



**Abdulkarim Rashid t/a Melodica v Elimu Investments Ltd & another (Environment and Land Appeal 112 of 2022) [2023] KEELC 16230 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16230 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 112 OF 2022**

**JO MBOYA, J  
MARCH 16, 2023**

**BETWEEN**

**ABDULKARIM RASHID T/A MELODICA ..... APPELLANT**

**AND**

**ELIMU INVESTMENTS LTD ..... 1<sup>ST</sup> RESPONDENT**

**SALIMIRWA TRADING CO.LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling and directions of the Honourable Honourable.  
Cyprian Mugambi Nguthari (Chairman) delivered on the 14<sup>TH</sup> day of  
November, 2022; in the Nairobi Business Premises Rent Tribunal at View Park  
Towers 7<sup>th</sup> & 8<sup>th</sup> Floor in TRIBUNAL CASE NO.464 OF 2016(NAIROBI)*

**RULING**

**Introduction And Background**

1. Vide Notice of Motion Application dated the 16<sup>th</sup> November 2022, the Appellant/Applicant has approached the Honourable court seeking for the following reliefs;
  - i. The Application herein be certified as urgent and service of the same be dispensed with in the first instance and ex-parte orders in terms of(1),(2),(3) and (4) be issued Ex Debito Justitiae.
  - ii. That the Proceedings in Tribunal Case No. 464 of 2016 (Nairobi) be stayed and adjourned and the Ruling and directions of the Honourable Cyprian Mugambi Nguthari (Chairman) delivered on the 14<sup>TH</sup> day of November,2022; in the Nairobi Business Premises Rent Tribunal be stayed and set aside pending the Hearing and Determination of this Application, Appeal and the determination of High Court in Misc. Applications 646/2019 and 733/2019.



- iii. That the Respondents, their agents, auctioneers, employees or anyone else be restrained from interfering, trespassing, evicting, levying distress, attaching, auctioning, or selling any of the Tenant's Goods or in any way interfering with the Tenant/Appellants businesses situate in Elimu Cooperative House 1989, tom Mboya Street/ronald Ngala Street, Nairobi (land Ref. No. 209/669) pending the Hearing and Determination of this Application, Appeal and the determination of High Court in Misc. Applications 646/2019 and 733/2019.
  - iv. That this Application and Appeal be heard viva-voce in open court and the Tribunal's files in BPRT Nairobi 730/2019, BPRT Nairobi/659/2019, BPRT Nairobi /464/2016 & BPRT Nairobi/855/2015 be produced before this Honourable Court
  - v. Costs be awarded to the Appellant.
2. The instant application is premised and anchored on various, albeit numerous grounds covering (sic) more than 10 pages, which have been enumerated in the body thereof.
  3. Furthermore, the Application is supported by the affidavit sworn on the 16<sup>th</sup> November 2022 and which affidavit is contained on a total of 19 pages ( not paragraphs) and same contains various annexures, which are attached thereto.
  4. Upon being served with the current application and the supporting affidavit thereto, the Respondent herein filed a Replying affidavit sworn on the 1<sup>st</sup> December 2022 and to which the Respondent has exhibited and attached, inter-alia, a copy of the ruling rendered on the 14<sup>th</sup> December 2022 and which is the subject of the impugned application.
  5. When the current application came up for hearing, the Honourable court ordered and directed the advocates for the respective Parties to canvass the application by way of written submissions. In this regard, the court proceeded to and set time lines for the filing and exchange of the written submissions.
  6. Pursuant to and in compliance with the directions of the Honourable court, the counsel for the Respondent duly filed his written submissions on the 23<sup>rd</sup> January 2023.
  7. However, learned counsel for the Appellant, who had hitherto sought to have the application heard and disposed of on priority basis, failed and neglected to file his written submissions.
  8. Arising from the failure and/or neglect to file the written submissions, the Honourable court granted further latitude to the Applicants to file and serve written submissions. Besides, the Honourable court ordered and directed counsel for the Respondent to extract and serve the order upon counsel for the Appellant.
  9. Be that as it may and despite concerted efforts to procure written submissions on behalf of the Appellant/Applicant, none was ever filed.
  10. Consequently and in the premises, the subject ruling has been crafted without the benefit of the Applicant's submissions



## **Submissions by the Parties**

### **a. Applicant's submissions**

11. Barring repetition, it has been pointed out elsewhere herein before that directions were given to have the instant application canvassed and ventilated vide written submissions.
12. Furthermore, after the directions to the extent that the application was to be canvassed/ ventilated by way of written submissions, the Honourable court proceeded to and circumscribed timelines for the filing and exchange of the written submissions.
13. Nevertheless and despite latitude/ indulgence, being granted to the Applicant, same did not find it fit or expedient to file any written submissions, either within the set timelines or at all.
14. In a nutshell, by the time the Honourable court set down the subject matter for delivery of the ruling, no submissions had been filed by and on behalf of the Applicant.

