



REPUBLIC OF KENYA



Seroney t/a Kimsite Park Hotel and Restaurant v Kipkemboi & 3 others (Civil Application E079 of 2021) [2022] KEHC 10377 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPLICATION E079 OF 2021
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

SAMWEL SERONEY T/A KIMSITE PARK HOTEL AND RESTAURANT APPLICANT

AND

**DOUGLAS KIPKEMBOI 1ST RESPONDENT
PRISCAH JEPTOO 2ND RESPONDENT
CHAIRMAN BUSINESS PREMISES RENT TRIBUNAL 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The applicant vide a Notice of Motion application dated 14th July 2021 expressed to be brought under Section 79G, 67(I), 63(e), 3 and 3A of the *Civil Procedure Act*, and order 42 rule 6 (1), (2)(a), Order 51 rule 1 of the *Civil Procedure Rules* and Article 50, 159 of *the Constitution* and all enabling provisions of the law) seeks orders:-
 - i. Spent
 - ii. That the Honourable Court be pleased to give a temporary stay of execution of the orders/decree made on 4th September 2018 delivered in Eldoret Business Premises Rent Tribunal Case No. 51 of 2017 pending the hearing and determination of this application interpartes and thereafter pending hearing and thereafter pending hearing and determination of the intended appeal against the said judgment.
 - iii. That the Honourable Court be pleased to allow the applicant to file a memorandum of appeal out of time against the orders made on 4th September 2018 and the ruling delivered on 7th June



2019 by Honourable Mbichi Mboroki the Chairman of the Business rent tribunal in Eldoret Business Premises Rent Tribunal Case No. 51 of 2017.

- iv. That costs of the application be in the cause
2. The application is grounded on the grounds set out in the body of the application and on the affidavit sworn in support of the application by the applicant. The applicant has set out the following grounds in support of the application:
- a) That the intended appellant/applicant was condemned unheard
 - b) That the intended appellant/applicant and his advocate were not present in court on 4th September 2018 and the orders made leading to execution of the decretal sum were made ex-parte.
 - c) That the applicant's application to set aside the ex-parte orders were dismissed by the court on 7th June 2019.
 - d) That the tribunal has ordered the applicant to pay a sum of Kshs. 4,840,000 plus costs of Kshs 50,000 exclusive of interest and other penalties arising from the suit.
 - e) That the appellant has been condemned or ordered to pay a colossal amount of money without being heard in his defence.
 - f) That there was tenancy agreement between the applicant and the respondent prior to the filing of the suit and the respondent's claim is baseless.
 - g) It is contrary to the cardinal principle of natural justice and *the constitution* to condemn a party before hearing his/ her side of the case.
 - h) The appellant intended appeal challenges the legality of the claim and the proceedings of the tribunal.
 - i) The advocate then on record for the appellant did not attend court on some occasions and did not inform the applicant of the orders in time and it was not until execution proceedings were commenced when the applicant came to be aware of the developments.
 - j) That upon being served with the orders and the ruling, the Advocate for the applicant failed to file an appeal in the High Court but instead instituted judicial review proceedings in the Environment & Land court which suit was dismissed for non-joinder of the parties, being in the wrong forum and wrong process on 23rd June 2021.
 - k) That unless this court grants the orders in time, the applicant will suffer irreparable harm and loss without being heard or ventilating his case before the tribunal.
 - l) That intended appeal intends to challenge the respondent's claim, setting aside of the orders, the ruling and the award of the tribunal.
 - k) The appellant being aggrieved with the ex-parte proceedings and judgment prefers an appeal against the whole judgment.
 - l) The intended appeal raises triable issues and stands good chances of success.
 - m) It is in the interest of justice that the applicant's application be allowed.
3. The 1st and 2nd respondents filed a replying affidavit sworn on 26th July 2021 by the 1st respondent where he depones that; the instant application should be dismissed as the applicant has stayed for



three years before filing this appeal; that the applicant made a choice to seek redress by way of Judicial Review which was dismissed on merit in their favour, the tribunal did not make a mistake(sic); that the applicant's application do not have(sic) a memorandum of appeal to show to this honourable court it has merit and high chances of success is allowed; that the application seeking to enlarge time to appeal without memorandum of appeal must be dismissed because the core reasons to allow the application is memorandum (sic) with good reasons to appeal therefore the application should be dismissed; that if the applicant wanted this court to know real reasons for appeal making a memorandum do not need the tribunal to make as it cannot be part of the records of appeal; that the applicant will not suffer any loss or harm if this application is dismissed with costs because he will be made to pay outstanding rent arrears which he neglected in the first place; that the applicant at the time the judgement in the Business Premises Rent Tribunal was being delivered, he had vacated the premises and therefore their relationship had ceased to exist; and that the applicant has not come to court with clean hands to merit equity and justice.

