



**Abdulqadera v Abdifatah (Environment and Land Appeal  
E117 of 2022) [2023] KEELC 17952 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E117 OF 2022**

**AA OMOLLO, J  
JUNE 15, 2023**

**BETWEEN**

**AL-SAWAE MOHAMMED ABDULQADERA ..... PLAINTIFF**

**AND**

**MUNA ADAN ABDIFATAH ..... DEFENDANT**

**RULING**

1. For determination is the application dated 17<sup>th</sup> November, 2022 brought under the provisions of Section 15 of Cap 301, Section 1A, IB, 3A and 79G of the [Civil Procedure Act](#) and Order 42 rules 1 & 6 of the [Civil Procedure Rules](#). The Applicant sought to be granted the following orders:
  1. Spent
  2. The Honourable court be pleased to issue an order staying the execution of the ruling and consequential orders thereto by the Tribunal delivered on 23<sup>rd</sup> September, 2022 at Nairobi and the proceedings at the Tribunal pending the hearing and determination of this application and appeal herein.
  3. The O.C.S Eastleigh Police Station to assist in the enforcement of the orders of the court.
  4. The Honourable Court be pleased to grant leave to the Applicant to file its appeal out of time and the memorandum of appeal be deemed as properly on record.
  5. Costs of this application be provided for
  6. Any other order the Honourable Court may deem fit and just to issue in the circumstances.
2. The application is premised on several grounds listed on its face inter alia;



- i. The Respondent herein filed a reference in the BPRT inter alia challenging a notice to vacate the Applicant's premises known as Sawa Towers formerly known as Al-Haqq Plaza on L.R.No. 36/VII/451, Eastleigh Nairobi (the suit premises) on a claim that they are controlled tenants.
  - ii. Notably, the appeal arose Nairobi BPRT Case No. 856 of 2020 – Badifatah Mohamed Abdi vs. Sawae Mohammed Abdulqader A. Hassan & Mariam Mohamed Shire which was filed on the same day, relying on the same facts, by the same advocates and against the Appellant herein.
  - iii. Subsequently, the Tribunal while delivering its ruling on 23<sup>rd</sup> September, 2022 and granting the prayers in the Respondent's application dated 25<sup>th</sup> November, 2022 found that the Respondent herein had demonstrated that he is indeed a tenant to the Applicant this is contrary to the ruling of this Honourable Court.
  - iv. The Tribunal vide its ruling delivered on 22<sup>nd</sup> September, 2022, dismissed the Applicant's application dated 1<sup>st</sup> December, 2021.
  - v. In order to save judicial time, Appellant beseeches the court to order that the ruling in ELC Case No. E211 of 2020, *Abdifatah Mohamed Abdi v Al-Sawae Mohammed Abdulqader A. Hassan* to be applicable in this matter and the others referenced to herein.
  - vi. In the interim pending the hearing and determination of this Application and the appeal therein the Appellant pleads with this court to issue it with temporary orders of injunction barring the Respondent from disrupting its business.
3. The Applicant also swore an affidavit on 17<sup>th</sup> November, 2022. In support of the application, he deposed that he is the owner of the suit premises L.R No. 36/VII/451 and he had issued all the occupants with a vacation notice dated 26<sup>th</sup> August, 2020. He stated that the Respondent challenged the Notice at the Business Premises Rent Tribunal vide BPRT case No. 915 of 2020. The applicant avers that while the case was on going before the BPRT, this Honourable Court (differently constituted) in ELC E211 of 2020 Abdifatah Mohamed Abdi vs. Alsawae Mohammed Abdulqader A. Hassan found that there was no existing tenancy relationship between this Respondent and the Applicant.
  4. The Applicant deposes that the Respondent is a broker who had let the premises from the previous developers and sublet them to others. That upon vacation of the premises for renovation, the Respondent & others became exposed as they were never occupants in the first place.
  5. The applicant urged the court to apply the findings in ELC E211 of 2020 to this case and the matter before the BPRT. He also urge that the ruling and order issued by the BPRT in case No. 915 of 2020 be stayed as he stand to lose the tenants for the inconveniences emanating from the Respondent and further incur grave financial losses.
  6. The Respondent opposed the application by filing grounds of opposition and replying affidavit. He deposed that he is a tenant of the Applicant occupying shop No. B014 on the ground floor of Sawa Towers located on LR No. 36/Vii/451. He admitted lodging a complaint at the BPRT to challenge the letter dated 26<sup>th</sup> August, 2020 after he was locked up and unlawful increment of rent from Kshs.32,500 to Kshs.50,000.
  7. He averred that he is a controlled tenant under section 2 of the Land Lord & Tenant (Shops Hotels) Act Cap 301 thus the Applicant must comply with the provision of the Landlord & Tenant Act Cap 301 in terminating the tenancy. The Respondent referred the court to the Orders of the Chairman of the BPRT issued vide its ruling made on 23<sup>rd</sup> September, 2022 and accused the Applicant of being



