



Pwani Breeze Limited v African Inland Church Tudor (Environment & Land Miscellaneous Case 12 of 2023) [2023] KEELC 18092 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE 12 OF 2023**

**SM KIBUNJA, J
JUNE 21, 2023**

BETWEEN

PWANI BREEZE LIMITED APPLICANT

AND

AFRICAN INLAND CHURCH TUDOR RESPONDENT

RULING

1. The applicant filed the notice of motion dated February 13, 2023 through Ms Birir & Co Advocates, seeking for *inter alia*, stay of execution of the ruling and order dated November 1, 2022 pending the hearing and determination of the intended appeal and for the appeal be admitted out of time. The application is premised on the eight (8) grounds on its face and supported by the affidavit of David Yego, director of the applicant, sworn on February 13, 2023. It is the applicant’s case that it had stayed in the respondent’s premises for more than 25 years, and made huge investments including a perimeter wall. That the respondent filed a suit over termination of the lease over Mombasa/BlockX1/806. That the applicant’s advocates applied for proceedings, ruling and order on November 1, 2022. That the advocates received the proceedings on December 15, 2022, while the ruling and order were received on January 17, 2023. That the advocates had closed the office for Christmas vacation until January 2023. That the intended appeal has high chance of success and would be rendered nugatory if the stay of execution order was not granted.
2. The application is opposed through the replying affidavit of Joshua Nyelele Kithuku, a pastor with the respondent, filed through Ms B W Kenzi & Co Advocates, sworn on February 27, 2023 in which he inter alia deposed that the application is frivolous, an abuse of the process of the court as the court cannot admit an appeal that has not been filed; that the ruling of November 1, 2022 was delivered in the presence of counsel for the applicant whose oral application for the ruling and proceedings were granted; that no certificate of delay has been exhibited to confirm that the Tribunal had delayed in providing the proceedings; the delay has been inordinate and is unexplained; that the open space let to the applicant in 2005 was of 50feet by 100 feet but it took possession of 100feet by 100feet despite the



applicant's protests; that the respondent had not allowed the applicant to do permanent developments on the space let to it; that the applicant has continuously defaulted in rent payments, and only pays when the Tribunal issues an order; that rent from July 2022 has not been paid to date; that similar premises in the area are attracting rent of Kshs.200,000 compared to the rent of Kshs 20,000 over the suit premises; that a valuation done on November 11, 2019 had recommended rent of Kshs 170,000 per month; that he applicant has not provided security and should be required to deposit security of Kshs.5 million.

3. The applicant filed a further affidavit sworn by David Yego on March 10, 2023 among others deposing that the applicant had paid rent in full, and is ready to pay up to Kshs 50,000 per month; that the respondent did not raise any objection to the developments carried out by the applicant from 2015; that the respondent never raised the issue of the applicant having taken possession of a larger area than agreed; that their developments on the suit premises are in millions and the issue of providing security should not arise.
4. The learned counsel for the applicant and the respondent filed their submissions dated March 10, 2023 and March 29, 2023 respectively which the court has considered.
5. The issues that commends themselves for determination by the court are as follows;
 - a. Whether the applicant made a reasonable case for the appeal filed outside time to be admitted.
 - b. Whether the applicant has met the threshold for grant of an order of stay pending hearing and determination of the intended appeal.
 - c. Who pays the costs.
6. The court has considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings;
 - a. That there is no dispute that the Tribunal's decision was delivered on November 1, 2022. It follows that the statutory thirty (30) days for filing the appeal lapsed on or about December 1, 2022 as submitted by counsel for the respondent. That under the provisions of 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, this court has the power to enlarge or extend time for filing appeals out of time upon sufficient cause being established.
 - b. The applicant has sought for the "court be pleased to admit the appeal out of time." The respondent has submitted that as there is no prayer to extend time for filing an appeal out of time, there is no appeal capable of being admitted, as none has been filed and no leave has been sought to file one out of time. This application was filed through counsel and the court and parties expect the prayers or orders sought to be specific and clear. That while the court agrees with counsel for the respondent's submissions that the prayer for appeal to be admitted out of time may not be construed to be for extension of time, I have noted the counsel extensively submitted under that heading. The learned counsel cited the decision in the case of *Paul Njage Njeru versus Dr. Karija K. Mugambi* [2021] eKLR, on the factors to be considered in an application for extension of time to file an appeal out of time, including the length of delay, reasons for the delay, chances of the appeal succeeding and the likely prejudice to the parties. That from the foregoing and the submissions by the counsel for the applicant, it is apparent what the applicant seeks is extension of time to file an appeal out of time. Though the applicant should have done better in tendering explanations as to why no appeal was filed immediately after receipt of the ruling and order on the 17th January 2023, the court finds



the period from that date to the 13th February 2023, when the application was filed does not amount to inordinate delay considering that the preceding period was Christmas holidays when many advocates chambers are closed and or offer only limited services.

- c. On the application for stay of execution pending the hearing and determination of intended appeal, Order 42 Rule 6 of the Civil Procedure Rules requires an applicant to satisfy the court that substantial loss would occur if the stay order was not granted, that the application was filed without unreasonable delay and that the applicant is ready and willing to tender security for the due performance of the decree. The learned counsel for the respondent has submitted on the threshold required and cited the decisions in the cases of *Vishram Dawji Harai versus Thornston & Turnphin* [1990] KLR 365 and *Vision Housing Co-operative Limited versus Wairimu Kinyanjui & Another* [2015] KLR. The issue of whether or not there was delay in filing the application has already been settled in (b) above, that the delay was not inordinate and therefore not unreasonable.
 - d. Going to the issue of substantial loss, the applicant has not given particulars of the loss that it is likely to suffer if the stay order was not granted, except stating in grounds (5) and (6) of the application that it is bound to suffer substantial and irreparable loss and damage. The value of a permanent wall can easily be valued to the last cent and an order of compensation made, followed by execution proceedings was that to become necessary. The existence of a permanent wall on its own is not equal to substantial loss without more, and the applicant has failed to satisfy the court on this ground of substantial loss.
 - e. On the last test for security for the due performance of the decree, the respondent has submitted that the applicant has offered none. The court has perused the grounds on the application, supporting and further affidavit by David Yego and noted no security has been tendered and no readiness or willingness to provide security should the court direct has been expressed by the applicant. In the applicant's deposition at paragraph (15) of the further affidavit David Yego was categorical that "...owing to the longstanding relationship with the respondent the issue of security does not arise because in any event the developments therein are in the region of millions which we put without the input of the respondent..." The permanent wall is reportedly on the suit premises belonging to the respondent, and could not be available to be tendered as security by the applicant for the due performance of the decree. A security needed to be an asset owned by the applicant. The foregoing shows that the applicant has not shown any readiness or willingness to tender security or comply with any order on provision of security for the due performance of the decree that the court may direct as a condition to the grant of an order of stay of execution pending hearing and determination of the intended appeal.
 - f. That on the issue of costs in the application, the court is of the view that it abides the outcome of the intended appeal notwithstanding the provisions of section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya.
7. That having come to the foregoing findings, the court orders as follows;
- a. That the applicant be and is hereby granted leave to file an appeal out of time.
 - b. That the intended appeal be filed and served in ten (10) days from today, and in default the leave granted to automatically lapse.
 - c. The prayer for stay of execution pending hearing and determination of the intended appeal is hereby rejected.



- d. The costs of the application to abide the outcome of the intended appeal.
- e. The file be closed.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 21st DAY OF JUNE 2023.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of;

Applicant: Absent

Respondent: Absent

Counsel : Absent

Wilson – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