4. The 3rd and 4th Respondents filed ground of opposition dated 30th July 2021 and filed in court on 11th August 2021 where they averred that the application before court was a non-starter, misconceived, untenable, bad in law, devoid of merits and an abuse of the court process; that the said application is an afterthought as the impugned decision of the Business Premises Rent Tribunal was challenged through Eldoret E&L JR 1 of 2019 which was dismissed with costs; that the application is incompetent due to inordinate and unreasonable delay and no grounds exist to warrant grant of stay of execution or leave to appeal out of time. Lastly, the state counsel contended that the application before court does not satisfy Order 42 Rule 6 of the Civil Procedure Rules.
5. In a rejoinder, the Applicant filed a supplementary affidavit on 19th November 2021 and averred that, from the annexed copy of the proceedings, the landlord had stated that the rent arrears was Kshs 7.2 million; that counsel for the respondent stated in court that in the application before the tribunal dated 30th October 2017, the respondents herein were seeking to evict the applicant from the premises to recover rent arrears of Kshs 7.2 million; that a perusal of the said application shows no prayer asking rent areas of Kshs 7.2 M; that as per the proceedings of the tribunal of 4th September 2018, the advocate for the landlord informed the tribunal that the applicant herein had vacated the premises and the rent arrears had reduced from Kshs 7.2 M to Kshs 4,840,000; that the respondents have annexed a sale agreement dated 18th February 2018 between the previous owner of the suit land and that from 18th September 2014 to 30th October, 2017, is a period of 44 months and going by the rent of Kshs. 20,000 per month, the cumulative rent for 44 months should be Kshs 880,000 and not Kshs 7.2 Million. According to the applicant, from the proceedings before the Business Premises Rent Tribunal, no evidence was tendered to prove that the applicant was in arrears of Ksh. 7.2 Million. It was submitted that the tribunal shifted the burden of proof to the defendant when in law it is the plaintiff who should prove his case on a balance of probabilities.
6. The 1st and 2nd Respondent's filed further replying affidavit and reiterated the contents of the replying affidavit that had been filed earlier.
7. The parties argued the application by way of written submissions. The applicant's submissions were filed on 2nd December 2021. The 1st and 2nd respondent's written submissions were filed on 14th December 2021.

Determination

8. Before I deal with the issues for determination, it is necessary that I give a brief background to this matter so as to contextualise the instant application. From the pleadings that are on record, it appears that the applicant herein entered into a lease agreement with one Mr Cheruiyot Kimeto for period of



five years, that is the 23rd August 2015, under the terms and conditions set out in the lease agreement made on 23rd August, 2010 that was annexed to the application. It would appear that things moved on swiftly until sometimes in February 2014 when Mr Cheruiyot sold the parcel of land where the applicant had leased to the respondents herein. It is apparent from the record that the respondents herein sued the applicant in the Business Premises Rent Tribunal vide an application dated 30/10/2017 seeking for eviction orders against the applicant and also for payment of rent arrears. A ruling was delivered on 4/9/2018 where the court ordered the applicant herein to pay the respondents the outstanding arrears of rent of Kshs. 4,840,0000 and an additional Kshs 50,000 as costs. The applicant filed an application dated 6/9/2018 before the tribunal seeking to set aside the orders of 4/9/2018. In his ruling, the Chairman of Business Premises Rent Tribunal dismissed the said application with costs of Kshs 20,000 to the landlord/respondent. Thereafter, the applicant file a Judicial Review in Eldoret Environment & Land Court in Judicial Review Case No. 1of 2019 which was later dismissed for being in the wrong forum.

9. The applicant's instant application is premised on Sections 79G *Civil Procedure Act*. The issue for determination is whether sufficient cause has been made by the applicant for leave to file an appeal out of time from the Judgment of the Business Premises Rent Tribunal file No. Eldoret No. 51 of 2017 delivered on 4th September 2018.

10. The said provision of the law provides that;

79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

11. In the case of *Gerald M'limbine vs. Joseph Kangangi* [2008] eKLR, Justice Emukule held;

My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:

"79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily"

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be "admitted" not to be "filed out of time." Admission presupposes that the appeal has been filed and will be "admitted" for hearing after a judge has established under Section 79B that there is "sufficient" ground for interfering with the decree part of a decree or order appealed against."

To allow the Applicant's Motion would be to defeat entirely the requirements of Section 79B of the *Civil Procedure Act* and indeed Section 79G itself upon which the Applicant



relies – the requirement for a Certificate of Delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant’s motion is bereft of such explanation or certificate. Default by the Applicants former advocate would then have seen properly anchored on such certificate.

12. In the instant case, I have carefully perused the court record and I note that the judgement that is being sought to be appealed against, are the orders made on 4th September 2018 and the ruling delivered on 7th June 2019. Thereafter, instead of filing an appeal against the said orders, the applicant’s counsel filed a Judicial review against the orders of the Chairman of the Business Premises Rent Tribunal in the Eldoret Environment and Land Court which suit was dismissed for being in a wrong forum on 23rd June 2021.
13. Without looking at the substantive issues, it is worth noting that the instant suit was filed on the 14th July 2021, that is less than a month after the ruling of the Environment & Land court.
14. In the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, the Court of Appeal held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
15. It has been held by courts that in dispensing justice, the courts ought to bear in mind the provisions of Article 159(2)(d) of *the Constitution*. In *Raila Odinga v Independent Electoral and Boundaries Commission & 4 others* [2013] eKLR the supreme court held:

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome.”
16. Juxtaposing the above guiding authorities to the instant case, I am satisfied that the applicant has given a good and reasonable explanation for the delay; the application has been brought without undue delay and from the draft memorandum of appeal, the proposed appeal is arguable.
17. As a result, I exercise my discretion under Section 3A of the *Civil Procedure Act* in the interest of justice and allow the Notice of motion dated 14th July 2021 and filed on the same day on the following terms:
 - i) The applicant is granted leave to appeal out of time
 - ii) The Applicant is further directed to file the Appeal not more than 30 days from the date hereof
 - iii) The Applicant shall deposit Kshs. 500,000 in court 30 days from the date hereof
 - iv) Costs shall be costs in the Appeal

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 20TH DAY OF MAY, 2022.

R. NYAKUNDI



JUDGE

