



Five Spot (KE) Limited v Mombasa Trade Centre Limited (Environment and Land Miscellaneous Application 61 of 2022) [2023] KEELC 18311 (KLR) (26 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 61 OF 2022
SM KIBUNJA, J
JUNE 26, 2023**

BETWEEN

FIVE SPOT (KE) LIMITED APPLICANT

AND

MOMBASA TRADE CENTRE LIMITED RESPONDENT

RULING

1. The applicant filed the notice of motion dated the October 10, 2022 through Ms Ngugi Mburu Advocates, seeking for among others;
 - a. Stay of execution of the order of the trial court in the ruling delivered in Civil Suit No E063 of 2021 pending the hearing and determination of the appeal.
 - b. Leave to file the appeal out of time.
 - c. Memorandum of appeal dated the October 10, 2022 and filed on October 11, 2022 be deemed as duly filed and properly on record.
 - d. Temporary injunction be issued restraining the respondent in person or agents from demanding payment of the alleged rent arrears being Kshs 359,531.90, or any sum whatsoever, and further disposing or otherwise interfering with any of the applicant's assets in an attempt to settle the alleged arrears pending the hearing and determination of the appeal.
 - e. Costs.

The application is based on the fourteen (14) grounds on its face and supported by the affidavit of Philip Nyamwaya, a director of the applicant, sworn on October 10, 2022. It is the applicant's case that after its suit was struck out through the trial court's ruling dated the August 30, 2022 and delivered through email on the September 1, 2022, it filed a memorandum of appeal and an application for stay at the High Court on the September 15, 2022. That while considering the application for stay, the High



Court held that it did not have the requisite jurisdiction to handle the application and appeal. That the applicant then filed this application and appeal ten (10) days out of the statutory timeline. That the applicant has an arguable appeal and this court has the discretion to allow the filing of the appeal out of time. That the applicant had filed an application dated September 14, 2022 on the September 16, 2022 for stay of execution before the trial court but withdrew it on the October 5, 2022 as the trial magistrate was away on official duties so as to file it before the High Court where the appeal had been filed. That the respondent has extracted the lower court decree and threatened to execute it against the applicant. That rent arrears demanded by the respondent are computed from the period the applicant vacated the suit premises, and its legality depends on the whether the notice to vacate the respondent's premises was valid, which issue can only be settled in the main suit should it be reinstated by the appellate court. That unless the stay of execution is granted, the appeal will be rendered nugatory and the applicant stands to suffer irreparable loss. That the applicant is ready and willing to deposit such sum of money as security for the due performance of the decree as the court may direct.

2. The application is opposed by the respondent through the replying affidavit of Abdulkader Mohamed Sale Mohamed, an accountant with the respondent, sworn on the October 24, 2022 filed through Ms Sherman Nyongesa & Mutubia Advocates. It is their case that the application is misconceived and a gross abuse of the court process. That after the applicant filed E063 of 2021, the respondent filed a defence to the effect that it was not a tenant of the respondent. The respondent also filed an application seeking to have the applicant's suit struck out which was granted. That the order striking out the suit against it was a negative order that is incapable of being stayed. That there is no valid appeal and no temporary injunction order can be granted. That this application is meant to advance the rights and interests not conferred under any contractual relationship and is therefore calculated to undermine the integrity of the court process.
3. The learned counsel for the applicant and respondent filed their submissions dated the February 5, 2023 and March 17, 2023 respectively which the court has considered.
4. The following are the issues for the court's determinations;
 - a. Whether applicant has made out a reasonable case for leave to file an appeal out of time to be granted.
 - b. Whether the applicant has met the threshold for orders of stay of execution of the ruling delivered in E063 of 2021 and temporary injunction pending the hearing and determination of the appeal to issue.
 - c. Who pays the costs of the application.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both parties, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations;
 - a. That sections 16A of the *Environment and Land Court Act* No 19 of 2011 and 79G of the *Civil Procedure Act* chapter 21 of Laws of Kenya are clear that appeals to this court from the subordinate courts should be filed within thirty (30) days. The law also gives the court the discretion to admit an appeal filed out of the statutory timeline where it is satisfied the applicant had a good and sufficient cause for not filing the appeal within the time stipulated. That is the discretion that the applicant seeks to be exercised in its favour through the application.
 - b. That while the respondent submits that the application to admit the appeal out of time was an afterthought and an abuse of the court process, the applicant has demonstrated that it indeed filed an appeal on September 15, 2022, and later a stay application on the October 5, 2022



