



**Hassan v Abdi & another (Environment and Land Appeal E115 of 2022)
[2023] KEELC 20478 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E115 OF 2022
J OMANGE, J
SEPTEMBER 29, 2023**

BETWEEN

AL SAWAE MOHAMMED ABDULQUADER A HASSAN APPELLANT

AND

ABDIFATAH MOHAMED ABDI 1ST RESPONDENT

MARIAM MOHAMED SHIRE 2ND RESPONDENT

*(Being an appeal against orders of the honourable vice chairperson of the
Business premises rent tribunal in NAIRONI BPRT Case No 856 Of 2020)*

RULING

1. Before me is the Notice of Motion application dated November 17, 2022 in which the Applicant seeks the following orders:
 - a. That an order do issue staying the execution of the orders and the proceedings at the tribunal pending hearing and determination of this application and appeal.
 - b. That the OCS Eastleigh police station do assist in the enforcement of the orders of the court.
 - c. That an order to grant the Appellant leave to file an appeal out of time and memorandum of appeal be deemed as properly on record.
 - d. Any further orders the court may deem just.
 - e. Costs of the application
2. The application is supported by the affidavit of the Appellant/ Applicant who depones that he is the registered- owner of the premises known as Sawa Towers formerly known as AL-haqq plaza on LR No 36/VII/451 in Eastleigh Nairobi and that he purchased the same from Bora developer Limited.



3. The Appellant states the Respondent who purports to be a tenant on his property is not a tenant as when he took occupation of the building, he did issue a notice to vacate to the tenants dated October 26, 2020 and that any tenancy agreement that were signed therein before were terminated and new tenancy agreements came into effect.
4. He contends that the Respondent is not a legal tenant rather he came to realize that the Respondent is a broker who was subletting the shops in the building contrary to the terms of lease agreement.
5. The Appellant states that the action of the Respondent to file a reference before the Business Premises Rent Tribunal challenging eviction was made in bad faith as there is no contractual relationship between the two.
6. In addition, the Appellant deponed that as the matter at the tribunal was still being heard, the Respondent initiated ELC case no E211 of 2020 wherein the court held that there was no tenancy relationship between the Appellant and Respondent. The Appellant in this appeal is therefore seeking for orders to set aside the interim orders in the Nairobi BPRT Case no 856 of 2020 wherein the Tribunal gave orders in relation to the application dated April 30, 2021 to stop the eviction of the Respondent herein.
7. The Appellant is also seeking to have the finding issued in E211 of 2020 regarding the tenancy adopted in this matter and in the matter at Business Premises Rent Tribunal as they relate to the same subject matter and parties. He argues that this would save the courts' time and is in the interest of justice.
8. The Respondent filed grounds of opposition to the application on the basis that the Appellant had not attached the ruling/order or grounds of his appeal. Further that the Appellant will not be prejudiced in any way as the Respondent is still paying rent to him. Lastly that the Appellant has not made a case to warrant this Court to exercise its discretion in the Applicant's favour.
9. Both counsels filed submissions which I have considered. Counsel for the Appellant urged the court to find that there was no tenancy as was found in a matter arising out of a similar matter ELC Civil Appeal No E116 of 2022. Counsel further urged the court to grant stay of proceedings in the interest of justice and to optimize judicial time. Counsel relied on the case of *Gichuhi Macharia & another v Kiai Mbaki & 2 others* [2016] eKLR in which the court cited the case of *Re Global Tours & Travel Ltd HCWC No 43 of 2000* wherein Ringera J stated that it is the discretion of the court whether to stay proceedings but the said discretion should look at the pros and cons of not granting the order. And in considering the application the court should bear in mind factors such as the need for expeditious disposal of the case, and merits of the intended appeal.
10. Counsel submitted that it is in the interest of justice to allow the Appellant to file the appeal out of time as the delay was not occasioned by the Appellant but by the Tribunal which delayed in issuing proceedings. He further submitted that the delay was within reasonable time and not intentional. As the delay falls within the parameters for granting leave to file out of time as posited in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No 107 of 2020).
11. In response counsel for the Respondent further submitted that the relationship between him and the Appellant is a controlled tenancy. He submitted that the Respondent is still paying rent to the Appellant and that no prejudice will be occasioned if the stay orders are not granted. The 1st Respondent in his submissions further states that the Appellant has failed to meet the threshold for grant of orders for stay and quotes a number of authorities. Counsel cited the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* where it was held inter alia "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.”

