



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MOHAMED SALIM BASHIR.....APPELLANT**

**SHAMI TRADING CO. LTD. ....RESPONDENT**

**RULING**

By way of a Notice of motion application brought under section 3A of the Civil Procedure Act order 42 rule 6(1) and 2 of the Civil Procedure Rules the applicant seeks orders for a stay of the order issued on 15th February, 2013 in BPRT case No.132 of 2013 pending the hearing and determination of the Appellants appeal.

The grounds are that the appellant may, unless the orders sought are granted suffer substantial loss and the appeal may well be rendered nugatory and further that the appellant is willing to abide by any condition that may be imposed including furnishing of security.

The application is supported by the affidavit of Mohamed Salim Bashir who depones that the Judgment appealed against was delivered by the Tribunal in Nairobi on 15th February, 2013 without notice first having been served upon the appellant or his Advocate.

That the hearing of the reference was conducted and completed in Mombasa where the reference was filed and Judgment was delivered in Nairobi clandestinely.

Further that the manner in which the reference was conducted was a violation of article 50 of the constitution of Kenya as it amounted to a denial of fair hearing and due process and also a violation of article 48 of the constitution on access to Justice.

Amir Shazaad in his replying affidavit depones that the order from the tribunal cannot be filed in the sub-court for execution because the order had not taken effect and that the appellant had conveniently failed to disclose to the court that he was served with a mention notice dated 28th January, 2013 for mention on 4th February, 2013 to confirm whether both parties had filed their submissions and Judgment date to be given.

The gist of this application is the alleged manner in which the tribunal conducted and presided over the reference. Whether this conduct violated the appellants rights under article 48 and 50 of the constitution.

I have not had the opportunity of perusing BPRT case No. 132 of 2012 but its common ground that BPRT case No. 132 of 2012 was filed at the Tribunal at Mombasa and was heard in Mombasa partially.

In his submissions counsel for the Respondents has given a chronology of what transpired in the tribunal hearing on the various sittings.

I deem four dates as relevant to this case. These are the dates of 15th December, 2012, 11th December, 2012, 4th February, 2013 and 15th February, 2013.

On 5th December, 2012 the Respondent gave its evidence and closed its case. The appellant sought an adjournment which was granted and case was fixed for hearing on 11th December, 2012. The appellant gave evidence and closed its case. A site visit was done at 2:30 pm and the appellant was ordered to file submissions within 14 days and the matter to be mentioned on 4th February, 2013 at Nairobi to confirm whether both parties had filed their submissions and to take a judgment date.

On 4th February, 2013 there was no appearance by the appellant though they had filed their submissions and a judgment date was given for 15th February, 2013.

Neither the appellant nor his Advocate appeared for the Judgment.

It is common knowledge that Business Premises Rent Tribunal main registry is based in Nairobi and all the documentation is done there. All its files are kept in the main registry.

It is not in dispute that Counsel for the Appellant was served with a Notice on 28th January, 2013 for the mention date of 4th February, 2013 at Nairobi to confirm filing of submissions.

This Notice is attached to the Replying affidavit of Amir Shazaad as an annexure. I find from the evidence before the court it has not been proved that there was a violation of article 48 of the constitution on the right of access to justice and article 50 on the right to a fair hearing.

The application has no merit and it is dismissed with costs to the Respondent.

Ruling delivered dated and signed this **11th** day of **October, 2013**.

**M. MUYA**

**11TH OCTOBER, 2013**

**In the presence of:-**

Adhoc for Mayia for Respondents

Mwawasi holding brief Asige

Court clerk Musundi