appellant was prepared to give any security for the due performance of the decree that may be passed in the appeal. He produced copies of the memorandum of appeal, the letter requesting for proceedings together with correspondence exchanged in 2015 on the termination of the lease. The Respondent was a lessee at the Appellant's premises in Union Towers, Nairobi. He annexed a copy of the lease over the suit premises which was in issue before the trial court.

The Respondent's Principal Legal Officer, Nelius Wanjiru Mwangi, swore the Replying Affidavit in opposition to the application. She urged that the Appellant had failed to demonstrate that it had an arguable appeal or that it would suffer substantial loss for the court to grant the orders it seeks. The Respondent pointed out that the Appellant had failed to append a copy of the judgement it wishes to challenge on appeal.

The court has considered the application, replying affidavit and the submissions filed by the parties together with the authorities. The Appellant submitted that it had made the application for stay timeously. It argued that the Respondent was a public entity funded by the State and that it would be extremely difficult to recover funds from it if the Appellant succeeded on appeal. It added that there was no evidence to show the Respondent's financial ability to refund the decretal sum if the appeal succeeds.

The Respondent submitted that the Appellant had not met the requirements for the grant of stay.

From what can be discerned from the application and response, the appeal arises from the judgement of the Learned Magistrate who dismissed the Appellant's claim for damages for alleged breach of the lease dated 5/10/2011 by the Respondent in relation to the premises situated on the 10th Floor of the building known as Union Towers erected on land reference number 209/8523. The court allowed the Respondent's counterclaim for a refund of the deposit it had paid of Kshs. 705,000/=.

For the court to grant an order for stay of execution unless it is satisfied that substantial loss may result unless the order is made, the application must be made without delay and the applicant must furnish security the court may order for the performance of whatever decree may ultimately be given. Without the benefit of seeing the judgement appealed against, it is difficult for this court to determine whether the intended appeal is arguable. The application was made without delay and the Appellant stated that it was prepared to give any security for the due performance of the decree that may be passed in the appeal.

The court grants the Appellant stay of execution on condition that it deposits the decretal sum of Kshs. 705,000/= in an interest earning bank account to be opened in the joint names of the advocates for both parties within 30 days of the date of this ruling. The costs of the application shall abide the outcome of the appeal.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2021.

K.BOR

JUDGE

In the presence of:-

Ms. Sharon Maina for the Appellant

Mr. V. Owuor- Court Assistant

No appearance for the Respondent