



REPUBLIC OF KENYA



**Dorcas Nabwire Makokha t/a Merricare Pharmacy v Ndageruando Investments Limited (Environment and Land Appeal E058 of 2023) [2023] KEELC 17900 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17900 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E058 OF 2023**

**JA MOGENI, J**

**MAY 25, 2023**

**BETWEEN**

**DORCAS NABWIRE MAKOKHA T/A MERRICARE PHARMACY ..... APPELLANT**

**AND**

**NDAGERUANDO INVESTMENTS LIMITED ..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion filed under certificate of urgency dated February 22, 2023, primarily brought under Order 42 rule 6 of the *Civil Procedure Rules*. The main prayers are No 3 and 5, which seek:
  - “3. That this Honorable Court be pleased to grant a stay of execution of the orders of the Tribunal issued on February 17, 2023 in BPRT No E005 of 2023 (Dorcas Nabwire Makokha t/a Merricare Pharmacy v Ndageruando Investments Limited) pending the hearing and determination of the intended appeal
  5. That this Honourable Court be pleased to grant temporary injunction against distress for rent by the Respondent, its servants, employees and agents from carting away, disposing off or otherwise interfering with the Applicant’s assets and further order the immediate release of the Applicant’s tools of trade unlawfully carted away by the Respondent’s Auctioneers on the February 17, 2023 pending the hearing and determination of the intended Appeal.”
2. The Notice of Motion is supported by the affidavit of Dorcas Nabwire Makokha the appellant t/a Merricare Pharmacy.



3. The subject matter of the appeal is the decision of the Business Premises Rent Tribunal (BPRT) in case No E005 of 2023, to the effect that:

“...directing the Appellant/Applicant to clear the outstanding Rent owing to the Respondent to the tune of Ksh 872,000.00 as at January 2023 failure to which the Respondent may distress for rent within 7 days from the date of the ruling (which was February 17, 2023)”

4. The appellant complains that following the said ruling the Respondent sent auctioneers to the Applicant’s rental shop at 6:30 a.m on February 17, 2023 and the auctioneers carted away the Applicant’s tools of trade necessary for carrying out its business. Further, that this happened despite the fact that the dispute was still actively before the Tribunal for hearing and determination and the Respondent had still not put in a response to the Application.

5. The applicant being aggrieved by the said ruling and order of the Honorable Tribunal intends to appeal against the ruling in its entirety and that the appellant believes that they have an arguable appeal. Further that the applicant stands to suffer irreparable loss and damage through the shutting down of its business and further that the order sought will at least stop the respondent from proceeding with the sale of the applicant’s tools of trade that are already in the possession of the Respondent. That in summary is the substance of the supporting affidavit.

6. In response, the respondent filed a Replying Affidavit opposing the Application. The Respondent describes the appellant’s application as being in bad faith, lacking merit and an abuse of the court process and asserts the respondent’s right to enjoyment of its proprietary rights and states that the application should be dismissed with costs. That the appellants have not demonstrated that they stand to suffer substantial loss.

7. In the alternative, the respondent urge that if the application is granted, it should be upon terms that the applicant should be ordered to deposit the outstanding rent in court or in a joint interest earning account held by both parties. The parties were represented by Ms. Nyachia holding brief for Mr Ngugi and Mr Ayisi. The parties agreed to canvass the Notice of Motion by way of written submission on March 14, 2023 and the ruling date set for May 17, 2023.

8. Written submissions were filed by the respective parties. I have now considered all the material canvassed before me in this application. I take the following view. This Notice of Motion is primarily brought under Order 42 rule 6 of the [Civil Procedure Rules](#) and Sections 1A and 3A of the [Civil Procedure Act](#). As stated above, the respondent opposed the prayer for stay of execution pending appeal citing the persistent default by the appellant in paying rent in respect of the suit property.

9. For her part, the appellant complains that the sums ordered by the BPRT to be paid are large and the time provided short further that currently the appellant is facing hard economic times. The question of the respondent having contributed to the appellant not being able to carry out her business due to electricity disconnection has kept surfacing in the application but in my considered view it is irrelevant for the purposes of this application.

10. Order 42 rule 6(2) of [Civil Procedure Rules](#) is in the following terms:

“6.

(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.”

11. While the appellants have undoubtedly come to court without unreasonable delay, the court must satisfy itself that they stand to suffer substantial loss if the order sought are denied, and secondly, that the appellant will furnish security for the due performance of the decree.
12. According to the order of the BPRT issued on February 17, 2023 the appellant was to clear arrears in excess of Kshs 800,000 within a period of about 7 days. In default the respondent was at liberty to levy distress for rent. On the face of it, the appellant is occupying premises that are owned by the respondent. The court had granted interim orders which is prayer 2 of the Notice of Motion thus ensuring that the appellant is not evicted before the hearing of the application.
13. From the foregoing, it is self-evident that an eviction of the appellant would subject her to substantial loss, if the respondent demanded eviction and distressed for outstanding rent. Besides, the sum of Ksh 872,000.00 ordered payable within 7 days is a substantial amount of money given the appellants submission about hard economic times. At the same time, the appellant cannot hope to continue enjoying free occupation of the respondent's premises. To date, they have neither paid the rent arrears nor monthly rent of Ksh 872,000.00 as ordered by the BPRT.
14. The appellant seems to have had difficulty paying rent right from the onset of the tenancy agreement in May 2022 and it is conceivable that a quick payment of Kesh 872,000.00 in arrears presents even greater difficulty (see *Kenya Shell Ltd v Benjamin Karuga Kibiru & others* [1982 – 88]1 KAR 1018. However, the appellant's circumstances and right of appeal must be “balanced against an equally weighty right; that is the respondent's (landlord's) right to enjoy the fruits of the judgment delivered in their favor” (per Waki J in *Portreitz Maternity v James Karanga Kabi*, HCA No 63 of 1997).
15. With the foregoing in mind, I am persuaded that the appellant sought for stay of execution pending the hearing and determination of their appeal which I will grant but it shall be a conditional stay subject to the following:
  - a. The appellant do deposit a sum of Ksh 500,000/- (five hundred thousand) into an interest earning account in the joint names of the parties within 30 days of today's date.
  - b. The court grants a temporary injunction against distress for rent by the Respondent, its servants, employees and agents from carting away, disposing off or otherwise interfering with the Applicant's assets and further order the immediate release of the Applicant's tools of trade unlawfully carted away by the Respondent's Auctioneers on the February 17, 2023 pending the hearing and determination of the intended Appeal.
  - c. The appellant continues to pay monthly rent and the ancillary costs as per the tenancy offer letter during the pendency of the appeal.
  - d. In default the respondent will be at liberty to execute.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.**



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**MOGENI J**

**JUDGE**

**In the virtual presence of :-**

Ms Nyachia holding brief for Mr. Ngugi for Applicant/Appellant

Mr Ayizi for the Respondent

**Court Assistant: Caroline Sagina**

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**MOGENI J**

**JUDGE**

