



REPUBLIC OF KENYA



KENYA LAW
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Benard Oyugi t/a Jobenpha School v Kimani (Suing as Guardian of Samuel Kimani Karoki) (Environment and Land Appeal E035 of 2022) [2023] KEELC 20266 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E035 OF 2022
EK WABWOTO, J
SEPTEMBER 28, 2023**

BETWEEN

BENARD OYUGI T/A JOBENPHA SCHOOL APPELLANT

AND

KENNETH KAUNDA KIMANI RESPONDENT

SUING AS GUARDIAN OF SAMUEL KIMANI KAROKI

(Ruling and orders of the tribunal granted on the 27th February 2023 in BPRT E431 of 2022)

RULING

1. This ruling is in respect to the Applicant's Notice of Motion dated 19th April 2023. The application was supported by an affidavit sworn by Benard Oyugi. The following orders were sought:
 - i) ...spent...
 - ii) That the Honorable Court be pleased to grant an order of stay of execution of the ruling and orders of the tribunal granted on the 27th February 2023 in BPRT E431 of 2022-Kenneth Kaunda Kimani vs Benard Oyugi t/a Jopenpha School pending hearing and determination of this application.
 - iii) That the Honorable Court be pleased to grant an order of stay of execution of the ruling and orders of the tribunal granted on the 27th February 2023 in BPRT E431 of 2022-Kenneth Kaunda Kimani vs Benard Oyugi t/a Jopenpha School pending hearing and determination of the Appeal in ELCA 0035/2022 Benard Oyugi vs Kenneth Kaunda Kimani.
 - v) That costs of this application be in the cause.



2. The grounds on the face of the application were that: -

- a) The Applicant is the head teacher of the school known as Jopenpha Community School situate at Kware Pipeline Embakasi sued as a tenant in BPRT cases No 132 of 2020, 575/2017 and 431/2022.
- b) A ruling was delivered in the 28th March 2022 in the BPRT 132/2020 dismissing an application by the applicant herein for an order that the tenant be allowed to file a reference out of time objecting to the termination notice
- c) The applicant then preferred an appeal against the orders to the ELC Court in ELCA E035 of 2022 to which a memorandum of appeal was filed on the 28th April 2022.
- d) While the aforesaid appeal was pending in the Court, the respondent/landlord herein filed another reference E431 /2022 on the 5th May 2022 claiming for an order of vacant possession of the suit premises Plot No 113/35 and 113/36 Embakasi and the orders be enforced by the OCS Embakasi Police Station
- e) The above matter was heard and ruling delivered on the 27th February 2023 allowing the application for vacant possession with a further order that the applicant do vacate the suit premises within sixty (60) days in default the landlord do break in and take vacant possession and the OCS Emabakasi Police Station do ensure compliance.
- f) The Applicant had contested the duplicity of the suits in BPRT 132 of 2020, BPRT E431 of 2022 and the fact that it was subjudice and res judicata at the same time, but the Honorable Chairman ignored the same and proceeded to hear and grant the contested orders
- g) The Honourable Vice Chairman proceeded to rely on the orders of the BPRT 132 of 2020 granted on 28th March 2022 and granted the orders of vacant possession couched in mandatory terms in the nature of forceful eviction
- h) The Tribunal may pronounce itself on vacant possession but on eviction by ordering a break in and take possession is a process of execution preserved for Magistrate's Court under Section 14 of the Landlord and Tenants (Shops, hotels and catering establishments) Cap 301 Laws of Kenta and the Land Act 6 of 2012-Section 152E
 - i) That unless stopped by an order of stay of execution by this Court the Landlord will proceed to enforce the orders to the detriment of the tenant, the school and the children of the community who are pupils of the school.

