



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1493 OF 2014

BONNY FASHIONS LIMITED.....APPELLANT/APPLICANT

=VERSUS=

DHIRAJLALA J. SHAH

RAJESH SHAH..... RESPONDENT

(Administrator of the Estate of Juthalal Virpal Shah)

RULING

1. This is the notice of motion dated 19th December 2018 brought under order 42 rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, cap 21 Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders

(1) Spent.

(2) Spent

(3) That this honourable court do stay the execution of the orders dated 15th November 2018 pending the hearing and determination of the appeal.

(4) That this honourable court do stay the execution of the orders dated 15th November 2018 pending the hearing and determination of the appeal.

(5) That costs of this application be provided for.

3. The grounds are on the face of the application and are:-

1. The honourable Justice L. Komingoi delivered a ruling in favour of the respondents against the appellant on 15th November 2018 striking out the appellant/applicant's defence dated 17th December 2014 and entering judgement in favour of the respondents as prayed in the originating summons dated 27th November 2014.

2. The respondents have technically obtained a declaration that the appellants are in occupation of Land Parcel No. 209/138/12 illegally and the eviction orders have issued against the appellants/applicants.

3. The appellants have been aggrieved by the ruling of this court and have lodged an appeal to the Court of Appeal.

4. The appellant/applicant has been condemned unheard and striking out pleading is a draconian act which a court should resort to only in plain cases.

5. The appellant/applicant is apprehensive that he is likely to be evicted by the respondents.

6. The appellant is ready and willing to furnish any security as shall be ordered by this honourable court for the due performance of the decree.

7. It is imperative and in the interest of justice that a stay of execution be granted.

4. The application is supported by the affidavit of Sanjay Kapoor director of the defendant/Applicant sworn on the 19th December 2018 and a supplementary affidavit sworn on the 8th February 2019.

5. The application is opposed. There is a replying affidavit sworn by Rajesh J Shah the 1st plaintiff/respondent sworn on the 25th January 2019.

6. On the 31st January 2019 and by consent of the parties the court directed that the application be canvassed by way of written submissions.

The defendant's/applicant's submissions

7. The import of the ruling of 15th November 2018 is that the plaintiffs/respondents have technically obtained a declaration that the defendant/applicant is in occupation of Land Parcel No. 209/138/12 illegally and the eviction orders have issued against the defendant/applicant. The defendant/applicant has been a tenant for 20 years for quarterly rent of Kshs.120,000 and it is not easy for the applicant to get an alternative premises to conduct the business.

8. The applicant is ready and willing to furnish any security as shall be ordered by the honourable court for the due performance of the decree. The applicant has put forward the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417**. The application has been brought without unreasonable delay. The applicant is likely to suffer substantial loss if the said orders are not granted because the business is his only source of income. Further that he is ready and willing to furnish security as the court may order for the due performance of such decree or as may ultimately be binding.

The Respondent's submissions

9. The defendant/applicant has not annexed any draft memorandum of appeal denoting the grounds for the appeal. The defendant/applicant continues to occupy the suit premises since the filing of the suit in 2014 and the Estate has been continuously incurring losses as they cannot enjoy their user. The loss is irrecoverable and the plaintiff has not received any sums as mesne profit. The continued payment of rent to the Business Premises Rent Tribunal in case no. 402 of 2015 is of no consequence to the plaintiffs. This application is meant to further delay the plaintiff's/Respondent's from enforcing the judgment delivered on 15th November 2018. They pray that the application be dismissed with costs.

10. I have considered the notice of motion and the affidavits in support. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

11. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

“No order for stay of execution shall be made under sub rule (1) unless:-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

It is clear from the above provision that for stay to be granted specific conditions must be met by the applicant.

12. The principles that guide a court in exercising discretion in an application for stay of execution pending appeal are now well settled.

(i) That the application has been brought without undue delay.

(ii) That unless stay is granted the applicant shall suffer substantial loss.

(iii) That the applicant has offered security for the due performance of the decree that may ultimately be found to be binding on him.

13. I have considered the notice of motion herein. I find that it has been brought without unreasonable delay. It is the defendant's/applicants case that it will suffer substantial loss if these orders are not granted. That it has no alternative premises to conduct business therefore the appeal will be rendered nugatory if the orders are not granted. The plaintiffs/respondents on the other hand contend that the defendant/applicant continues to occupy the premises illegally, hence the estate of Juthalal Virpal Shah continues to incur losses.

14. The defendant/applicant have failed to attach a draft memorandum of appeal. This would have been a basis upon which this court can be persuaded that there exists an intended appeal which is arguable or has merit.

15. In the case of **Feisal Amini Far Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd MSA HC Civil Appeal No. 65 of 2013 [2014] eKLR Kasango J** stated as follows:-

“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application is made without unreasonable delay and that the applicant has offered proper security”.

I have considered the defendant’s/applicant’s application in its entirety. In my view, it has not demonstrated that it will suffer substantial loss if these orders are not granted. As stated earlier in the ruling of 15th November 2018 the lease has been terminated and the defendant/applicant has ceased to be a tenant. What loss could it possibly suffer?

In the case of **Michira t/a Michira & Company Advocates vs East African Standard [200] KLR 63**, it was held that:-

“it is not enough merely to state that substantial loss will result or that the appeal will be rendered nugatory. That will not do. Id the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specific, details given, or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done, or in execution of an award or decree or order before disposal of the applicant’s business (e.g appeal or intended appeal)”

16. The other condition to be satisfied by the applicant is that he must provide such security as may be ultimately be binding on him. The same is set in mandatory terms. Order 42 rules 6(2) of the Civil Procedure Rules requires specific conditions to be met by the applicant of which the applicant herein has not satisfied. I find that he has not stated whether he intends to furnish or he has already furnished security for due performance of the decree.

17. In conclusion, I find that the defendant/applicant has failed to satisfy the requirements set out in order 42 rule 6(2) of the Civil Procedure Rules. I find no merit in this application and the same is dismissed with costs to the plaintiffs/respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9th day of October 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Applicant

.....Advocate for the Respondent

.....Court Assistant