



**Alduchira Investment Company v Borabu Trading Company (Environment and Land Appeal E002 of 2023) [2023] KEELC 17674 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17674 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

**M SILA, J**

**MAY 25, 2023**

**BETWEEN**

**ALDUCHIRA INVESTMENT COMPANY ..... APPELLANT**

**AND**

**BORABU TRADING COMPANY ..... RESPONDENT**

*(Kisii BPRT Case No. E028 of 2022)*

**RULING**

1. The applicant has been tenant of the respondent in the premises identified as Keroka Plot No. 66. The landlord wished to terminate the tenancy on grounds that she needs to demolish and reconstruct the premises, and on 20 May 2022, she issued a notice to terminate tenancy. The applicant filed suit before the Business Premises Rent Tribunal to contest the notice. The suit is registered as Kisii BPRT Case No. E028 of 2022. Before the same could be heard, it was contended that the landlord had started removing the roof of the premises. This prompted the tenant to file an application dated 4 August 2022 under certificate of urgency before the tribunal. The application was registered as Kisii BPRT Case No. E041 of 2022. Within that application, the tenant complained that despite the pendency of the suit Kisii BPRT Case No. E028 of 2022, the landlord had moved to evict her. Interim orders in favour of the tenant were granted ex parte and the tribunal ordered that the application be heard inter partes on 3 October 2022.
2. I am not too sure what transpired on 3 October 2022, for I am yet to see the proceedings of the tribunal, but a ruling was delivered on 20 December 2022, vide which both the references No. E028 of 2022 and E041 of 2022 were dismissed with costs of Kshs. 40,000/= to the landlord. That same ruling upheld an application by the landlord dated 22 September 2022. At the moment, I do not have the benefit of that application.



3. Aggrieved by the ruling, the tenant has preferred an appeal to this court on various grounds, inter alia, that the Vice-Chairman of the tribunal erred by delivering a joint ruling for two distinct cases, and also by terminating the case Kisii BPRT Case No E028 without first hearing the reference. Two appeals have been filed but I ordered the two to be consolidated. Together with the appeal, the tenant has filed an application for stay of execution of the ruling of the tribunal, pending hearing of the appeal. It is that application which is the subject of this ruling. The applicant is apprehensive that unless stay is granted, his appeal will be rendered nugatory.
4. The landlord has filed a replying affidavit sworn by Harrison Omari Maronga, to oppose the motion. Inter alia it is deposed that the appeal is a nullity for failure to file a Memorandum of Appeal and thus there is no substantive appeal; that the applicant has filed another matter in Nairobi being Nairobi ELCA No. 1 of 2023; that the decision of the tribunal was correct; that the landlord was issued with a notice on 23 August 2022 to improve the sanitation of the premises; that the respondent is incurring losses of Kshs. 250,000/= as a result of other tenants moving out of the building; that the appellant has already moved out; that she also removed the corridor grill without their consent; that the appellant has malicious intentions. The tenant filed a supplementary affidavit vide which it is deposed that the matter herein was transferred from Nairobi; that a memorandum of appeal was filed; that she is still a tenant in the premises; that it is a fiction to claim loss of Kshs. 250,000/= per month.
5. I directed counsel to file written submissions, which they did, and I have taken the same into account. I note that it was raised by counsel for the respondent that there is there is another suit being Nairobi ELCA No. 1 of 2023. The position is that the said appeal was transferred to this court by the ELC Nairobi so there is no other suit pending in Nairobi. Secondly, it is argued that there is no Memorandum of Appeal. I wonder where that argument is coming from because I have seen on record a Memorandum of Appeal.
6. To the substance of the application, what is before me is an application for stay pending appeal, and I stand guided by the provisions of Order 42 Rule 6 (1) which provides as follows :-
  - (2) 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.
7. It will be seen that there are three principles outlined being: that the application has been filed timeously; that the applicant demonstrates that she will suffer substantial loss if the stay is not granted; and that the applicant is ready to offer security for the due performance of the decree.
8. On the first principle, the ruling was delivered on 19 December 2022 and this application was filed barely a month later. I find no delay. On substantial loss, I am of the opinion that if the decree of the tribunal is executed, the appeal may be rendered nugatory as the respondent will take over the premises and there is potential of its character being radically changed. This may occasion the applicant substantial loss. Finally, is security. There was an award of Kshs. 40,000/= as costs. I direct that this amount be confirmed by counsel for the applicant to be available within 30 days and thereafter be deposited in a joint interest earning account to be held in the names of counsel for the applicant and respondent. The applicant to also continue paying rent and any other charges in the usual manner pending hearing of the appeal.
9. The last issue is costs. The costs of this application to abide the costs of the appeal.



10. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 25 DAY OF MAY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

