



**Kiute v Girolstein & another (Environment and Land Appeal
E29 of 2022) [2023] KEELC 16507 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E29 OF 2022
NA MATHEKA, J
MARCH 22, 2023**

BETWEEN

ELIZABETH KIUTE APPELLANT

AND

WOLFGANG GIROLSTEIN 1ST RESPONDENT

ABDULLAH SHEIKH OMAR ABDULLAH 2ND RESPONDENT

RULING

- 1 The application is dated September 6, 2022 and brought under Sections 3, 3A and 63 (e) of The [Civil Procedure Act](#) Cap 21 Laws of Kenya and Order 40 Rules 1 (a) and 2 of The [Civil Procedure Rules](#) seeking the following orders;
 - a. That the Application herein be certified as urgent and service of the same be dispensed with in the first instance.
 - b. That this Honourable Court be pleased to issue a Temporary Order of Injunction restraining the Respondents whether by themselves, their agents, servants and/or employees from evicting, harassing, threatening or in any other manner howsoever interfering with the Tenant/Appellant's quiet enjoyment of the tenancy in the demised premises on Plot No 2197/111/ MN situated in Mtwapa pending the hearing of this Application inter partes.
 - c. That this Honourable Court be pleased to issue a Temporary Order of Injunction restraining the Respondents whether by themselves, their agents, servants and/or employees from evicting, harassing, threatening or in any other manner howsoever interfering with the Tenant/Appellant's quiet enjoyment of the tenancy in the demised premises on Plot No 2197/111/ MN situated in Mtwapa pending the hearing and determination of the Appeal.
 - d. That costs of the Application be provided for.



- 2 It is supported by the Annexed Affidavit sworn by Elizabeth Kiute and is based on the following grounds that on May 28, 2021 the Respondents issued the Appellant with an illegal Notice of Termination forcing the Appellant to file a Complaint and Reference on the Business Premises Rent Tribunal. That on July 8, 2022 The Honourable Chairperson of the Business Premises Rent Tribunal delivered a Ruling dismissing the Tenant/Appellant's Application dated July 14, 2021 and the Reference. That Appellant is aggrieved by the said Ruling and Order and has lodged an Appeal and filed a Memorandum of Appeal dated August 3, 2022 before this Honourable Court. That the Appeal has high chances of success. That no prejudice will be occasioned to the Respondents if the orders sought herein are granted. That unless a temporary order of injunction restraining the Respondents either by themselves, their employees, servants and/or agents from evicting, harassing, threatening or in any other manner howsoever interfering with the Tenant/Appellant's quiet enjoyment of the tenancy in the demised premises, the Respondents may proceed to illegally evict the Appellant from the suit premises which is the subject matter of the Appeal. That unless Order of a temporary injunction is granted the Appellant's Appeal will be rendered nugatory thereby occasioning the Appellant irreparable loss. That it is in the interest of justice that a temporary Order of Injunction be issued and for the substratum of the Appeal to be preserved to avoid creating a mockery of the appeal.
- 3 The 2nd Respondent submitted that as a professing Muslim he is unable to collect rent from the Appellant as the business she runs sells liquor and it would be against his right to practice his religious beliefs to receive rent from her. The Appellant has occupied the subject property rent free for more than fifteen months which has caused immense hardship to the 2nd Respondent, which continues to date. The Appellant is a tenant and can obtain alternative premises. He stated *inter alia* that the Applicant was notified to vacate premises two months prior July 14, 2021 when the lease expired. The 2nd Respondent was the current landlord as the 1st Respondent had died. (Attached and marked as ASOA 2). He further deponed that injunctive orders sought by the Applicant were meant to allow her to continue occupying the subjective premises free of charge as he could not collect rent for the Applicant who was running a bar as it was haram for him to do so and in response for compensation owed to the Applicant the matter could be referred to a different suit
- 4 The Applicant vide the Law firm of Sherman Nyongesa & Mutubia Advocates filed submissions in support of the application on December 5, 2022 it was Counsel's submission that the Applicant had met the threshold for grant of injunctive orders as per the cases of *Mrao Ltd vs First American Bank Ltd & 2 Others* (2003) eKLR and *Raphael Mulunge Muthusi & 2 others vs Mary Ndila Nyolo* (2021) eKLR; Counsel averred that the Applicant had a prima facie case as seen in the annexures attached i.e the tenancy agreement and compensation agreement.
- 5 It was submitted that the Applicant had raised substantial and weighty issues in the memorandum of appeal that merited grant to the injunctive orders. Reliance was placed on *Kenya Commercial Bank Limited vs Nicholas Ombija* (2009) eKLR. It is submitted that the counsel may suffer irreparable damage as Appellant may be forcefully evicted at any time and have their source of livelihood taken away and the Respondent has on occasion disconnected the power for the premises suit. It is submitted that the Applicant has met all grounds for grant of injunction and application should be allowed with costs.
- 6 The 2nd Respondents vide the law firm of Njoroge & Katisya filed their submissions dated July 10, 2022. The 2nd Respondent avers that the appeal by the Applicant is frivolous and has no chance of success as it the tribunal found that there was no dispute between the Applicant and 2nd Respondent and the Applicant never opposed 2nd Respondent's ownership of the suit premises. The 2nd Respondent was also enjoined as an interested party and was never a 2nd Respondent in the matter and appeal therefore



raises new issues against the interested party that was never raised in the tribunal. 'ASOA 1A' is also prima facie evidence that the 2nd Respondent is the owner of the subject premises as referred to in Section 26 of the Land Registration Act No 3 of 2012 and there was no tenancy agreement between the Applicant and 2nd Respondent and the appeal was an abuse of the court process. It is submitted that the 2nd Respondent would suffer immense hardship if the injunction is not granted. It was further submitted that Applicant complaint against the 1st Respondent should be abated. It is submitted that the application dated September 6, 2022 should be dismissed with costs.

7 This court has considered the application and submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”

8 The Appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

9 The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd* Civil Appl No Nai 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,



2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

10 The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

11 In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right

12 We are further guided by this court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No 291 of 1997, at Page 4 as follows:

... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

13 The 2nd Respondent submitted that the Applicant was notified to vacate premises two months prior July 14, 2021 when the lease expired. The 2nd Respondent was the current landlord as the 1st Respondent had died. (Attached and marked as ASOA 2). He further deponed that injunctive orders sought by the Applicant were to mean to allow her to continue occupying the subjective premises free of charge as he could not collect rent for the Applicant who was running a bar as it was haram for him to do so and in response for compensation owed to the Applicant the matter could be referred to a different suit. The Applicant submitted that the 1st Respondent was to compensate her Kshs 1,400,000/= being agreed repair charges in respect of the suit premises before termination of the lease and or grant of vacant possession. I find that what the Applicant seems to be pursuing is compensation from the 1st Respondent who is deceased and not continued stay at the suit premises. I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the Applicant has not fulfilled the above mentioned grounds to enable me grant the stay. I find the application dated September 6, 2022 is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA



JUDGE

