



**Villa Greens Limited v Creekview Limited (Environment and Land Appeal
E082 of 2022) [2023] KEELC 18866 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E082 OF 2022
OA ANGOTE, J
JULY 19, 2023**

BETWEEN

VILLA GREENS LIMITED APPELLANT

AND

CREEKVIEW LIMITED RESPONDENT

RULING

1. The Appellant/Applicant in this matter has filed a Notice of Motion dated 23rd September 2022, in which it has sought for the following orders:
 - a. That this Honourable Court be pleased to stay execution of the judgement of the Business Premises and Rent Tribunal by Hon Gakuhi Chege (Vice-Chair) delivered on the 26th day of August 2022 in BPRT No 654/2019 pending hearing and determination of the appeal.
 - b. Any other relief that this Honourable Court may deem fit to grant.
 - c. Costs of this application.
2. The application is premised on the grounds on the face of it and the Affidavit sworn in support by Mwenda Sawa Chokera, a Director of the Applicant, who deposed that the dispute herein emanated from a tenancy agreement between the Appellant and the Respondent and that the Honourable Tribunal directed the Appellant to pay rent up until it is evicted from the premises by the Respondent.
3. According to the Appellant's director, if these orders are not stayed, they will be detrimental to the Appellant because the Appellant does not use the premises, the Respondent having disconnected its electricity, took all its tools of trade, and has not been in possession of the premises and that it is unfair and unjust to the Appellant to require them to pay rent up until the Respondent evicts them, as this may take even 20 years.



4. It was deposed that since 2019, the Appellant has not been able to carry out its business on the suit premises, due to the actions of the Respondent and that if this Court does not intervene and grant the orders sought, the Applicants will suffer irretrievable harm.
5. The Respondent's Director deposed that the application is replete with non-disclosure, untruths and made in bad faith and is designed to deny the Respondents the fruits of their judgement.
6. It is the Respondent's case that the Applicant has not demonstrated any loss that it will suffer in the event the stay orders sought are not granted and that the Applicant has been in occupation of the Respondent's premises, Ruaka Square Building room 301, 3rd floor Kiambu, since 2015 up to the time of delivery of judgement, when it vacated the premises.
7. The Respondent's Director averred that the Applicant did not pay rent for a period of more than three years, between 2019 and 2021, despite being in occupation of the suit premises and despite various orders issued by this Court and by the Tribunal and that at the time of the Judgement, on 22nd August 2022, the Appellant was indebted to the tune of Kshs. 3,329,739.01 in rent arrears.
8. It was deposed that the Tribunal terminated the tenancy agreement and allowed the Respondent to take vacant possession of the premises; that upon delivery of the Judgement, the Appellant immediately vacated the premises, locked it and did not return and that on 20th September 2021, the Auctioneers, in reliance on the final orders of the tribunal, accessed the premises for purposes of granting the Respondents vacant possession; that there were no goods on the premises and that for this reason, there is nothing to stay on the order for vacant possession.
9. The Respondent's Director further deposed that the only unsatisfied part of the Tribunal's Judgement is the recovery of rent arrears and costs, totaling to Kshs. 3,329,739.01 as of 29th August 2022, when the Appellant vacated the suit premises and that the Appellant has not provided security to demonstrate that it is not bringing the current proceedings merely to deny the Respondent the fruits of its labour.
10. It was deposed that in the event this appeal fails, they may not have the means to enforce the Judgement for recovery of the amount owed especially considering that the Appellant is running an illegal real estate agent's business without a license contrary to the law.
11. The Respondent's Director deposed that the dispute before this court relates to a monetary claim in terms of rent or rent arrears, and any loss occasioned to the Appellant may be adequately compensated by way of damages, should the appeal be successful.
12. In the Further Affidavit, it was deposed that if the stay of execution is not granted, the Appellant will suffer substantial and irreparable harm because they will be forced to comply with orders that are a nullity and unlawful. According to the Applicant, the BPRT lacked jurisdiction to hear and determine the entire suit because the contract between the parties was a tenancy agreement for 6 years starting 1st January 2016, and not a controlled tenancy of less than five years.
13. The Appellant denied that it was in the premises until the Judgement of the BPRT was delivered; that it was forced by the Respondent to end its tenancy once the Respondent disconnected the electricity on 1st June 2019, making it impossible to operate and frustrating the tenancy agreement between them and that it is a company duly registered in Kenya and operating within their objects and as per the law.
14. Both counsel filed submissions and authorities which I have considered.



Analysis and Determination

15. The Appellant herein has filed an application seeking orders of stay of execution against the Judgement and orders of the Business Premises Rent Tribunal delivered on 26th August 2022 in BPRT Civil Suit No 654 of 2019.
16. This court has the discretionary power to issue orders of stay of execution upon filing of an application, such as the one before this court. Order 42 Rule 6 of the Civil Procedure Rules 2010 provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (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.”
17. In *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
18. The Court of Appeal in *Visbram Ravji Halai v Thornton & Turpin* Civil Application No Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 (as it then was) of the *Civil Procedure Rules* is fettered by three conditions, namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.



