



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 63 OF 2011

GAMEX ENTERPRISES LTD. APPELLANT

VERSUS

SAYANI INVESTMENT LTD.RESPONDENT

R U L I N G

This application by the Appellant dated the 22nd February, 2011, seeks a stay of execution pending the final determination of the appeal. The orders intended to be stayed were made by the Business Premises Rent Tribunal regarding a premises known as plot No. 209/1913/2 & 3.

The facts of the case show that the Appellant was the Tenant of the premises to the Respondent at a monthly rent of Ksh.150,000/-. The Respondent/Landlord alleged arrears of rent to the tune of Ksh. 2 million. The landlord served a landlords Notice to terminate or alter the tenancy on the Tenant on the ground of persistent non-payment of rent. It threatened and/or attempted levying distress. On 3rd September, 2010 the Tenant filed a Reference to the Business Premises Rent Tribunal seeking protection by the Tribunal.

By a Ruling delivered on 4th February, 2011 the Tribunal found that the tenant had been persistently in arrears of rent which according to the Tribunal, correctly attracted the levy of distress. The Tribunal went ahead to dismiss the Appellants Reference with costs. It made orders that since the tenant was not itself in occupation but had sublet to subtenants, the latter would pay their monthly rents to the Landlord/Respondent directly. A request for a temporary stay by the Tenant was rejected by the Tribunal on the ground that it did not have jurisdiction to make such orders of stay.

It was the above orders that aggrieved the Tenant, who then appealed in this appeal on 22nd February, 2011. On the same day this application for stay was made.

It may be important to add that the Tribunal had also found that there was no written Tenancy Agreement between the parties herein. However, the Tribunal found that there was a tenancy relationship due to the Tenants constructive possession of the premises. The same had given the Tenant the right to receive monthly rents from the subtenants before being under legal obligation to pay it to the Landlord.

Be that as it may, the Tribunal considered the Tenancy as having been lawfully terminated by the Landlord's Notice to terminate the tenancy dated 16th May, 2010. That meant that the tenancy no longer

would exist after the Ruling by the Tribunal.

I have carefully considered the grounds upon which the stay of execution is sought. I have also examined generally the grounds of this appeal. It is clear to me that the Appellant is not itself in occupation of the premises but occupied the same through its subtenants. It cannot therefore suffer any prejudice if the stay is not granted. The rents coming from the subtenants monthly, rightly belong to the Landlord/Respondent and the Appellant was under obligation to pass the same to the landlord. This is now achieved by the subtenants paying the rents directly to the Landlord. Accordingly, the Tenant's interest in the tenancy is superficial. If however, the Tenant/Appellant will lose the rents it used to obtain thus probably failing to pass it to the landlord, the arrangement clearly became illegal the moment the Tenant failed/refused to pass the rents to the Landlord to whom the same belonged.

The court on the other hand thinks that the grounds of appeal although arguable, may not lead to the relationship of Landlord-Tenant being sustainable.

Finally, the Applicant/Appellant failed to offer any reasonable security as required under the law to secure a stay. In these circumstances the conditions required to be fulfilled under Order 42 Rule 6(2) of the Civil Procedure Rules were not fulfilled.

The upshot is that this application has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 17th day of March, 2014.

.....

D A ONYANCHA

JUDGE