REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. C.A. 97 OF 2015

KENYA COLLEGE OF COMMERCE & HOSPITALITY….1ST APPLICANT

CAFÉ D'ELEGANCE……..……...……...….2ND APPLICANT

VERSUS

ST PAUL'S UNIVERSITY……...……..……..RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 10th November 2015 in which the Appellants/Applicants are seeking for an order of stay of execution from the Judgment delivered by the Business Premises Rent Tribunal on 2nd October 2015 in BPRT No. 645 of 2013, 626 of 2012 and 778 of 2013 (consolidated) pending the hearing and determination of the Appeal.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Fred Masinde and John Munene. In his Supporting Affidavit sworn on 9th November 2015, Fred Masinde averred that he is running the business known as Kenya College of Commerce and Hospitality and has been a tenant on 4th and 5th Floor of Church House L.R. No. 209/3848 along Moi Avenue/Tom Mboya Street (the "suit premises") since the year 2003 which had a previous owner but was later sold to the Respondent in October 2010. He further averred that the Respondent illegally and unprocedurally issued a Notice to Terminate the Tenancy which prompted his filing a Reference objecting to the termination at the Business Premises Rent Tribunal. He added that the matter was heard and a Judgment delivered on 2nd October 2015 whereupon the Respondent's Notice to Terminate the Tenancy was allowed and he was ordered to vacate and hand over vacant possession of the suit premises on or by 31st December 2015. He further averred that the College currently has many students who are still learning and are yet to sit for their final exams and that sudden relocation of the school will cause irreparable damages to student and will disrupt ongoing classes. He added that he is apprehensive that if stay of execution is not granted, he would suffer irreparable loos due to the eminent eviction. In his Supporting Affidavit sworn on 9th November 2015, John Munene averred that he has been running the restaurant business known as Café D'Elegance in the suit premises and that he too received a Notice to Terminate the Tenancy leading to his filing a Reference at the Business Premises Rent Tribunal. He further averred that he too was dissatisfied by the Judgment read on 2nd October 2015 whereupon the Respondent's Notice to Terminate the Tenancy was allowed and he was ordered to vacate and hand over vacant possession of the suit premises to the Respondent by 31st December 2015. He added that he runs the

restaurant business and that due to demand of the business, he made some alterations therein and invested heavily in terms of good will and financially which cannot be compensated. He added that he is apprehensive that if stay of execution is not granted, he would suffer irreparable loss due to the eminent eviction.

The Application is contested. The Respondent filed the Replying Affidavit of James W. Mururi, sworn on 7th December 2015, in which he averred that he is the Deputy Registrar Administration in the employ of the Respondent and was the Respondent's sole witness at the hearing of the References before the Business Premises Rent Tribunal. He averred further that from the impugned Judgment, the Respondent had proved in evidence that the Kenya College of Commerce & Hospitality was in rent arrears of over Kshs. 6 million having last paid the monthly rent of Kshs. 109,332.61 on September 2011. He further averred that the College did not dispute the fact that the Respondent, which is a University, requires the demised space for its own exclusive use due to its expanded student population. He further added that the Café D'Elegance also admitted that the Respondent bought the building recently and now occupies 90% of it after most of the other tenants vacated and that the Respondent was in fact forced to source for extra space in an adjacent building due to increased student numbers. He further averred that due to this evidence, the Honourable Tribunal had little difficulty in finding that the Respondent was justified in issuance of its Quit Notices to both Appellants/Applicants. He added that the Quit Notices were issued on 30th July 2013 and on 30th October 2013 and that the BPRT also gave the Applicants a further 3 months to vacate the suit premises and that was sufficient time to enable them to relocate. He added that the Applicants have not demonstrated the specific loss they are bound to suffer should the stay orders be refused.

The issue I am called upon to determine is whether or not to grant the Appellants/Applicants stay of the Judgment of the Tribunal pending the hearing and determination of this appeal. The applicable law on this issue is **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."**

Order 42 Rule 6(2) provides as follows:

> **"No order for stay of execution shall be made under subrule (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."**

On the issue of whether the Appellants/Applicants stand to suffer substantial loss if the order of stay is not granted, I rely on the position taken by the court in **Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63** where it was held that:

> ***"It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details 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 (eg appeal or intended appeal)"

In this Application, the Appellants/Applicants have urged that being going concerns, eviction out of the suit premises shall result in substantial loss. For the 1st Applicant, the loss has been described as the disruption of the ongoing teaching activities of students who are about to face exams while the 2nd Applicant has stated that its restaurant business shall be disrupted, leading to a loss of the good will and other heavy investments that they have made. I would in this matter agree with the Applicants that should the impugned Judgment be executed, indeed the very substratum of this Appeal shall be rendered nugatory by the disruption of learning and restaurant business that the Applicants conduct. To this extent therefore, I find that substantial loss shall indeed be suffered by the Applicants.

On whether the Application has been brought without unreasonable delay, this Application was filed on 11th November 2015 while the impugned Judgment was delivered on 2nd October 2015. In the court's view, there was no delay in bringing this Application as it was brought within the required time.

The third element to establish before an order of stay of execution is issued is whether 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 Appellants/Applicants. Judging by the submissions by counsel for the parties, it emerged clearly that the Appellants/Applicants have not come to court with clean hands and have not done equity to the Respondent. The assertion that the Appellants/Applicants are in rent arrears remain unchallenged. It was indicated in the impugned Judgment that the 1st Applicant owes rent arrears to the Respondent exceeding Kshs. 6 million while the 2nd Applicant owes the Respondent rent arrears exceeding Kshs. 1 million. As a condition to allowing this Application for stay of execution, the 1st Applicant is directed to deposit the sum of Kshs. 5 million to the court and the 2nd Applicant to deposit Kshs. 1 million to the court as security for their performance of the Judgment delivered herein should their Appeal fail. Subject to these conditions, the Application is allowed. The sums ordered to be deposited in court within 30 days from today's date.

It is so ordered.

DELIVERED AND SIGNED IN NAIROBI THIS 20TH DAY OF JANUARY 2017.

MARY M. GITUMBI

JUDGE