3. The application was canvassed by way of written submissions. The Applicant filed submissions dated 6th July 2023, in which it was submitted that the consolidation of two suits BPRT 132 of 2020 and BPRT 431 of 2022 though irregular gives the court an opportunity to exhaustively handle the matters thus the court should deal with BPRT 431 of 2022 as an attempt to enforce the orders granted in BPRT 132 of 2020. It was submitted the landlord should move the Magistrate's Court appropriately as provided under Section 14 of the Act with leave to the tenant to challenge the same in accordance with the law. Relying on the Section 152 of the Land Act, it was submitted that the tenant deserves



an order for preservation of the tenancy by allowing him to challenge for the termination of tenancy eviction orders in court by way of appeal and stay of execution of eviction orders. Lastly, it was argued that the appeal would be rendered nugatory since the tenant is a school which is dealing with children from within Kware Informal Settlement who if affected will lead to their dropping out of school and in contravention of their right to education.

5. The Respondent filed a replying affidavit dated 31st May 2023 sworn by Kenneth Kaunda Kimani in which it was averred that the Memorandum of Appeal was only served on 4th May 2023 despite being filed in 2022 therefore it was grossly unfair for the Appellant to have held onto the Memorandum of Appeal for close to one year and only serve it when eviction was imminent. It was also averred that the Appellant erected illegal structures on the premise and has not been paying rent commensurate to the value and therefore the Respondent's family continues to be prejudiced. Moreover, it was reiterated that since the Applicant admitted to the reference application being dismissed by the BPRT on 28th March 2022 and had not appealed the ruling dated 27th February 2023, the prayers now sought were untenable.
6. The Respondent also filed written submissions dated 14th July 2023, in which the following issues for determination were outlined for determination by this court; when was the Respondent served with the Memorandum of Appeal?, whether the subject application is correctly before the court without an appeal on the impugned ruling?, whether the subject application has been brought without unreasonable delay? and whether the Appellant has demonstrated that he will suffer any prejudice should the application be declined?
7. Relying on the case of Teresiah Njeri Kamau vs Geoffrey Mukinya Mbuku at Nakuru ELC Appeal No 23 of 2020, it was submitted that a delay of over one year is an unreasonable delay that cannot be cured by any overriding objective. Moreover, it was emphasized that the developments on the suit parcel had not been authorized by the county government and as such the Appellant was required to stop any further developments and remove structures that had not been approved. Lastly, it was submitted that the Appellant would not suffer any prejudice considering that the suit property neither belonged to the Appellant nor material placed before the Court to prove that he was head teacher of any registered school.
8. 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 19th April 2023 is merited?
9. 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.



10. 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 Applicant 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.”
11. In the instant case, a perusal of the records shows that that the Applicant’s Memorandum of Appeal dated 26th April 2022 seeks to Appeal against the BPRT decision in 132 of 2020 as delivered on 28th March 2022 and not the ruling in BPRT 431 of 2022(delivered on 27th February 2023). Secondly, an affidavit of service dated 2nd June 2023 sworn by Michael Kamau Njonjo confirms that service of the Application dated 19th April 2023 and Memorandum of Appeal was done on 4th May 2023, which is over a year after filing. Save for the foregoing, it is evident that the Applicant gave no further reasons for the delay in taking up its Appeal and as such this court find that the delay is unjustifiable and unreasonable.
12. With regards to the Applicant’s submissions for consolidation of cases BPRT 132 of 2020 and BPRT E431 of 2022, I find that the issue was exhaustively handled by the Tribunal in its ruling dated 27th February 2023 under Paragraph 16 and 17 where the Tribunal stated that:
- “..I have given full consideration of the Applicant’s Notice of Motion Application and the rival affidavits. This matter came up for hearing on 25th January 2023 wherein this Honorable Tribunal put the ruling on notice and further directed that the instant suit be consolidated with BPRT 132 of 2020. In the said matter, BPRT No 132 of 2020, this Court already dispenses with the issues and condensed them in a ruling dated 28th March 2022, in which the Tenant’s Application was found to lack in merit, thus, dismissed.”
13. In the end, I find that the Notice of Motion Application dated 19th April 2023 is unmerited and the same is hereby dismissed in its entirety with an order that each party to bear own costs of the application.
14. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF
SEPTEMBER 2023

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Moriasi for the Applicant

Mr. Kamwaro for the Respondent

Court Assistant; Caroline Nafuna.