### **b. Respondent's Submissions**

15. The Respondents herein filed written submission dated the 23<sup>rd</sup> January 2023 and in respect of which same has raised, highlighted and amplified three salient issues for consideration by the Honourable court.
16. First and foremost, learned counsel for the Respondent has submitted that the Applicant herein filed and lodged an application dated the 27<sup>th</sup> June 2022, before the Business Premises Rent tribunal, wherein the Applicant sought for a plethora of reliefs.
17. Additionally, learned counsel for the Respondents has submitted that upon the filing of the impugned application, same was duly canvassed and disposed of by the chairperson of the tribunal vide ruling rendered on the 14<sup>th</sup> November 2022; whereby the chairperson of the tribunal made various orders, some of which were in favor of the Applicant.
18. On the other hand, learned counsel further contended that other aspects of the ruling, were in the negative and in particular, some of the reliefs which had been sought by the Applicant were declined.
19. Be that as it may, learned counsel for the Respondent has now submitted that to the extent that a majority of the orders which were granted were in the negative, no order of stay can therefore arise and/ or be granted in the manner sought by the Applicant.
20. In support of the submissions that a dismissal or negative order cannot attract an order of stay of execution either in the manner sought or at all, learned counsel for the Respondent has cited and relied on the decision in the case of *Western College of Arts & Applied Technology versus Oranga & Others* (1976)eKLR.
21. Secondly, learned counsel for the Respondent has submitted that the current application is calculated to invite the Honourable court to sit on appeal on the decision of Hon. Justice Chitembwe, Judge, ( as he then was) which was issued on the 11<sup>th</sup> March 2022. For clarity, learned counsel has added that this Honourable court is not seized or possessed of the requisite Jurisdiction to sit on appeal on the decision of a court of concurrent jurisdiction.
22. Thirdly, learned counsel for the Respondents has further submitted that the doctrine of *Lis Pendens*, which has been invoked and relied upon by the Applicant herein, is not only irrelevant but in



applicable, insofar as there is no property that is on the verge of being alienated and/or disposed of during the pendency of the instant proceedings.

23. Furthermore, learned counsel has cited and invited the Honourable court to take cognizance of the decision in the case of *Mawji versus US International University & Another* (1996)KLR page 185, wherein the doctrine of *Lis Pendens* was discussed.
24. In a nutshell, learned counsel for the Respondents has therefore implored Honourable the court to find and hold that the current application is not only an abuse of the due process of the court, but also legally untenable.
25. Consequently and in view of the foregoing submissions, Learned counsel has invited the Honourable court to dismiss the application with costs to the Respondent.

### **Issues for Determination**

26. Having reviewed and evaluated the omnibus application dated the 16<sup>th</sup> November 2022, together with the supporting affidavit thereto and having taken into account the Replying affidavit filed in opposition thereto; and having considered the written submissions filed on behalf of the Respondents, the following issues do arise and are thus germane for determination;
  - i. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to grant an order of stay where the court appealed from has merely dismissed an application filed.
  - ii. Whether this Honourable court has the requisite Jurisdiction to set aside the ruling and orders of the Business Premises Rent Tribunal on the basis of an Interlocutory application, like the one beforehand.
  - iii. Whether this Honourable court can stay the proceedings before the Business Premises Rent Tribunal pending the hearing of (sic) proceedings and applications in the High Court.

### **Analysis and Determination**

#### **Issue number 1**

Whether the Honourable court is seized and possessed of the requisite Jurisdiction to grant an order of stay where the court appealed from has merely dismissed an application filed.

27. To start with, the Applicant herein had filed and lodged an application dated the 27<sup>th</sup> June 2022, before the Business Premises Rent Tribunal and in respect of which same had sought for various reliefs.
28. Given the importance of the reliefs which were sought at the foot of the application before the tribunal, it is appropriate to reproduce same.
29. For ease of reference, the reliefs are reproduced as hereunder;
  - i. The application herein be certified as urgent and service of the same be dispensed with in the first instance.
  - ii. That this Application be heard viva-voce in priority of the main suit.