19. On this basis, the Applicant ought to have satisfied this court of three things: that it stands to suffer substantial loss unless the orders of stay of execution are made; that the application has been made without unreasonable delay, and that such security as this court orders for the due performance of such decree is provided.
20. The Applicant in this suit has outlined that in the event that this court does not grant the orders of stay of execution sought, it will suffer substantial loss because it will be forced to comply with orders that are a nullity and unlawful; that it will be forced to pay for rent for over three years when they were in fact not tenants, and that its appeal will be rendered nugatory yet it has very high chances of succeeding.
21. According to the Appellant, the BPRT lacked jurisdiction to hear and determine the entire suit since the contract between the parties was a tenancy agreement for six (6) years starting January 1, 2016, and not a controlled tenancy of less than five years.
22. As to the definition of substantial loss, it was observed in [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) [2012] eKLR, as follows:

“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 ... 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.”

23. In considering an application for stay of execution pending appeal, a court must also consider the right of a successful litigant to enjoy the fruits of judgement. A court thereby undertakes a balancing exercise in seeking to preserve the subject matter, preventing substantial loss and the entitlement of a successful party to the fruits of judgement. This was articulated in [*Samvir Trustee Limited v Guardian Bank Limited*](#) [2007] eKLR as hereunder:

“I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.

It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.



...At this stage we must as a court ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interest of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court. In my view justice and fairness requires this court to give an order of stay but with certain condition."

24. The orders of the Business Premises Rent Tribunal which the Applicant has sought to stay are as follows:
- i. The tenant's reference in Nairobi BPRT No 654 of 2019 is hereby dismissed with costs.
 - ii. The Landlord's notice to terminate tenancy dated October 3, 2019 subject matter of Nairobi BPRT No 234 of 2020 (sic) is hereby upheld and the tenant's tenancy in respect of Ruaka Square Building, Room 301, 3rd floor, Kiambu County is hereby terminated.
 - iii. The tenant shall forthwith vacate the suit premises and in default shall be forcibly evicted therefrom by a licensed Auctioneer who shall be provided with security by the OCS whose jurisdiction the premises is situate.
 - iv. The tenant shall be liable to pay rent arrears owing to the landlord up to and including the date of such vacation or eviction.
 - v. The landlord is at liberty to use all lawful means to recover rent arrears against the tenant.
 - vi. The tenant is disentitled to offset the rent arrears owing to the landlord in respect of the suit premises against the alleged agency commission as the claim is illegal under Section 18 of the *Estate Agents Act* Cap. 533, Laws of Kenya.
 - vii. The tenant shall pay exemplary costs of Kshs. 100,000/- to the landlord in the consolidated case all inclusive.
25. The Appellant is of the opinion that the fourth order of the court is drafted in such a manner as to raise the risk of the Respondent extrapolating the tenancy contract even up to 20 years and thereafter requiring payment of such rent.
26. First, this order must be read as against the other orders of the Tribunal. The Tribunal clearly terminated the tenancy between the parties. It thereafter ordered the tenant to vacate the suit premises with immediate effect, and only upon the Applicant's default of such order would the Respondent forcibly evict the tenant. It thereafter ordered that the Appellant/tenant would be liable to pay rent arrears owing to the landlord up to and including the date of eviction.
27. The Appellant averred that it has not been in the premises since 2019, when the Respondent disconnected electricity. Conversely, the Respondent avers that the Appellant vacated the suit premises upon delivery of the BPRT's Judgment on August 22, 2022. The exact date that the Appellant vacated the suit property can only be determined after the hearing of the Appeal.
28. However, the landlord has the legal right to claim for rental arrears up to the period the Tribunal delivered its Judgment considering that the Respondent never informed the Tribunal that it had indeed



vacated the premises. The claim that the Appellant suffer loss if it pays rental arrears up to the time of eviction does not meet the definition of substantial loss.

29. The Appellant also claimed that it stood to suffer substantial loss as the Appellants will be forced to comply with orders that are a nullity and unlawful and that the appeal would be rendered nugatory if these orders are not granted.
30. The purpose of orders of stay of execution, as stated in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, is to preserve the status quo, because if execution were to proceed, the Applicant would suffer such loss as would render the appeal nugatory. The substantial loss articulated by the Appellant/ Applicant does not constitute substantial loss, considering that the Respondent has already vacated the suit premises. The rent ordered to be paid by the Respondent can always be refunded in the event the appeal succeeds.
31. Contrary to the Applicant's assertions, the rationale for security for costs under Order 42 of the Civil Procedure Rules is to guarantee the due performance of the decree which may ultimately be binding on the Applicant. This was held by Gikonyo J in the case of *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 Others* (2014) eKLR as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

32. The Applicant herein has not offered and is not willing to pay security for costs to secure the decretal sum. This court cannot therefore grant it the orders of stay of execution.
33. The upshot of the foregoing is that the Appellant/Applicant has failed to establish that it will suffer substantial loss if this application is not allowed. For those reasons, the application dated September 23, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for all parties

Court Assistant - Tracy

