REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 20 OF 2015

ROCKY DRIVING SCHOOL LIMITED.....APPELLANT

VERSUS

CUTE KITCHEN LIMITED.....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion dated 21st January, 2015 seeking a stay of execution of the judgment and decree in Business Premises Rent Tribunal Case No. 528 of 2012 and all consequential orders therefrom pending the hearing and determination of the appeal. The application also seeks an order that the Respondent be restrained from attaching or putting up for sale the Appellants goods pending the hearing and determination of the appeal.
2. The application taken out under Order 42 rule 6 of the Civil Procedure Rules, is premised on the grounds on the face of the application and the supporting affidavit of Muhib Nooran sworn on 21st January, 2015. Mr. Nooran stated that the Appellant has been a tenant of the Respondent on L.R. No. 209/4549 Tom Mboya street, 1st floor measuring 1,310 square feet (***'the subject property'***) since December, 2005 when it took over the premises from its sister company known as Kings Driving School Limited at a monthly rent of KShs. 50,000/=. That in the year 2012, the Respondent wanted to evict the Appellant and gave various notices but that the Appellant resisted the eviction vide Business Premises Rent Tribunal Case No. 528 of 2012. That in an attempt to evict the Appellant, the Respondent increased rent by 504% which the Appellant resisted giving rise to this case. That there was been delay in concluding the matter before the tribunal due to lack of a chairperson.
3. It was further averred that the judgment was delivered on 16th January, 2015 but the Appellant's advocates were not aware of the date of judgment; that from the judgment, the Tribunal failed to consider the Appellant's Valuer's Report and submissions made on its behalf; that the Appellant has been condemned to pay rent of KShs.5,249,000/= and was at a risk of bankruptcy. It was contended that since the Appellant had no hand in the delay in the conclusion of the matter at the tribunal it should not be condemned for failure by the government to appoint a chairperson and that the chairperson had wrongly exercised his discretion to backdate rent to the detriment of the Appellant.
4. Mr. Wandaka learned counsel for the Appellant submitted that; the tribunal had raised rent from KShs.50,000/= to KShs.181,800/- per month; that the judgment was based on erroneous comparables; that no good reason had been given why the Respondent's premises on the 1st floor should attract higher rent, than the rest of the floor; that there were comparables from the same building and that the appeal is arguable. Counsel argued that if the Appellant is made to pay the backdated rent of KShs.5,249,000/=, it will suffer irreparable loss. He relied on the case of **Anthony Muli t/a Mutembei Muthoka Gen. Stores v. Kilalani Cooperative Society Ltd ELC No. 467 of 2014** wherein stay was given on condition that the Applicant continued to give rent on

an increment of 10% per annum pending the hearing of the appeal.

5. The application was opposed vide the Replying Affidavit of Dipitkumar Premchand Chheda. He contended that the Respondent bought the subject property on 20th November, 2010 and has never increased rent to a similar or comparable rent payable by other tenants on the 1st floor of the same street. That on 18th July, 2012, the Appellant filed a reference in opposition to the notice to increase rent dated 24th April, 2012. That after the hearing the parties' case to the reference as well as considering the rent valuation reports, the Tribunal lawfully assessed the rent payable at KShs. 181,800/= per month exclusive of V.A.T. with effect from 1st August, 2012. He stated that; the Tribunal has discretion under Cap 301 Laws of Kenya to increase rent payable from time to time; that the Appellant will suffer no irreparable loss since the subject matter is monthly rent payable in cash and that there is no evidence that the Respondent will not be able to refund the decretal sum in case the appeal succeeds. He concluded that the Appellant had not expressed willingness to furnish security.
6. Mr. Owino learned counsel for the Respondent submitted that since 1999 when the Respondent took possession of the subject property, the rent has never been increased; that the landlord had the right to seek increment and that there were valuation reports that guided the tribunal; that the appeal had no chances of success. Counsel distinguished the case of **Anthony Muli** (supra) from the instant case stating that in the earlier case there was no basis of increasing rent. He referred to the case of **Peter Odande t/a Spree Wet Chemists v. Josephine Wangari Karanja (2014) e KLR** where the court held that no stay could issue for the reason that the Applicant had failed to deposit security. He further that the Applicant had not established that it would suffer substantial loss and in any event, the respondents were capable of refunding the same if ordered to. Placing reliance in the case of **Silver Crown Merchants v. Agricultural Holdings Ltd. (2004) eKLR**, counsel submitted that backdating the rent to the date of the notice was in discretion of the Tribunal and was properly exercised. Counsel urged that the application be dismissed.
7. I have considered the Affidavits on record and the rival submissions. Under Order 42 of the Civil Procedure Rules, stay will be granted where the Applicant satisfies the court that the application has been made timeously; that substantial loss may result if a stay is not granted and the Applicant must give security for the due performance of the decree or order appealed against.
8. Was the application filed without reasonable delay? From the record, judgment was delivered on the 16th January, 2015. The current application was filed on 21st January, 2015. The time to be considered is not between 28th November, 2014 when the judgment was originally fixed for delivery, but rather 16th January, 2015 when it was actually delivered. The time taken was only five (5) days. Accordingly, the application was filed timeously
9. On the issue of substantial loss, the Appellant stated that if it is made to pay the back-dated rent of KShs. 5,249,000/=, it will suffer irreparable loss. What amounts to substantial loss was well explained by Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** as follows: -

> ***"…substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."***

Elsewhere in **Mukuma v. Abuoga (1988) KLR 645** the court stated that: -

> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory…"***

10. In ***Ujagar Singh V Runda Coffee Estates Ltd (1960) E.A. 263***, the court observed that:-

> ***"...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in event that its***

appeal is successful..."

11. The applicant did not allege that the Respondent is incapable of refunding the monies decreed if the appeal is successful. Although the amount is substantial, as held in various authorities substantial loss is the cornerstone of the order for stay under Order 42.It was incumbent upon the Applicant to demonstrate that if the sum of KShs.5,249,000/= is paid over to the Respondent, the same will or may be irrecoverable. This the Appellant failed to demonstrate.

12. On the issue of security, I take the same stand as in **Kenya Tanzania Uganda Leasing Co. Ltd v. Mukenya Ndunda (2013) eKLR** where this court stated as follows on the issue of security:-

> "***As I stated in the case of KENYA COMMERCIAL BANK LIMITED vs. SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR "in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced…***"

13. The Appellants appeal may be arguable. But on the other hand, the Respondent has a judgment in its favour. The competing of interests in an application for stay under Order 42 of the Civil Procedure Rules that the court must balance is that when an Applicant is exercising its undoubted right of appeal the same should not be rendered nugatory whilst on the other hand, the successful respondent should not unnecessarily be kept away from realizing the fruits of his Judgment. In the present case, not only that the Applicant has failed to give security for the due performance of the decree; but it has intimated that if it pays the decretal sum it may be wound up. To my mind, that is not so encouraging to the successful Respondent. The latter is greatly exposed.
14. The upshot is that this application is unmeritorous and the same is hereby dismissed. Costs however, shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 6th day of March, 2015.

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A MABEYA

JUDGE