- iii. That the main suit be adjourned pending the hearing and determination of the Contempt Proceedings before the High Court being Misc. Appl. 646/2019 and 733/2019.
  - iv. That the Tenant/Applicant be provided with the inspection Report arising out of the Inspection conducted by this honorable Tribunal or in the alternative the Tribunal directs and conducts a fresh inspection of the subject matter premises herein.
  - v. The Tenant/Respondent be allowed time and access to the Tribunal documents touching on the proceedings heretofore this suit touching on the Landlord/Respondent.
  - vi. That summons do issue to the persons who prepared or under whose authority and expertise documents relied in this matter by the parties herein were prepared: inclusive of the Director of Criminal Investigation, the Nairobi City County, and the Experts named in the documents.
  - vii. Costs be awarded to the Tenant/Applicant.
30. Subsequently, the chairperson of the tribunal entertained the subject application and thereafter rendered a ruling wherein same granted the following orders;
- i. An inspection of the suit premises will be carried out by the tribunal and a report filed within the next 7 days of this ruling date.
  - ii. This matter be fixed for hearing on a priority basis.
31. From the foregoing, there is no gainsaying that the various reliefs which had been sought at the foot of the application, were declined or better still dismissed.
32. In the premises, the nature of the orders that ensued and arose from the ruling of the Chairperson of the tribunal, were majorly in the negative. Consequently, the question that does arise; is whether this Honourable court can grant an order of stay of execution pertaining to and concerning dismissal or negative orders.
33. In my humble, albeit considered view, where the resultant order is in the negative, such an order cannot attract or form, the basis of an Application for stay of execution, nay, an order of stay.
34. In the circumstances, the limb of the current application seeking for stay of the orders, ruling and directions of the chairperson of the tribunal, are certainly misconceived and legally untenable.
35. To this end, the ratio decidendi in the case of *Western College of Arts & Applied Technology versus Oranga & Others (1976)eKLR*, is succinct, apt and relevant.
36. For coherence, the Honourable Court of Appeal stated and held as hereunder;

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There



is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

37. Recently, the Court of Appeal re-visited the issue or question as to whether an order of stay can issue where negative orders were given in the case of *Charles Barongo versus The County Government of Kisii* (2020)eKLR, where the Honourable court stated and observed as hereunder;
11. This Court has also consistently held that a negative order cannot be executed, and that where the trial court in its judgment has dismissed a suit, that is a negative order that is not amenable to grant of any stay. See *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63.
  12. The applicant’s claim was dismissed by the ELRC. What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court’s judgment pending hearing and determination of the intended appeal sought by the applicant cannot therefore be granted.
38. Other than the foregoing, it is also imperative to note that the Applicant herein had also sought for an adjournment and/or postponement of the hearing of the suit before the Business Premises Rent Tribunal. However, the chairperson of the tribunal declined to grant the adjournment and instead directed that the proceedings shall be heard on a priority basis.
39. In this regard, the ancillary question that arises and which must also be determined is whether an order declining a request for adjournment or postponement of the scheduled hearing, can be the basis of stay of proceedings or better still, stay of execution.
40. Additionally and in my humble view, an order refusing to grant an adjournment is a discretionary order and once same is issued, it cannot be the basis of stay of execution, either in the manner sought or at all.
41. Other than the negative orders which arose from the ruling and decision of the chairperson of the tribunal, the other limb of the order related to the direction that an inspection of the suit premises be carried out and a report be prepared within 7 days of the delivery of the ruling of the tribunal.
42. As pertains to this limb of the order, it is imperative to state and underscore that the Applicant herein had himself sought for an alternative order, namely, that the tribunal directs and conducts afresh inspection of the subject matter/premises herein.
43. Clearly, the limb of the order of the tribunal which directed the inspection of the suit premises, was granted at the instance and request of the Applicant. Consequently, it was a favorable order, granted at the request of the Applicant himself.
44. Notwithstanding the foregoing, the Applicant herein is still courageous and brave to approach this Honourable court and seek to obtain an order of stay of execution of the stated limb of the order, which was indeed in his favor.
45. For the umpteenth time and in my humble view, where an order is favorable to the Applicant, the Applicant cannot be heard to say that same wants a stay of the said (sic) order.
46. Clearly, the Application by and at the instance of the Applicant and wherein same is seeking for an order of stay in the manner sought, constitutes and amounts to an abuse of the Due process of the Honourable court.
47. Furthermore and in any event, time is ripe and parties and their counsel, ought to understand that the process of the Honourable court is not to be misused or better still abused.



48. In addition, litigants and their advocates must eschew and void at all cost, pleadings that are trifling and amounts to playing Lottery with the due process of the Honourable court.

### **Issue Number 2**

Whether this Honourable court has the requisite Jurisdiction to set aside the Ruling and order of the Business Premises Rent Tribunal on the basis of an Interlocutory application, like the one beforehand.

