



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. APPEAL NO. 41 OF 2017

**SHADE MANUFACTURERS
& HOTEL LIMITED.....APPELLANT
VERSUS**

**SERAH MWERU MUTUU
GRACE GACIKU
VIRGINIA WANJIRU &
LOUIS WAITHERA.....RESPONDENTS**

RULING

The Appellant seeks an order to stay execution of the judgement and order delivered on the 13/10/2017 by the Honourable Mr. Mbichi Mboroki, Chairman of the Business Premises Rent Tribunal (BPRT) in **Nairobi BPRT Case No. 95 of 2015**. The application is premised on the grounds that the BPRT dismissed the Appellant's Reference and allowed the Respondent's Termination Notice which required the Appellant to vacate and hand over vacant possession of L.R. No. 192/19, Karen, Nairobi ("the Suit Property") on or before 1/5/2018. The Tribunal also ordered the Appellant to remove all its improvements from the suit premises.

The Appellant avers that it has invested heavily and made substantial improvements on the Suit Property with the authority or consent of the Respondent and stands to suffer substantial loss if the BPRT order is not stayed. Further, the Appellant contends that it has an arguable appeal with high chances of success as shown in both the draft memorandum of appeal and record of appeal. Its apprehension is founded on the fact that after the judgement was delivered; the Respondents leased part of the Suit Property to a third party. A director of the Appellant swore the affidavit in support of the application. He attached a copy of the authority to act granted by the company together with the copy of the judgement delivered by the BPRT. He also attached photographs of the hotel it runs on the Suit Property which it claims it has made substantial investments into to make it a modern hotel and restaurant.

Louis Waitthera, one of the owners of the Suit Property swore the affidavit in support of the termination before the BPRT. She attached the draft development plans and averred that the owners desired to develop the Suit Property that is why they terminated the Appellant's tenancy.

Both parties filed submissions. The Appellant submits that under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, the court to which an appeal is preferred is at liberty on an application being made to consider the application and make orders it deems just. It submits that the court should be satisfied that substantial loss will result to the Applicant if the order is not made and that the application was made without unreasonable delay. The Appellant submits that it stands to suffer substantial loss if the orders sought are not granted since it has been in occupation of the Suit Property from 1981 and has been running a successful business thereon. It contends that it has undertaken various improvements and that if it is evicted from the Suit Property it will suffer loss. Further, it submits that it filed the appeal timeously on 7/11/2017 following the delivery of the judgement on 13/10/2017. The application for stay of execution was filed on 15/12/2017.

The Appellant contends that it has an arguable appeal which raises important points of law and fact to be determined by this court. The Appellant avers that it will be futile to pursue the appeal if it is evicted from the suit premises and that this will render its appeal nugatory. The Appellant relied on the case of **Butt v Rent Restriction Tribunal, Civil Application No. NAI 6 of 1979** in which the court held that the general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

The Appellant also relied on the case of **Masisi Mwita v. Damaris Wanjiku Njeri [2016] eKLR** in which the court analysed various decisions on the issue of stay. In that case, Mativo J. was persuaded that proof of substantial loss and that the appeal would be rendered nugatory had not been established. The court referred to the case of **Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63** in which the court held that in dealing with applications for stay of execution, the ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage; and that in applying this principle the court must focus on upholding the overriding objective to do justice in accordance with the law and prevent the abuse of the process of the

court.

The dispute relates to the termination of the Appellant's lease over the Suit Property. The Appellant claims it has developed the Suit Property and stands to suffer if it is evicted from the Suit Property. The decision of the BPRT gave the Appellant six months to remove its structures from the Suit Property. The court is not satisfied that the Appellant, who is the Respondent's tenant, will suffer substantial loss if the orders sought are not granted. The Appellant has not furnished security for the performance of the order of the Chairman, BPRT.

The court has considered the application dated 15/12/2017, the submissions of counsel and finds no merit in the application. It is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 10th day of July 2018.

K. BOR

JUDGE

In the presence of: -

Mr. D.M. Mwaura for the Appellant

Mr. Machira holding brief for Mr. Chege for the Respondents

Mr. V. Owuor- Court Assistant