He also quoted the case of “Stephen Wanjiku v Central Glass Industries Ltd. Nairobi) HCC No 6726 of 1991 in which the court held that stay of Execution is subject to Sufficient cause; Substantial loss; No unreasonable delay and furnishing security.

12. Having considered the foregoing, the court identifies the following issues for determination; Whether the court should stay the order and proceedings in the Tribunal, pending the intended appeal. Whether the court should grant the applicant leave to appeal and extend time for filing of appeal.
13. On the first issue of stay the applicant seeks to stay proceedings pending an appeal he intends to file. The main argument he advances is that a court of equal jurisdiction faced with similar facts has already decided that there is no controlled tenancy. Further that in the interest of expediency the court should adopt the determination of the court in ELC 211 of 2020.
14. The application before the court seeks stay of the Tribunal's Order and the proceedings. The Court's jurisdiction is derived from Order 42 rule 6 (1) of the *Civil Procedure Rules* which provides;

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.
15. In this case the applicant has not proved substantial loss. He argues that the Respondent is using the Tribunal order to interfere with his tenants. Yet this order by the Tribunal has not been annexed to the application. Neither has it been demonstrated the tenants who have been interfered with. The application has been made after four months which amounts to considerable delay considering the order sought to be appealed arises from an interlocutory application. There is no offer to furnish the court with any security.
16. In support of the prayer that the court stay the proceedings before the Tribunal, the Applicant argues that the matter in the Tribunal has taken long yet there is a court decision that there is no controlled tenancy. The applicant relies on the case of *Re Global Tours & Travel Ltd HCWC* No43 of 2000 to urge the court to stay the proceedings.
17. There is no doubt the court has discretion to stay proceedings. In the case of *Kenya Alliance Insurance Co. Ltd v Annabel Muthoki Muteti* [2020] eKLR Justice Odunga stated That jurisdiction given under section 3A of the *civil procedure Act* is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory”.
18. In the present case the Appellant has sought to stay proceedings in the Tribunal on the basis that the case in the Tribunal has taken long. He has not attached a copy of the proceedings in the Tribunal or demonstrated the efforts he has made to obtain the proceedings. Neither has he proved any efforts he has made to fast track the proceedings in the Tribunal.



19. This court holds the view that *the Constitution* of Kenya 2010 in Article 169 (d) entrenched the Tribunals as a subordinate court at par with the Magistrates Court. This matter is alive before the Business Premises Rent Tribunal. No evidence has been adduced to demonstrate that the Ruling in E211 of 2020 has been shared with the Tribunal. This court should not short circuit proceedings which are ongoing before another court in the interest of expediency. I therefore find that there are no grounds that justify staying the proceedings in the Tribunal.
20. On the question of extension of time to file the appeal, the courts have had occasion to address the issue of extension of time. In the case of *Edith Gichungu Koine v Stephen Njagi Thoitbi* [2014] eKLR Odek JJA stated:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
21. For the reasons I have cited earlier I find that the applicant has not given sufficient reasons for the delay. Neither has degree of prejudice been sufficiently proved. In the circumstances there are no grounds to allow extension of time within which the appeal is to be filed.
22. I therefore find that the application has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF SEPTEMBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Mwaia for Applicant

Ms Mary Wanjiku for Respondent

Steve - Court Assistant

