



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: KWACH, LAKHA & KEIWUA, J.J.A.)**  
**CIVIL APPLICATION NO. NAI. 45 OF 2000 (UR. 22/2000)**

**BETWEEN**  
**HARDROCK CAFE LIMITED ..... APPLICANT**  
**AND**  
**PLAZA TRUST LIMITED ..... RESPONDENT**

**(An application for stay of execution of the Judgment and Order of the High Court of Kenya at Nairobi (Rawal, Commissioner of Assize) delivered at Nairobi on 20th January, 2000**

**in**  
**H.C.C.C. NO. 1719 OF 1999)**  
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**RULING OF THE COURT**

The applicant in this application was the defendant in the superior court and seeks an order of stay of execution of the judgment of that Court (Mrs. Rawal, Commissioner of Assize) given on 20 January, 2000 pending the hearing and determination of an intended appeal.

The relevant facts are few and simple. By its plaint dated 1 September, 1999, the plaintiff sued the defendant, inter alia, for possession on the ground that the term in the lease dated 25 August, 1993 and made between the parties hereto whereby the plaintiff demised to the defendant for a term of six years from and including 1 September, 1993 the premises on Mezzanine 2 and the Restaurant Gallery measuring approximately 12038 square feet in the building known as Barclays Plaza, Loita Street, Nairobi (the suit premises) expired by effluxion of time on 31 August, 1999. Yet the defendant did not, in breach of an express term in the lease, yield up the suit premises to the plaintiff. The defendant's defence was an admission and in terms read as follows:-

"4. In answer to paragraph 5 of the plaint, the defendant admits the expiry of the lease by effluxion of time ....."

Upon the hearing of an application made by the plaintiff for summary judgment for possession, the learned Commissioner having considered the matter in detail concluded as follows:-

"In this case, after considering the case before me, there is no doubt in my mind that the Hard Rock has no Defence to the part of the claim of Plaza i.e. expiry of tenancy by affluxion of time. If the tenancy is at an end, Plaza should not be asked to await for the full trial to enable it regain possession of the suit premises. The authorities cited do not support the case of Hard Rock."

The applicant now applies under **rule 5(2)(b)** of the Rules of this Court for a stay as aforesaid. In making an order for a stay pending an appeal against summary judgment pursuant to **Order 35 of the Civil Procedure Rules**, it is the duty of this Court to refuse a stay where there is plainly no defence to the claim or where the defence is a sham one thus rendering an intended appeal unarguable. Here, the defence amounts to a clear admission and it has not been demonstrated to us that the applicant has an arguable appeal.

The principles on which this Court grants a stay under its **rule 5(2)(b)** are now well settled. The applicant has to show that he has an arguable appeal and that the same will be rendered nugatory if a stay were not granted. Since, in our view, it has not been shown to us that the applicant has an arguable appeal, it is not necessary for us to express our view on the second condition, namely, whether the appeal will be rendered nugatory if a stay is not granted.

In all the circumstances of this case, we are satisfied, the confidence of Mr. Lumumba for the applicant notwithstanding, that the learned Commissioner was plainly right and an appeal from her decision would be unarguable. Accordingly, this application fails and is dismissed with costs.

**Dated and delivered at Nairobi this 3rd day of March, 2000.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**M. KEIWUA**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**