



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

The application argued before us as stated earlier is for stay of execution of the decree of the superior court made on 16th day of June, 2009, striking out the applicant's defence and entering summary judgment for the respondent. We are aware a stay of execution order can issue if the applicant satisfies the usual twin principles which must govern the application, that is to say; that the intended appeal is arguable or, put it differently, that it is not frivolous, and secondly, that the intended appeal, if successful would be rendered nugatory unless the stay is granted. On the first principle counsel for the applicant referred us to **section 2** of the Act and also that it was a protected tenant. We are not persuaded this section assists the applicant on the issue of jurisdiction; given in particular that the lease agreement stipulated its determination and also the correspondence from the respondent to the applicant immediately before and after the said lease expired to notify it that it was to surrender the premises after expiry of the lease. The respondent had specifically stated in one of the correspondence dated 3rd October, 2007 that it would not renew the lease. In this regard we are not persuaded this appeal is arguable. And having so found it may not be necessary for us to make a finding on the nugatory aspect. But even if we were to do so, the applicant has not shown that whatever he will suffer will be irreparable or that it cannot be compensated by damages or that the type of business it is engaged in can only be confined to the respondent's premises. Orders made in this type of application are based on its peculiar facts and circumstances and in this application we are not persuaded the superior court failed to apply its judicial discretion correctly. This application has no merit and we order it to be dismissed with costs.

Delivered and dated at Nairobi this 16th day of October, 2009

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR