

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 20 OF 2013

MOHAMMED SALIM T/A

CHOICE BUTCHERY APPELLANT

V E R S U S

NASSERPURIA MEMON JAMAT RESPONDENT

RULING

1. Appellants appeal is directed towards the judgement of the Chair of the Business Premises Rent Tribunal being **Tribunal Case No. 133 of 2012**.
2. The Appellant has filed an application for stay of execution pending the hearing and determination of this appeal. That application is dated 26th February 2013.
3. The Appellant deponed that unless stay is granted the Respondent will evict him since the Respondent has already served him with a notice to vacate the premises. That if the eviction is carried out he will suffer substantial loss which will render the pending appeal nugatory. He stated that he and his family have carried out business of butchery at those premises now for forty (40) years. In those years they had built a good will which will be lost if they are evicted. He further deponed as follows-
 - iv. *That I run and have strategically invested, placed and extensively advertised my butchery business operated from the premises which I cannot uproot and commercially relocate.*
 - v. *That there is no other location and premises that is available comparable and even approximate to the one where I operate the business.*
4. In the Respondent's view the Applicant has not shown that he will suffer substantial loss. He stated that the Applicant had been a habitual defaulter in rent payment. The Respondent also stated that that was the basis of the finding of the BPRT judgment. In seeking to stay that judgment the Respondent stated that the Applicant was denying him the fruits of his judgment.
5. I have considered the parties affidavits submissions and their authorities. I begin by stating that the Court when it is called upon to grant stay it has to balance the interests of the Appellant with those of the Respondent. This was well stated in the case **M/S PORTREITZ MATERNITY - VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997** where the Court had this to say-

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

6. Bearing that balance in mind and considering the provisions of Order 42 Rule 6 I am of the view that the Appellant requires to get a conditional stay of execution. The Appellant stated and it was

not controverted that he and his family have run a butchery business from those premises for over forty (40) years. They have built a good will within that period. I accept therefore that if the Appellant is evicted as the Respondent intimated he will suffer substantial loss of the good will that has been built over the years. The fact that the Respondent has substantial means to compensate the Appellant if the appeal is successful is not the only consideration in this sort of application. The loss that the Appellant may suffer may not be quantifiable and it is for that reason I grant the following orders-

- a. **A stay of execution of the judgment in BPRT No. 133 of 2012 is granted pending the hearing and determination of this appeal on condition that the Appellant does not fall into rent arrears for more than fifteen (15) days. If the Appellant fails to pay to the Respondent the rent due for more than fifteen days from the date it is due the stay granted hereof will automatically vacate.**
- b. **The costs of the Notice of Motion dated 26th February 2013 shall abide with the outcome of this appeal.**

Dated and delivered at Mombasa this 4th day of October, 2013.

MARY KASANGO

JUDGE