



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO. 180 OF 2019

HURLINGHAM GROCERS LIMITED.....APPLICANT

VERSUS

APA INSURANCE LIMITED.....RESPONDENT

RULING

The Applicant seeks an order to stay execution of the judgement of the Hon. Mbichi Mboroki delivered on 5/7/2019 in **Nairobi Business Premises Rent Tribunal (BPRT) Case No. 664 of 2015**. In addition, it seeks enlargement of time and leave to appeal out of time against that decision. The application was made on the grounds that the Applicant became aware of the judgement on 9/9/2019 when it was served with the letter dated 31/7/2019 attaching the order made by the BPRT. Being dissatisfied with the order of the BPRT Chairman, the Applicant wishes to appeal against the decision and contended that it would suffer substantial loss and the appeal would be rendered nugatory if the Respondent proceeds to execute the judgement.

The application was supported by the affidavit of Firozali Kassam Jaffer in which he deponed that the BPRT did not give notice of the delivery of judgement. He averred that he learnt of the judgement on 9/9/2019 by which time the period for lodging an appeal had lapsed. He attached a copy of the letter dated 31/7/2019 from Lloyd Masika Limited together with the computation of the outstanding balance on account of rent as at 30/6/2019. He also attached a copy of the draft memorandum of appeal challenging the finding of the BPRT.

Judith Onyango, the Respondent's Legal Manager, swore the affidavit in opposition to the application. She averred that the Applicant was a tenant of the Respondent at its building known APA Arcade located in Hurlingham Shopping Centre. She stated that the Respondent served a tenancy notice on 13/8/2015 on the Applicant notifying it of its intention to increase rent for the premises. The Applicant filed the reference before the BPRT and commissioned a valuation of the property. She averred that the Applicant's lawyer was aware about the manner in which the BPRT gave notices for the delivery of rulings and judgements and that this case was listed on 5/7/2019. She stated that the BPRT assessed the rent at Kshs 135,809/= payable with effect from 1/11/2015. The rent arrears against the Applicant were computed at Kshs. 4,526,911.12/=. She added that according to the valuation report prepared at the Applicant's instance, the rent was assessed at Kshs. 107,257.43 per month hence the appeal only relates to the difference of Kshs. 28,551.57. She maintained that the Applicant was not being entirely honest since its advocates were notified of the BPRT decision on 1/8/2019 and would have been expected to inform the Applicant of the delivery of the judgment. She contended that the delay in filing the application was not explained and that the intended appeal does not raise any arguable point of fact or law while contending that the Chairman of the BPRT arrived at a fair decision on the assessment of the monthly rent payable for the premises.

Parties filed submissions which the court has considered. The Applicant contended that what the court ought to consider is the period of delay, reasons for the delay, whether there is an arguable appeal, the prejudice to be suffered by the Respondent if the extension is granted and the importance of complying with time limits. The Applicant blamed the delay in filing the appeal on lack of knowledge on the exact date when the judgement was to be delivered by the BPRT. It challenged the increment of rent from Kshs. 57,147.82 to Kshs. 135,809/= and the fact that this was backdated to 2015. It contended that the Respondent would not suffer any prejudice if the orders sought were granted.

The Respondent submitted that the Applicant had not satisfied the conditions for the grant of stay of execution which are, that it will suffer substantial loss if stay is not granted, the application was made timeously without unreasonable delay and such security as the court may order for the due performance of the decree. Further, the Respondent contended that the Applicant had not met the conditions for the grant of leave to appeal out of time while urging that there was unreasonable delay in bringing this application. The Respondent submitted that it stood to suffer prejudice if the application was granted leave to appeal out of time since it had been waiting for the enhanced rent since November 2015 when the tenancy notice was to take effect. Further, that the Applicant had been paying the previous rent which amounted to a loss to the Respondent. The Respondent added that the Applicant was only disputing the difference of Kshs. 28,551.57 and hence it should pay the undisputed rent of Kshs. 107,257.43 per month based on its own valuation report, which can be secured in an interest earning account in the joint names of the advocates representing both parties.

The Respondent attached a copy of the order dated 5/7/2019 issued by the BPRT Chairman which confirms that the tenant's advocate was

not in court when the BPRT decision was delivered. Quite apart from the letter dated 31/7/2019 vide which Lloyd Masika Limited demanded rent in arrears from the Applicant while intimating that a court order had been issued on 5/7/2019, there is nothing on record to show when the Applicant became aware of the decision of the BPRT. The court is inclined to accept the Applicant's assertion that it was not aware of the delivery of judgement by the BPRT until the time for lodging an appeal had lapsed. The court grants the Applicant leave to file an appeal against the decision of the BPRT out of time within 14 days of the date of this ruling.

Turning to the second limb of the application, to grant an order for stay of execution, the court must be shown that substantial loss may result to the Applicant, the application has been made without delay and the Applicant has furnished security for the due performance of the decree.

The Applicant seeks to challenge the increase of rent by the BPRT and the date from which it should pay the increased rent. It is not in dispute that the Applicant is a tenant of the Respondent and is still in occupation of the suit premises. If the Applicant succeeds on its appeal, whatever sum the court may find it should not have paid as the increased rent can be offset against the future rent that it will pay to the Appellant.

The court declines to grant the orders of stay of execution sought in the application dated 9/10/2019.

The court directs parties to take steps to have the appeal heard and determined expeditiously. The costs of the application shall abide the outcome of the appeal.

Dated and delivered virtually at Nairobi this 20th day of July 2020

K.BOR

JUDGE

In the presence of:-

Mr. James Wachira for the Applicant

Mr. Kennedy Ochieng for the Respondent

Mr. V. Owuor- Court Assistant