49. Other than the prayer pertaining to and concerning the grant of stay of the orders and ruling of the chair person of the tribunal, the Applicant herein has also implored the Honourable Court to set aside the impugned ruling pending the hearing and determination of the Application and the appeal.
50. In my understanding, the Applicant herein is seeking to have the Honourable court set aside, vacate and rescind the orders, ruling and directions of the Chairperson of the tribunal, albeit on the basis of the current Interlocutory application.
51. It is not lost on the Honourable court that the mandate and/or jurisdiction to set aside and vary the orders appealed against, is vested in the court. However, it must be remembered, that same can only be exercised after the substantive hearing of the appeal and not otherwise.
52. Consequently and in view of the foregoing observation, the only time that this Honourable court, subject to due persuasion, can set aside and vary the impugned ruling of the tribunal, is after the hearing of the appeal.
53. Premised on the foregoing, it is therefore evident and apparent that whilst adjudicating and entertaining upon an interlocutory application, like the one beforehand, this Honourable court cannot arrogate unto itself the powers of the trial court, namely, the court that shall hear the appeal.
54. In the circumstances, I come to the conclusion that the limb of the application, which seeks to invite this Honourable court to set aside and rescind the impugned ruling, is not only premature and misconceived but same is also legally untenable.

### **Issue Number 3**

Whether this Honourable court can stay the proceedings before the Business Premises Rent Tribunal pending the hearing of (sic) proceedings and applications in the High Court.

55. The Applicant herein has also implored the court to grant the requisite stay of proceedings and stay of execution of the matter before the business premises tribunal pending the hearing of High Court Misc. Application No. 646 of 2019 and 733 of 2019, respectively.
56. In this regard, the question that this court must grapple with, is whether the grant of such kind of orders would be tantamount to superintending and/or supervising the High Court in the discharge of her function and/or mandate.
57. Clearly, if the Applicant herein acknowledges that the proceedings before the High Court are paramount and thus necessary to be heard and determined before the continuation with the proceedings in the Business Premises Rent Tribunal, then the appropriate forum to procure the order of stay of proceedings is before the High Court and not otherwise.
58. I must also point out that having filed the Miscellaneous. Proceedings before High court (for whatever their worth), I do not understand why the Applicant has not chosen to mount the application for stay or proceedings before the High court.



59. Be that a it may, the lodgment of the current application before the Environment and Land Court and thereafter seeking for orders pending the hearing and determination proceedings before the High Court is akin to subordinating the High Court, or better still, seeking to invite this Honourable court to superintend the High court.
60. In my humble view, the limb of the application that requires an order of stay of proceedings before the tribunal pending the hearing of the Misc. Application/ proceedings before the High court, is wrought and replete with illegalities; and may very well, bring the two Superior courts, into conflict.
61. In a nutshell, I come to the conclusion that the application beforehand is not only misconceived but similarly omnibus in nature.
62. Consequently and in the premises, my answer to issue number three is that the reliefs sought for and in particular, an order of stay of the proceedings before the tribunal, pending the hearing and determination of the matters before the High court, is similarly untenable and bad in law.

### **Final Disposition**

63. In conclusion, it is evident and apparent that the application that was placed before the Honourable court and which seeks the various reliefs thereunder, is not only misconceived, but is bad in law and legally untenable.
64. Nevertheless, before venturing to make the final pronouncement, there is one incidental issue/ matter, which requires mention; and a short discourse.
65. For coherence, the matter herein touches on and relates to an aspect of the application by the Applicant wherein same sought to have the current application and the appeal to be heard vide viva voce evidence in open court.
66. To my mind, all applications (save for originating summons under order 37 which subject to directions may be heard vide viva voce evidence), all other applications are canvassed and ventilated on the basis of affidavit evidence.
67. Additionally, all appeals are canvassed on the basis of the record of appeal, containing the pleadings, proceedings and the Judgments/rulings, appealed against. Furthermore, such appeals are ventilated either vide oral or written submissions.
68. Consequently, I am lost as to the import and tenor of the request by the Applicant to have both the current application and the appeal heard vide vide viva voce (oral evidence).
69. In my considered view, such an invite is clearly untenable and inimical to the established procedures, developed and cherished over time, but also contrary, to the provisions of the Law.
70. Having made the foregoing remarks, it is now imperative to state that the entire application dated the 16<sup>th</sup> November 2022, is misconceived, legally untenable and Bad in law.
71. In the premises, same be and is hereby Dismissed with costs to the Respondents.
72. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>th</sup> DAY OF MARCH 2023.**

**OGUTTU MBOYA**

**JUDGE**



**In the Presence of;**

Benson. Court Assistant:

Mr. Kevin Ndoho Macharia for the Appellant/Applicant.

Mr. Murimi Murango for the Respondents.

