REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. APPEAL CASE NO. 98 OF 2015

AJALE ENTERPRISES LIMITED…….……..APPELLANT

VERSUS

SIMON GIKONYO NDIRANGU…..……..…….RESPONDENT

(*An application for stay pending Appeal arising from the Judgment of the Chairperson of the Business Premises Rent Tribunal, Hon. Mbichi Mboroki at Nairobi delivered on 10th July 2015 in the Business Premises Tribunal Case No. 220 of 2013)*

RULING

Coming up before me for determination are two applications by the Appellant/Applicant being Notice of Motion dated 2nd October 2015 and Notice of Motion dated 15th December 2015 both seeking for an order of stay of execution of the Judgment and Decree of the Chairman of the Business Premises Rent Tribunal, Hon. Mbichi Mboroki, delivered on 10th July 2015 in the Business Premises Rent Tribunal Case No. 220 of 2013 (herein referred to as the "Judgment") pending the hearing and determination of this Appeal.

The first Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Joseph Mwangi Maina, the Director of the Appellant, sworn on 2nd October 2015 in which he averred that he filed a Reference at the Business Premises Tribunal opposing a Notice of Termination dated 21st January 2013 served upon him by his Landlord the Respondent. He added that the notice was signed by the Respondent's advocate whose authority to do so was in question. He further stated that the Chairman of the Business Premises Tribunal in that case delivered judgment in favour of the Landlord/Respondent. He further averred that being dissatisfied with that judgment, he preferred this appeal by filing a Memorandum of Appeal dated 10th August 2015. He stated that he filed this appeal without unreasonable delay. He further stated that this appeal is meritorious and raises grave issues with a high probability of success. He further averred that if the orders sought herein are not granted, the Appellant/Applicant shall suffer substantial loss of its business which stands the risk of being closed and a loss of its regular local customers who account for most of its business transactions. He added that substantial loss will also include the risk of 9 employees losing their jobs due to the closure of the business and that he will also lose the goodwill surrounding the business. He added that the Appellant/Applicant is ready and willing to provide such security as the court may direct for the due performance of the decree or order that may be ultimately binding on it.

In opposition of the Applications, a Replying Affidavit sworn by one Carol Mwihaki Gikonyo was filed on 21st October 2015. The court shall disregard this Replying Affidavit for the reason that the deponent, Carol Mwihaki Gikonyo, avers that she is the Respondent in this matter which is not the case. The Respondent is Simon Gikonyo Ndirangu. The said Carol Mwihaki Gikonyo has not disclosed her relationship with the Respondent and has also not filed any authority to act on behalf of the Respondent. For that reason, I will take the Applications before court as unopposed.

The issue for determination is whether or not to issue an order of stay of execution of the Judgment.

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."***
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> **Order 42 Rule 6(2)** provides as follows:
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> *"**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 Appellant/Applicant stands 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 Appellant/Applicant has averred that he stood to suffer the loss of his business, the goodwill he has built over the years and his 9 employees should the stay not be granted. In my view, this amounts to substantial loss for the purpose of this appeal.

The other element I must consider is whether this appeal was brought to this court without unreasonable delay. The Judgment was delivered on 10th July 2015 while this appeal was filed a month later on 11th August 2015 and the first Application was filed on 2nd October 2015 which is about 2 ½ months later. I find that this request was brought to court without unreasonable delay.

The final element is in respect of the security that the Appellant/Applicant should supply the court for the due performance of the decree that may ultimately be binding on him should this appeal fail. The details in that respect are not before the court at this juncture. The court will therefore not require the

Appellant/Applicant to give any security.

The upshot of this is that the first and the second Applications are hereby allowed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE