REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEALS NO 79 & 80 OF 1987

NATIONAL DRYCLEANERS LTD & ANOTHER …..……..……APPELLANTS

VERSUS

NDUNE……………………………………......…..………..RESPONDENTS

RULING

The Notice of Motion filed in civil appeal No 79 of 1979 (which application is dated 9th June 1987 and filed on 10th June 1987) was by consent of counsel heard together with a similar application in civil appeal No 80 of 1987.

I heard the applications on 16th June, 1987 and in view of the urgency of the matter ruled that the execution of the order dated 10th March 1987 made by the Business Premises Rent Tribunal be stayed pending final determination of these two appeals and that costs of the applications do abide the result of the appeals.

I now give my reasons for the orders made by me on 16th June 1987.

The appellants were ordered to vacate the shops occupied by them on plot LR No 209/2400 situated on Luthuli Avenue/Tom Mboya Street by the Business Premises Rent Tribunal, by 30th day of April 1987. This order was made, as stated earlier, on 10th March 1987.

The appellants (tenants) applied to the Business Premises Rent Tribunal on the 8th day of April, 1987, seeking orders to stay the execution of the orders of the Tribunal made on 10th March 1987. By its ruling delivered on 3rd June, 1987, Tribunal declined to stay execution of the said orders. However, the Tribunal granted stay until 18th June 1987 to enable the applicants to come to this court.

The applications before me are made under order XLI, Rule 4(1) of the Civil Procedure Rules and Inherent powers of this court.

Mr Gautama very properly handed over to me a copy of proceedings and ruling of the Tribunal relating to the stay application made in the Tribunal. The Tribunal has valiantly attempted to bring an end to any further litigation by saying that the tenants are attempting (by that application) to deprive the landlord of his right under Section 7(i)(f) of the Act. The record of the Tribunal seems to suggest that the delay in finalizing the hearing of the Reference before the Tribunal cannot be attributed to any one in particular. The learned National Chairman of the Tribunal has said that the reference came for hearing before two past chairmen of the Tribunal namely M E Mut and then Mr S Pao and also before Mr Imanyara and finally before Mr George Oraro and Mr Macharia. Some delay seems to have occurred because of delay

in filing written submissions. The reason for such delay is not shown.

I will first deal with the question of the Tribunal in granting an order for staying execution of its own orders on judgments. This can arise out of Section 12(1)(i) of The Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya (hereinafter referred to as “the Act”) The material portion of the Act reads:

12(1) “A Tribunal shall in relation to its area of jurisdiction have power to do all things which it is required to or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power.

(i) to vary or rescind any order made by the Tribunal under this Act.

The material words are “to vary or rescind”. I must give the ordinary meaning of the words “vary” or “rescind”. Variation or precision cannot include the words “Stay pending appeal”. An appeal generally seeks to set aside the orders of the Tribunal or court below. I appreciate that in some appeals a variation or rescission is sought but such variation or rescission is necessarily with a view to having the orders of the court below set aside. In my opinion the words “vary or rescind” are used in Section 12 of the Act in a restricted sense, in that the Tribunal can possibly vary or rescind its order or determinations in the sense that the High Court can review its orders or judgments under order XLIV of Civil Procedure Rules and I find nothing else in the Act which empowers a Tribunal to grant stay pending appeal from the Tribunal to the High Court.

I am fortified in what I have said in regard to powers of the Tribunal to order stay of execution pending appeal by the then Chief Justice Simpson. In H C Civil Appeal No 300 of 1981 he said

“Mr Rayani for the respondent submitted that the application must first be made to the Tribunal. But I am satisfied that on the constructions of Cap 301 under O.41 Rule 4(i) this is not the case”.

I agree respectfully with whatever was said by the then Chief Justice Simpson. I am aware that Sachdeva J has said in another similar application that the applicant ought first to apply to the Tribunal for stay pending appeal. Unfortunately I have not been able to get a copy of Sachdeva J’s ruling. Order XLI Rule 4(i) requires that such applications ought to be made in the first instance to the court (underlining mine) from whose decree or order the appeal is taken. “Court” is defined in the Civil Procedure Act as the High Court or a subordinate Court, acting in the exercise of its civil jurisdiction.

A Tribunal is not a subordinate court. It is a Tribunal specially established under the Act to exercise jurisdiction conferred upon it by the Act.

Platt J (as he then was) said in H C Misc Civil case No 106 of 1983 *Vibhakar vs Parani & others* (unreported) that the Tribunal was not a subordinate court or inferior court to the High Court as “Court” is defined in the Civil Procedure Act.

