



China Wu Yi (Kenya) v MS Advocates LLP (Environment and Land Appeal E058 of 2023) [2023] KEELC 19356 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E058 OF 2023
EK WABWOTO, J
AUGUST 30, 2023**

BETWEEN

CHINA WU YI (KENYA) LANDLORD

AND

MS ADVOCATES LLP TENANT

(Being an Appeal against a decision by the Business Premises Rent Tribunal (BPRT) delivered on 16th September 2022 by Hon A. Muma in the Business Premises Rent Tribunal Case No. 869 of 2022 (Nairobi))

RULING

1. This ruling is in respect to the Application dated 2nd June 2023. The application was supported by an affidavit sworn by Zhang Hua Alias James in which the Applicant sought the following orders:
 - i) ...Spent...
 - ii) That pending the hearing and determination of this Application and the intended appeal, this Court be pleased to stay compliance with the Ruling of the BPRT delivered on 16th September 2022.
 - iii) That time be extended for such a period as this Honorable Court deems fit and proper for the Landlord to lodge and serve a Memorandum of Appeal against the ruling of the BPRT delivered on 16th September 2022.
 - iv) That upon granting of prayers 3 above, leave be granted to the Landlord to appeal against the ruling of the BPRT delivered on 16th September 2022



- v) That the costs of and incidental to this Application be awarded to the Landlord in any event.
2. The grounds on the face of the application are: -
- a) By a ruling delivered on 16th September 2022, the BPRT ordered the Tenant to pay rent arrears of Kshs 140,245 as per the Tenant's valuation report.
 - b) The Tribunal found no rent shall be payable from the date of signing of the Agreement for sale to the date the negotiations collapsed being 30th November 2019 to 24th August 2020.
 - c) The Landlord is aggrieved by the findings of the BPRT and is intent on lodging an Appeal against the said decision.
 - d) The delay in filing the appeal was occasioned by the Tribunal's failure to issue ruling on notice such that by the time the ruling was reviewed and considered by the officers of the Landlord, the 30 day period for lodging the Memorandum of Appeal and the application for leave had lapsed.
 - e) The delay in filing the Memorandum of Appeal is not unreasonable and the Tenant will not be prejudiced if the Application is allowed.
 - f) The Landlord is owed rent by the Tenant which were incurred during the tenancy period and as per the terms of the tenancy agreement, thus it is only fair for the application to be allowed.
 - g) The Tenant used the premises as their residence and it is therefore not just for the Tenant to seek to evade paying for the same.
 - h) The intended appeal has reasonable prospect of success as seen from the annexed Memorandum of Appeal.
3. the Application was canvassed by way of written submissions. The Appellant filed submissions dated 14th July 2023 in which it was submitted that as per the Landlord's valuation the Tenant owed Kshs 1,550,000/- in rent yet the Tribunal only considered the Tenant's valuation report. Relying on Section 79G of the Civil Procedure Act and order 42 rule 6 of the Civil Procedure Rules, it was argued that there was substantial loss likely to be suffered by the Landlord.
4. The Tenant/Respondent filed a replying affidavit dated 17th July 2023 and submissions dated 3rd August 2023. It was submitted that the Appeal is an afterthought intended to cause further hardship and injustice. Relying on the cases involving Tulsi Construction Company Limited v Kenya Airports Parking Services Limited [2019]eKLR and Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co Limited [2014]eKLR, it was submitted that the unreasonable delay had not been explained and substantial loss not proven. It was also submitted that the Appellant was silent on security for costs which as in the Tulsi case(supra) had become custom. It was argued that in this case, since payment of rent arrears was to the benefit of the Appellant, nothing would be rendered nugatory should stay or leave not be granted.
5. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties. The main issue which arises for determination is whether or not the application dated 2nd June 2023 is merited.



6. With regards to conditions for stay of execution, this Court is guided by order 42 rule 6 (2) of the Civil Procedure Rules, 2010:

“No order for stay of execution shall be made under sub-rule (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.”

7. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

8. In the instant case, the Tribunal delivered a ruling against the Applicant on 16th September 2022. Consequently, the Applicant filed a memorandum of appeal on 2nd June 2023 together with the Notice of Motion herein. This is nearly 9 months after delivery of the ruling. The Appellant alleged that the delay was due to the Tribunal’s failure to release a ruling notice. I believe this assertion is partially dispelled by the Tenant’s evidence of a judgment notice that was duly served by the Applicant on 19th August 2022. The Court remains cognizant that the notice was for judgment on 9th September 2022, a date that was inevitably deferred and judgment later delivered on 16th September 2022. On this premise, the Court finds the circumstances of the delay has been adequately explained.

9. The Appellant also averred that they stand to suffer substantial financial loss occasioned by the rent owed as a result of Respondent’s failure to uphold their tenancy agreement for several months. As a result, this Court is satisfied that the requirement on substantial loss has been demonstrated.



10. The Appellant also submitted that they had filed a memorandum of appeal which raised triable issues. The Respondent attacked the said grounds of appeal stating that the same were incompetent and fatally defective. However, at this stage the Court is not concerned with the merits or otherwise of the appeal as the applicable considerations in order 42 rule 6 of the Civil Procedure Rules do not include such a requirement.
11. On the final requirement on whether or not there is an offer for security, the Appellant did not offer any security. According to the Ruling of the Tribunal, each party was to bear their own costs. Additionally, since the Tenant had vacated the premises the Landlord was to file a claim for damages. In my opinion, the benefits for the Appellant in the BPRM Ruling far outweigh the Tenants. Nonetheless, it doesn't disqualify the Tenant from enjoying possible fruits in the suits to come.
12. With regard to the issue of security, the court in Absalom Dova vs. Tarbo Transporters [2013] eKLR, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
13. From the above decision, it is clear that the issue of security for costs is discretionary and it is upon the court to determine the same. It is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment. Undoubtedly, the Applicant is desirous of exercising its right of Appeal and the Respondent wishes to have the matter finalized. To balance the competing interests of both parties, I allow the application and make the following orders: -
 - i) A stay of execution of the Ruling of the Business Premises Tribunal delivered on 16th September 2022 is hereby granted on condition that the Appellant compiles, files and serves the record of Appeal within 30 days from the date hereof.
 - ii) In default of compliance to (i) above, the stay of execution shall automatically lapse.
 - iii) Costs of this application to abide the outcome of the Appeal.

14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF AUGUST 2023

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Mbae for the Landlord/Appellant.

Ms. Adhambi for the Tenant/Respondent

Court Assistant; Caroline Nafuna.