indolent on his right to appeal. He stated further that the ruling was merited and orders issued were obtained with full disclosure of all the relevant facts.

8. The Respondent deposes further that the application is misconceived and incompetent. He asserts that the application does not meet the set down principles of law in the absence of a draft memorandum of appeal and that failure to attach a copy of the order/ruling is fatal to this application. It is the Respondent's contention that the Applicant has not made out a case to warrant the court's exercise of discretion as extension of time is not a right.
9. The Applicant filed two sets of written submissions which I have taken time to read and consider. In the first set, the Applicant repeated the grounds set out in the face of the application. He then went on discussing two questions he raised for determination i.e;
  - i. Whether there is a tenancy relationship between the Applicant and the Respondent.
  - ii. Whether this court should apply its ruling in ELC Case No. E211 of 2020 Abdifatah Mohamed Abdi vs. Al Sawae Mohamed Abdidqader A. Hassan to this case.
10. There is no appeal yet filed as prayer 4 of the motion sought leave to file an appeal. The Applicant however raised two issues and submitted on them as if he was arguing the substantive appeal. It is my considered opinion and I so hold that the arguments contained in the first set of submissions are out of context with the motion dated 17<sup>th</sup> November, 2022.
11. The second set of submissions raised the question whether the court should grant a stay of the orders issued by the BPRT. He argued that the BPRT issued an order of injunction despite the attention of the Tribunal being drawn to the finding that no tenancy relationship existed (in ELC E211 OF 2020). He further referred the court to the case of RWW vs. EDW (2019) eKLR which held that the purpose of stay is to "preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory."
12. On the question of whether time should be extended to file the appeal, the Applicant explained that the delay was occasioned by delay in obtaining the proceedings from the Tribunal. He referred the court to the decision in *Omar Shurie vs. Marian Rashe Yafar* Civ. App. 107 of 2020 where 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."
13. The Respondent also filed his written submissions. He reiterated the averments in the replying affidavit particularly that he is a controlled tenant having operated in the suit premises for the past ten (10) years. The Respondent submitted on the provisions of Order 42 rule 6(2) stating that the Applicant has failed to prove to the court the loss he is likely to suffer if the orders sought are not granted. The Respondent argued that despite there being a dispute, he continues to pay rent without fail.
14. In support of his argument, he cited *Masisi Mwita vs. Damaris Wanjiku* (2016) eKLR where Mativo J. (as he then was) held thus;

"The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is



granted.[5]What constitutes substantial loss was broadly discussed by Gikonyo J in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto[6] where it was held inter alia that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni,[7] .....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

15. On the prayer for extension of time to file the appeal, the Respondent cited the case of *Nicholas Kiptoo Arap Salat vs. IEBC & 7 Others* (2014) eKLR which held thus;