I would respectfully agree with Platt J when he said that the Tribunal is not a subordinate court. Although Platt J (as he then was) was referring to the Rent Restriction Tribunal as opposed to the Business Premises Rent

Tribunal I would say that his observations would apply equally to the Business Premises Rent Tribunal. I would, therefore, prefer the views of Simpson CJ (as he then was) as opposed to those of Sachdeva J.

I would also observe that the Tribunal has no machinery to execute its own judgments or orders. Under Section 14 of the Act a competent subordinate court of the first class has the power to execute the determinations or orders of the Tribunal. This further fortifies the views of Simpson CJ (as he then was) to which views I have already referred to. I have gone at length in this particular matter because I am aware of the fact that the parties have been not sure where to apply for stay.

The principles of granting of stay in possession suits are well settled. Mr Gautama has not really challenged those principles. In fact, he had conceded in the Tribunal that the normal rule is that stay ought to be granted. I will, however, elaborate as Mr Rayani cited to me several authorities.

In Civil Appeal No 67 of 1952 (Chogley vs Bains) the President of the Court of Appeal for Eastern Africa Sir Barclay Nihill said:

"Mr Nazareth has pressed on us most strongly that taking into account that the respondent landlord has won his case at each stage upto and including this court it will be a real hardship if he is any longer prevented from taking possession of his own property. We have considerable sympathy with this submission for as this court has more than once observed we are well aware that in Rent Restriction cases, the machinery of appeal is often invoked by a tenant merely to delay the inevitable, with consequent great financial loss to the landlord. Yet in such cases, where the subject matter is simply the right to possess on a statutory tenancy, it is difficult to see how this can be preserved, unless the *status quo* is maintained pending determination of the appeal. Certainly we know of no local case of this nature where a stay pending appeal has been refused."

I need not emphasize the fact that in *Chogley vs Bains* the matters had gone to the then court of appeal from the rent control board via the High Court (then Supreme Court).

In Civil Application No Nairobi 6 of 1979 *M M Butt vs R R Tribunal and Z N Shah* our Court of Appeal expressed similar views. The court said:

"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory."

The Court of Appeal in that application was endorsing the sentiments of Brett LJ in *Wilson vs Church* (No 2) 12 Ch D (1879) 454 at p 459. Lord Justice Brett said:

"It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory.

Mr Rayani also referred to the order of the Court of Appeal made in Civil Application No NAI 90 of 1985, *Interocean Training Co vs Esmail Adamali and two others* where the court said:

"We note the landlords offer that if they are ordered to reinstate the tenant they undertake to do so to avoid the appeal being rendered nugatory. We do not doubt their sincereity, but in maters of possession of premises it is rarely a satisfactory method, for the original disruption more often than not can cause irreparable damage".

Mr Gautama was at pains to show that stay ought not to be granted in this appeal as the appeal was frivolous, without merit and basically an appeal only against findings of facts.

I would not wish to prejudge the probability of success lest I put the judges who eventually hear these appeals in the invidious position of possibly having to disagree with me. But I must, in view of Mr Gautama's serious attack on the probability or rather improbability of success, point out that the Tribunal has treated Hotel Salaama Limited as being at par with Ezekiel Karanja Ndune when it came to who wants to construct the premises. It is clear that finance was allegedly offered to Hotel Salaama Limited (a mere letter to say finance is available may not be enough). It is also clear that it was for the expansion of Hotel Salaama Limited that the landlord wished to reconstruct. The Act clearly shows (Section 7(i)(f) that the landlord is entitled to order for possession if the landlord (underlining mine) intends to demolish and reconstruct. It appears to me that it is Hotel Salama Limited which wishes to demolish and reconstruct, to suit its own needs.

The Tribunal appears to have failed to apply its mind to the fact that Hotel Salama Limited (which in law is a different entity from the Landlord even if the hotel is family company) has the offer finance to expand

its own business, as opposed to the business of the landlord himself. It appears that the provisions to section 12(i)(c) of the Act is being circumvented in an indirect manner. Hotel Salaama Limited wants to expand its business through its director, the landlord.

I am not prepared to say that all grounds of appeal are without merit. As Mr Gautama has not abandoned the issue of possession under Section 7(i)(g) of the Act I am bound to say that the interest of the Landlord was certainly created within the period of five years preceeding the date of tenancy notice seeking to terminate the tenancy.

I direct that the appellants do move expeditiously to prosecute these appeals. I direct the Civil appeals registry of the High Court to call for Tribunal files forthwith. The applicants are ordered to continue paying mesne profits at a rate equal to the present as each payment falls due. There will be liberty to apply should there be any breach on part of the appellants to comply with the two conditions that I have imposed.

Dated and Delivered on this 23rd Day of June, 1987

A.B SHAH

…………..

JUDGE