



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. APPEAL NO. 96 OF 2015

RIVERSIDE SECURITY SERVICES LTD.....APPLICANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

(Under order 42 rule 6, order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act Cap. 21 Laws of Kenya, the inherent jurisdiction of the court and all other enabling provision of the law).

RULING

Coming up before me for determination is the Notice of Motion dated 1st December 2015 in which the Appellant/Applicant seeks for an order of stay of execution of orders 2, 3 and 4 of the orders issued on 31st July 2015 by the Honourable Chairman, Business Premises Rent Tribunal in Tribunal Case No. 878 of 2011 pending the hearing and determination of this Appeal.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Phillip K. Metto, the Director of the Appellant/Applicant, sworn on 1st December 2015 in which he averred that the Honourable Mbichi Mboroki, Chairman, Business Premises Rent Tribunal delivered a judgment and decree in this matter on 31st July 2015. He further averred that in the said judgment, the Chairman found for the Respondent on the ground of change of user when no sufficient or factual basis was laid before him, prompting them to file this Appeal. He added that pending the hearing and determination of the Appeal, he seeks for an order of stay of execution pending the hearing and determination of this Appeal pursuant to Order 42 Rule 6 of the Civil Procedure Rules, 2010. He stated further that it is not in question that the Appellant/Applicant's hotel business dealing with food and drinks is located on the suit premises and losses are bound to be suffered by the Appellant/Applicant if no stay is granted. He added that this matter is unique and has special circumstances on the basis that the Appellant/Applicant has been a tenant in the suit premises from January 2006 and has over the years build a customer base and substantial goodwill. He added that all will "go with the wind" if the Appellant/Applicant is forced out or evicted from the suit premises before the Appeal is heard and determined. He added that unless a stay of execution is granted, the Appellant/Applicant shall be evicted and possession taken over and the pending Appeal shall be rendered nugatory. He mentioned that the specific details and particulars of the pecuniary or tangible loss is as shown on the annexed statement of accounts, which were not annexed. He further averred that the question of requisite security is a matter for the discretion of the court, pointing out that the order under appeal was not a monetary decree or

judgment. He also stated that the Appellant/Applicant has not delayed in making this Application given that the orders appealed against were made by the Business Premises Tribunal on 31st July 2015.

The Application is contested. The Respondent filed the Replying Affidavit of Eric Langat, its Facilities Manager, sworn on 16th December 2015 in which he averred that he has full knowledge and information concerning the Appellant/Applicant's tenancy and occupation of the suit premises being L.R. No. 209/12535 located on Matumbato Road within the Upper Hill area in Nairobi. He averred that pursuant to a letter of offer dated 19th January 2006, the Respondent agreed to lease out the suit premises to the Appellant/Applicant for the term of 5 years 3 months from February 2006 to April 2011. He stated further that the tenancy has been fraught with instances of the Appellant/Applicant not paying rent or if paying rent, doing so irregularly. He noted that there have been no less than 3 matters filed in the relevant courts and tribunal between the parties as they sought to enforce their rights and obligations. He further averred that a ruling was delivered by the Chairman Business Premises Rent Tribunal, the Honourable Mbichi Mboroki on 31st July 2015 wherein it was *found inter alia* that the Appellant/Applicant had changed user illegally from an office premises for a security service firm to a restaurant without the requisite approval from the Respondent. He averred further that the Appellant/Applicant has been in occupation of the suit premises for more than 4 years since the original eviction notice was issued to it on 30th September 2011 after the original lease expired. He added that the Appellant/Applicant has been inconsistent with the payment of rent for the period and is in arrears of Kshs. 851,815/- for the tenancy period from September 2011 to the present. He mentioned the unpaid cheques that have been issued by the Appellant/Applicant. He added that the Appellant/Applicant has not made an attempt to regularize the arrears despite filing this Application. He stated that the prayers being sought by the Appellant/Applicant are equitable and discretionary in nature and are premised on the following two equitable principles: he who comes to equity must do equity and he who comes to equity must come with clean hands. He added that the Appellant/Applicant is undeserving of the orders on this Application because he has accumulated a very significant amount in rent arrears, issuing dishonoured cheques, seeking to impose its occupation on the suit premises despite his lease having lapsed way back in 2011 and he has not reverted the user of the suit premises back to the original office and instead continues to run a restaurant.

The issue I am called upon to determine is whether or not to grant the Appellant/Applicant stay of the Award/Judgment of the Tribunal pending the hearing and determination of this appeal. The Appellant/Applicant has brought this Application under **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

Order 42 Rule 6(2) provides as follows:

“No order for stay of execution shall be made under subrule (1) unless –

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

On the issue of whether the Appellant/Applicant stands to suffer substantial loss if the order of stay is not

granted, I rely on the position taken by the court in **Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63** where it was held that:

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (eg appeal or intended appeal)”

In this Application, the Appellant/Applicant alluded to statements of account containing the details and particulars of the loss they were bound to suffer if the order of stay of execution is not granted. However, those statements of account were not annexed. My finding is that the Appellant/Applicants have not shown to the satisfaction of the court that they will suffer substantially if stay is not granted. On whether the Application has been brought without unreasonable delay, Judgment was delivered on 31st July 2015 and this Application was filed on 1st December 2015. In the court's view, there was no delay in bringing this Application as it was brought within the required time. On the security to be given, the Appellant/Applicant has not stated what security they will furnish. **Order 42 rule 6 (2) (b)** requires the applicant to provide such security as may ultimately be binding upon him. It is my finding that the Appellant/Applicant has not satisfied all the requirements for the grant of an order of stay of execution. This position is further strengthened by my observation that the orders sought by the Appellant/Applicant are equitable and discretionary in nature. Judging by the submissions by counsel for the parties, it emerged clearly that the Appellant/Applicant has not come to court with clean hands and has not done equity to the Respondent. The assertion that the Appellant/Applicant is in rent arrears, has issued bouncing cheques and has changed the agreed user of the suit premises from office to a restaurant all remain unchallenged in a convincing manner. In light of this, I find that this is not a case that deserves the orders sought. This Application is therefore dismissed with costs to the Respondent.

DELIVERED AND SIGNED IN NAIROBI THIS 1ST DAY OF JULY 2016.

MARY M. GITUMBI

JUDGE