REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA 51 OF 2019

AFRICAN ARTS LIMITED.....PLAINTIFF

-VS-

SHAZMEER ENTERPRISES LIMITED.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 2nd December, 2019 in which the Appellant/Applicant is seeking orders of stay of execution of the orders issued and the judgment of Business Premises Rent Tribunal (BRPT) delivered on 1st November, 2019 in BPRT Case No. 1 of 2019 **African Arts Limited –v- Shazmeer Enterprises Limited** pending hearing and determination of the Appeal herein. The application is supported by the affidavit of Pravinchandra Nanji Vaghela sworn on 2nd December 2019 and the supplementary affidavits sworn on 4th December 2019, and on 9th December, 2019.

2. Briefly, the appellant states that the respondent issued notice to the appellant seeking to increase rent form Kshs.40,000/= to Kshs.286,000 which the appellant opposed, hence culminating in the case the subject of the appeal. The BPRT in its assessment vide the judgment delivered on 1st November 2019 increased the rent from Kshs.40,000/= to Kshs.149, 886/= , exclusive of the VAT and it further ordered that the effective date of the increment to be 1st February 2019. Being dissatisfied with the said decision, the applicant filed the appeal herein. The applicant avers that the increment of approximately 274% was not done in line with the provisions and requirements of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya in that the rent was not determined according to the market value. It is the appellant's contention that the tribunal failed to take into account the evidence and submission made by the appellant and submitted that if stay is not granted, the appellant will suffer substantial loss and hardship, and that should the respondent proceed to execute, the appeal shall be rendered nugatory. The appellant avers that it has an arguable appeal and has brought the application timeously.

3. The application is opposed by the Respondent company through a replying affidavit of Haresh Palan sworn on 22nd January, 2020. It is deposed that the suit premises is empty as the applicant is not operating therefrom and that the same is wasted, depreciating in value and that it will cost the respondent to restore it into a good tenantable condition before occupation by another tenant. That no prejudice will be suffered by the applicant if stay of execution is not granted since it does not use the suit premises. It is deposed that if the court is inclined to allow the application, it should order the applicant to pay the respondent the sum of Kshs.83,742.72 and the balance to be deposited in a joint interest earning account at the rate of kshs.90,125.04 per month from 1st February 2019 till the determination of the appeal.

4. Mr. Hassan, learned counsel for the applicant submitted that should the stay not be granted and the applicant is forced to pay the new rent, its business will grind to a halt and that the appeal will be rendered nugatory. The applicant's counsel submitted that the application has been filed timeously and has been brought without undue delay. The applicant's counsel further submitted that the applicant shall abide by whatever conditions of security that the court may impose, but added that the security should not amount to depositing the full amount. The applicant suggested half of the assessed rent as being reasonable security.

5. Mr. Omwenga, learned counsel for the Respondent submitted that the assessment was made pursuant to the applicant's recommendation and urged the court to order the applicant to pay to the respondent the sum of Khss.88, 716 per month, exclusive of VAT, with effect from 1st February, 2019, and that the difference should be deposited in a joint account as security. Counsel further submitted that no substantial loss will be suffered by the applicant because the premises are empty and is being wasted. Counsel for the respondent submitted that the applicant should deposit the difference of what it has admitted and what the tribunal assessed in a joint account.

6. I have carefully considered the application and the arguments advanced by both parties in this case. I have also considered the relevant law as well as the authorities cited. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

> ***" 1. No appeal or second appeal shall operate as a stay of execution or proceeding 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 the appeal is preferred shall be at liberty, on the 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.

2. No order for stay of execution shall be made under subrule (i) 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.

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."

7. It is clear from the provisions of Order 42 rule 6(1) that the applicant must satisfy the following conditions namely: i) that substantial loss may result to it unless the order is made, ii) the application has been made without undue delay, and iii) security has been given by the applicant.

8. In this matter, the orders appealed against were made on 1st November 2019 and the application herein was filed on 2nd December 2019. This was a period of above one month. On whether or not the application was brought without undue delay, I am satisfied that the same was made timeously. I do not think that there was unreasonable delay on the part of the applicant in bringing the application.

9. The other issue to consider is whether the applicant will suffer substantial loss if the stay is not granted. In the case of **Kenya Shell Limited –v- Benjamin Karuga Kigubu & Another (1982- 1988) KAR 1018**, the Court of Appeal stated as follows:

"It is usually a good rule to see if order 41 rule 4 of the Civil Procedure Rule can be substantial. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone for granting stay."

10. Also in the case of **Absalom Dora –v- Turbo Transporters (2013) eKLR** it was stated:

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order does not introduce any advantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. "

11. In this particular case, how does the court balance the rights of the parties? The appeal is against the increment of rent from Kshs.40,000/= to Kshs.149,886/=, exclusive of value Added Tax. It was further ordered that the effective date of the increment was to be 1st February, 2019. It is the applicant's contention that the judgment represents a massive increment of the rent payable by a sum of kshs.109,886 which, according to the applicant, is an increment of approximately 274%. The applicant argued that if it pays the new rent, its business will ground to a halt. The applicant proposed to pay half of the assessed rent as reasonable security of the performance of the decree. The respondent on the other land proposed that should the application be allowed, the applicant should be ordered to pay kshs.83,742.72 inclusive of VAT directly to the respondent and the balance to be deposited in a joint interest earning account.

12. It is not disputed that the increment of rent was necessary. However, the only dispute as I can deduce from the pleadings and submissions is the amount of the increment. It is also not shown or alleged that the respondent is unable to repay the decretal amount if the appeal succeeds. The onus is on the applicant to show that the money would not be recoverable. Furthermore, in this particular case, even if the respondent loses the appeal and money has been paid, the same can be converted into future rent. However, going by the authorities referred to above, the court has to balance the rights of both parties.

13. It is my considered opinion that would it be in the interest of justice to exercise the court's discretion and grant conditional stay. I will issue an order of stay of execution on condition that the applicant pays half of the rent that was assessed by the Tribunal.

14. Accordingly, the notice of motion dated 2nd December 2019 is allowed in terms of prayer (3) thereof on the following conditions:

a. The applicant shall pay to the respondent the sum of Kshs.74,943/= exclusive of VAT with effect from 1st February 2019.

b. The applicant shall pay all the arrears of rent arising out of the judgment at the rate outlined in (a) above within three (3) months from the date of ruling, in default, the Respondent shall levy distress.

c. Costs of the application shall abide the outcome of the appeal.

It is so ordered

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C.K.YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant