



REPUBLIC OF KENYA



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Midlands Zero Thirty- Three Hotel LLP v Kindi (Environment and Land Appeal E002 of 2023) [2023] KEELC 17645 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17645 (KLR)

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

CG MBOGO, J

MAY 25, 2023

BETWEEN

MIDLANDS ZERO THIRTY- THREE HOTEL LLP APPELLANT

AND

MORIASO OLE KINDI RESPONDENT

RULING

1. Before this court is a notice of motion application dated 14th February, 2023 expressed to be brought under Section 3A of the [Civil Procedure Act](#), Order 9 Rule 9 and Order 42 Rule 6 of the [Civil Procedure Rules](#) seeking the following orders:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. Spent.
 6. That pending hearing and determination of appeal filed herein, there be a stay of execution of the judgment and/or decree made on 16th January, 2023.
 7. That the costs of this application be costs in the cause.
2. The application is premised on the grounds inter alia that in a judgment delivered on 16th January, 2023, the Business Premises Rent Tribunal disallowed the reference and the application giving the respondent green light to levy distress and evict the applicant from the premises and during the delivery of the said judgment no order of stay was granted.



3. The application is supported by the affidavit of Bismack Wasta sworn on even date. The applicant deposed that the appellant is a limited liability partnership registered as such and he is the duly appointed manager. Further, that the applicant faces real and imminent danger of execution being undertaken against it anytime.
4. The applicant further deposed that there is need for this court to adopt the change of advocates from the firm of Njeri Anne Kamau Associates Advocates to the firm of Kitipa Naikumi & Co. Advocates. Also, that the draft memorandum of appeal raises triable issues with high chances of success and that unless the orders sought are granted, the appellant stands to suffer substantial loss if the intended execution is carried out.
5. The application was opposed by the replying affidavit of the respondent sworn on 9th March, 2023. The respondent deposed that no substantial loss will be occasioned on the applicant as it is able to repay the decretal amount and whatever costs this court will impose and that he has numerous properties in the country which generate millions in income which leaves no doubt as to his financial stability to repay or meet the costs.
6. The respondent further deposed that the intended appeal raises no arguable case and is just an attempt to delay his realization of the fruits of the judgment. Also, that before judgment was delivered, the applicant escaped paying rent by closing shop in an attempt to defeat justice. Further, that by not offering or proposing any security for the intended appeal, the applicant is acting in bad faith.
7. The respondent further deposed that security for the appeal is a necessary prerequisite under the *Civil Procedure Rules* and that if the court is to allow the said application, the same should be on condition that the applicant deposits the decretal sum of Kshs. 8,037,500/- in a joint interest earning account.
8. The applicant filed a supplementary affidavit in response thereto which was sworn on 3rd April, 2023. The applicant deposed that from a copy of the judgment “BW-3”, the applicant herein sought injunctive orders seeking to bar the respondent from evicting it and there was no decretal sum of Kshs. 8,037,500/- and that the need to deposit the colossal sum stated is completely misconceived.
9. The application was canvassed by way of written submissions. The applicant filed written submissions dated 3rd April, 2023. The applicant submitted that pursuant to Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*, unless stay of execution is granted, the applicant is likely going to suffer substantial loss as the respondent will attach and sell its assets including its tools of trade. Further, that the application has been made without unreasonable delay.
10. As regards security for costs, the applicant submitted that the figure proposed by the respondent is plucked from the air and has no foundation in the dispute herein as no specific sum was decreed to be due and payable to the respondent.
11. The applicant submitted that it is the respondent who was ordered to pay the hotel a contractual sum of Kshs. 5,000,000/- subject to some set off. In conclusion, the applicant submitted that the application be allowed without the necessity of depositing security thereof.
12. The respondent filed written submissions dated 26th April, 2023. The respondent raised one issue for determination which is whether the appellant has met the threshold required for granting of stay pending appeal by this honourable court.
13. On whether the applicant will suffer substantial loss, the respondent submitted that the applicant has failed to demonstrate the substantial loss it is likely to suffer more so with the admission that its hotel business has been closed down for over three months. Also, the applicant has not demonstrated how



- execution will cripple its business further. In addition, the respondent submitted that in the unlikely event that this court rules in favour of the applicant, the respondent would be able to pay the decretal amount and any costs imposed by the court.
14. On the contrary, the respondent submitted that should stay be granted in favour of the applicant, the applicant will be unable to pay him and this is evidenced from the fact that the applicant has escaped payments and further closed shop in an attempt to defeat justice. The respondent relied on the case of Jackson Kaio Kivuva versus Peninah Wanjiru Muchene Civil Appeal No. 15 of 2015.
 15. On whether the applicant has met the mandatory requirement to provide security for the appeal, the respondent submitted that no offer to provide security has been made which demonstrates the intention to use the appeal as a means of not fulfilling its obligation to pay rent that is owing. The respondent relied on the case of *Jamii Bora Bank & Another versus Samuel Wambugu Ndirangu* Civil Appeal No. E030 of 2021.
 16. The respondent submitted that the applicant had rent arrears before filing of the reference and it continues to deprive him of rent from his property to date and this court should not be used to assist litigants to delay executions of decrees through filing vexatious and frivolous appeals.
 17. Also, that the decretal sum is indicated in the ruling dated 16th January, 2023 and if this court is to grant stay, the same should be conditional that the applicant deposits the decretal amount in an interest earning account held by both advocates.
 18. I have carefully analysed and considered the application, replies thereof and the written submissions filed and the sole issue for determination is whether the applicant has met the legal threshold to be granted the orders of stay of execution pending appeal.
 19. The principles upon which the court assesses such an application are laid down in Order 42 Rule 6 of the *Civil Procedure Rules* 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.”
 20. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.
 21. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:
 - “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
22. I will begin with unreasonable delay. The applicant herein filed the instant application in court on 15th February, 2023. Annexed to the instant application is a memorandum of appeal dated 14th February, 2023. The ruling of the Business Premises Rent Tribunal was delivered on 16th January, 2023. I am satisfied that the application was filed without delay.
 23. On whether substantial loss will be occasioned in the event the orders sought are not granted, the applicant contended that it runs a hotel business and that if execution is to ensue, its assets will be attached and sold. On this, I find the ground for stay reasonable bearing in mind that it is in business and there is likelihood of attachment of assets in realisation of the execution process.
 24. On the third limb which is security for costs, the applicant deposed that the application be allowed as prayed without the necessity of security for costs. As it can be seen from the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the requirements are in mandatory terms including deposit of security for costs. On the other hand, the respondent has sought for a figure of Kshs. 8,037,500/- as the decretal amount which if the application is to be allowed, then the same should be on condition that the decretal sum is deposited in a joint interest earning account.
 25. A look at the ruling the subject of the instant application does not address any decretal amount. In any case, parties were to ascertain the difference in the amount and pay the respondent within 30 days. It would be thus unfair for this court to peg security for costs on the decretal sum arrived at by the respondent.
 26. It is my considered view that a reasonable amount would suffice to adequately protect the respondent in the process of appeal. As such, the sum of Kshs. 400,000/- is suitable for this purpose.
 27. As such, the notice of motion application dated 14th February, 2023 is allowed in the following terms:-
 - i. That a stay of execution is hereby issued pending hearing and determination of the appeal on condition that the applicant deposits the sum of Kshs. 400,000/- in a joint interest earning account within 45 days from the date of this ruling.
 - ii. In the event that the applicant is unable to deposit such sums within the period as stated in item i. above, the respondent will be at liberty to levy distress.



iii. Costs to be in the cause.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 25TH DAY OF MAY, 2023.

HON. MBOGO C.G.

JUDGE

25/5/2023.

In the presence of:

T.Chuma:CA