before the High Court that was struck out on the October 6, 2022 for lack of jurisdiction before moving to this court on the October 11, 2022. The counsel for the applicant has submitted that the delay in filing the appeal before this court was due to the mistake of counsel of going to the wrong forum, and should not be visited on the applicant. Like was held in the case of *West Kenya Sugar Company Ltd versus Matayo Ingoshe* [2022] eKLR, I am satisfied with the explanation tendered for the delay in filing this application. Indeed the mistake of counsel of filing the initial appeal before the High Court, which struck it out for lack of jurisdiction, should not be used to lock out the appeal route for the applicant who has shown determination to be heard by filing the instant application without undue delay. That however, it is only fair and just that the applicant pays the respondent the costs of the application notwithstanding the outcome of the appeal.

- c. That both learned counsel have correctly submitted that an applicant for stay of execution orders must satisfy the conditions set in Order 42 Rule 6 of the *Civil Procedure Rules*, which requires the court to be satisfied that substantial loss may result if the order is not granted; that the application was filed without undue delay; and that the applicant is ready and willing to tender security for the due performance of the decree as the court may direct. The court has already held that in view of the initial filing of the appeal and application before the wrong forum, the instant application has been filed without undue delay. It is also apparent that the applicant has in ground 12 of the notice of motion and paragraph 31 of the supporting affidavit indicated its preparedness to deposit such sum as the court may direct as security for the due performance of the decree. Then what the court need to determine is whether the applicant stands to suffer substantial loss if stay order is not granted. On this the respondent has taken the position that the lower court ruling merely struck out the suit and being a negative order it cannot attract a stay of execution order. That the respondent had no contractual relationship with the applicant but with 1Pay Limited, and therefore the applicant has failed to prove that it would sustain substantial loss if the order was no granted. The applicant's counsel has submitted that unless the stay of execution order was issued, the appeal will be rendered nugatory and an academic exercise occasioning it irreparable loss and damage. However, the nature of the loss or damage that the applicant claims will be irreparable or substantial has not been particularized or set out to enable the court make an appreciation or determination of whether it is likely to be substantial. What the applicant has disclosed is that the respondent is likely to demand payment of Kshs 359,531.90/= in rent arrears and costs of Kshs 108,500 as a result of the lower court ruling unless stay order was granted. The applicant has not established or attempted to show how paying the said amounts would amount to substantial or irreparable loss to it. That the applicant having failed to satisfy the court that it is likely to suffer substantial loss, then it does not deserve to get the stay order.
 - d. That in view of the finding in (c) above, the prayer for temporary injunction do not commend itself to the court primarily for failure of the applicant to demonstrate that substantial loss or injury would likely occur to it if the order is not granted.
6. In view of the above determinations, the court finds and orders as follows;
- a. That the applicant is hereby granted leave to file an appeal out of time.
 - b. That the memorandum of appeal be filed and served within ten (10) days from today, and in default the leave granted above to automatically lapse.
 - c. The prayers for stay of execution of the trial court ruling in Civil Suit No E063 of 2021, and temporary injunction are found to be without merit and rejected.



- d. The applicant to pay the respondent's costs in the application notwithstanding the outcome of the appeal to be filed.
- e. This file be closed.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 26TH DAY OF JUNE 2023.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of;

Applicant : Absent

Respondent : Absent

Counsel: M/s Myachia for Ngugi for Applicant

M/s Juma for Mutubia for Respondent

Wilson – court assistant.

S. M. Kibunja, J.

ELC MOMBASA.