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

16. The Respondent argues that the Applicant has not given any reason for the delay; that the application is bad in law and it ought to be dismissed with costs.
17. From the pleadings and the submissions rendered, two questions are ripe for determination;
- a. Whether time should be extended for filing the appeal.
  - b. Whether orders of stay of execution can issue.
18. The Applicant has submitted that the delay in filing the appeal was occasioned by delay in obtaining the proceedings from the BPRT. Filed alongside his application is a letter dated 23<sup>rd</sup> September, 2022 addressed to the chairman of BPRT seeking to be supplied with court proceedings. The impugned ruling was delivered on 23<sup>rd</sup> September, 2022 while the present application was made on 17<sup>th</sup> November, 2022 a difference of two months. The time to file the appeal lapsed on 22<sup>nd</sup> October, 2022. It is my view and I so hold that the delay in bringing the application is not inordinate.
19. The Applicant took steps as he applied for copies of the proceedings immediately on the delivery of the ruling hence he did not sleep on his right as submitted by the Respondent. As held in the case of Nicholas Salat Supra, the discretion to extend time is unfettered. In the instant case, I find no reason to deny the Applicant the opportunity to exercise his right of appeal. The prayer for leave is granted.
20. The next question is whether the Applicant merits the order of stay of execution. The Applicant did not annex any draft of the memo of appeal to his application. Instead he premised his arguments on the “findings of the court in ELC E 211 of 2020” that no tenancy relationship existed between them. I infer that this forms the Applicant’s contention that he has an arguable appeal.



21. On substantial loss the Applicant states that the continued stay of the Respondent denies him opportunity to lease out the premises and that he has been made to incur legal costs by the existence of the two suits.
22. The Applicant intend to appeal the orders of injunction issued against them by BPRT whose effect allows the Respondent to continue staying in the suit premises. The Applicant deponed that the Respondent was not in occupation but was a broker. In contradicting the Applicant, the Respondent stated that he carries business in shop No B014 on the ground floor of the suit building. The Applicant did not file a further affidavit to refute this averment.
23. As already submitted by the Applicant, the purpose of stay of execution is to preserve a status quo which in this case is the Respondent being in possession no wonder the Applicant issued the notice dated 26<sup>th</sup> August, 2020. Whether there exists a tenancy relationship is a matter that can be determined either during the hearing of the case before the BPRT or in the appeal once filed.
24. I have read the finding in ELC E 211 of 2020 was struck out before it was heard on its merit. The observation made by Mbugua J. at paragraph 13 of her ruling that;

“Further the receipts availed by the plaintiff cannot by themselves be termed as establishing the controlled tenancy as they were between the plaintiff and a different entity. There is nothing to indicate that the new owner of the property was obliged to inherit the existing tenants. The letter of 21<sup>st</sup> August, 2020 is certainly not a binding agreement that the Defendant was bound to follow”

Paragraph 14; Finally I find that in terms of the provisions of section 6 of Cap 301, the plaintiff did challenge the notice issued to him by lodging his complaint vide Tribunal Case No. 856 of 2020.
25. The Applicant stated that he brought to the attention of the Chairman of BPRT the decision in E211 of 2020 which the chairman ignored. In my opinion, the refusal to take note of the judges observation in E211 of 2020 does form a ground of appeal and not a ground to stay the execution. In urging this court to adopt it when the matter is at an interlocutory stage is indirectly closing out the Respondent on his right to be heard.
26. Will the Applicant suffer substantial loss? The Respondent stated that the orders granted on 23<sup>rd</sup> September, 2022 were conditional. That he has deposited rents as directed by the BPRT without fail. Since the Respondent also enjoys a right to bring a suit against the Applicant as he did and since the Applicant has not disputed that rents are being deposited as and when they fall due, I find that the Applicant has not demonstrated that he is likely to suffer substantial loss.
27. On the issue of being forced incur legal costs, the winner of this case and the case before the Tribunal can always be paid their costs as provided for in Section 27 of the *Civil Procedure Act*.
28. In conclusion, the application succeeds partially on terms that the time is enlarged for the Applicant to file the Appeal within 14 days from the date of this ruling. The prayer seeking stay of execution is dismissed for want of merit. The costs of the application shall abide the winner of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE, 2023**

**A. OMOLLO**

**JUDGE**

