



**Ndibaru v Koinange (Environment and Land Miscellaneous Application
E114 of 2023) [2023] KEELC 20296 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E114 OF 2023
EK WABWOTO, J
SEPTEMBER 28, 2023**

BETWEEN

ZACHARIA MAINA NDIBARU APPLICANT

AND

BARBARA WAMBUI KOINANGE RESPONDENT

RULING

1. This ruling is in respect to the Applicant's Notice of Motion dated April 24, 2023. The application was supported by an affidavit sworn by Zacharia Maina Ndibaru sworn on the same date. The Applicant sought the following orders:
 - i) ...Spent...
 - ii) That the Honorable Court be pleased to grant the Application leave to file an appeal out of time against the Ruling delivered by Honorable Gakuhi Chege on March 17, 2023 in Business Premises Rent Tribunal No E763 of 2022.
 - iii) That the Honorable Court be pleased to issue an order for stay of execution of the Ruling delivered by Honorable Gakuhi Chege on March 17, 2023 pending hearing and determination of this application and the appeal.
 - v) That costs of this application be provided for.
2. The application was premised on the following grounds: -
 - a) That judgement was delivered on March 17, 2023 in favour of the Respondent against the Applicant and that the Applicant being aggrieved by the said judgement intends to prefer an appeal.
 - b) That the time allowed for filing the appeal has lapsed.



- c) That the delay herein is not so inordinate or so great as to be inexcusable.
 - d) That the delay in filing the appeal has been occasioned by the delayed supply of certified proceedings and ruling of the Tribunal. The Ruling and proceedings are still pending before the Vice Chairperson awaiting proof reading and a draft of the ruling was made available.
 - e) That the Applicant has an arguable appeal that raises triable issues thus the need to allow the determination of the appeal on merit.
 - f) That there is high and probable likelihood of execution of the said judgment in the absence of stay orders by this Honorable Court.
 - g) That if an order of stay of execution is not granted, the Applicant's appeal will be rendered nugatory and the Applicant will suffer substantial and irreparable loss.
 - h) That the Respondent is unlikely to suffer any prejudice if the orders herein are granted.
 - i) That the application has been made in good faith and it is in the interest of justice that be allowed.
3. The application was contested by the Respondent who filed a replying affidavit dated May 22, 2023 sworn by Barbara Wambui Koinange in which it was averred that the applicant maliciously vacated the premises and destroyed the land. It was averred that the applicant was in rental arrears of Kshs 673,500.00 and has not come to court with clean hands while seeking equitable remedies. Additionally, irrespective of express orders granted by the Tribunal requiring the payment of rent, the last cheque issued was dated February 5, 2023 claiming it was rent for January. It was averred that the Applicant has been earning from his car wash business without any interference while keeping the Respondent from his sole source of income by not paying rent thus rendering him financially unstable.
 4. Pursuant to the directions issued by the court, the application was canvassed by way of written submissions. The Applicant filed written submissions dated September 18, 2023. While Respondent also filed skeleton submissions dated June 5, 2023 which this court has carefully considered.
 5. The Respondent submitted that the Applicant has moved out of the premises with three-year' worth of arrears and the intended grounds of appeal are merely a repetition of what the Business Premises Rent Tribunal has conclusively decided. The Respondent also Relied on the cases of involving [*Daniel Kihara Murage vs Jacinta Karuana Nyangi & Another \[2015\] eKLR*](#) and [*Charles Wabome Gethi vs Angela Wairimu Gethi \[2008\] eKLR*](#) in support.
 6. The Applicant outlined the following issues for determination by the court; did the Applicants advocate fail to file the Appeal within time, why was the Appeal not filed in time and Is there an arguable Appeal?
 7. The Applicant submitted that the Tribunal delivered its ruling on March 17, 2023 but the typed and certified ruling was held up for typing until April 17, 2023 thereafter making it impossible to draw the intended Memorandum of Appeal on time. The delay in filing an appeal was out of the Applicant's control. Relying on the Court of Appeal case of [*Gatu vs Muriuki \[1986\] 211-214*](#), it was submitted that the delay in lodging the appeal was comparatively short and the reasons for the delay seems to be plausible. It was also submitted that the applicant has demonstrated that he has an arguable case for consideration by this Court. Lastly, relying on the case of [*New Stanley Hotel Limited v Arcade Tobacconists Limited \[1986\] 757-759KLR*](#) it was argued that if the Respondent is allowed to execute the directive of the ruling, the intended appeal would be rendered nugatory and remain an exercise in futility.



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 April 24, 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, the Tribunal delivered a ruling against the Applicant on March 17, 2023 and the alleged delay in filing an Appeal was attributed to delay in supplying certified copies of the Ruling and proceedings. Regardless of the delay, the Applicant in Paragraph 12 of his supporting affidavit avers that:

' ...I am willing to abide by any reasonable and just consideration that this court may impose in allowing the application herein...'



12. On the final requirement on whether or not there is an offer for security, the Applicant did not offer any security. According to the Ruling of the Tribunal, the Landlord was granted costs with the following observation under Paragraph 44-45:

' ..In any event, the tenant having paid the agreed rent for the initial 5 years term cannot be heard to complain after its expiry that the area occupied by him is smaller than what had been contracted for. He owed himself a duty to undertake due diligence before entering into the lease contract and taking possession, The application to that effect a non-starter and candidate for striking out...

....As regards costs, the same are in the Tribunal's discretion but always follows the vent unless for good reasons otherwise ordered reasons to deny costs to the landlord....'

13. I echo the sentiments in the case of *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 Applicant 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...'

14. It is clear as day that the issue of security is discretionary and it is upon the court to determine the same.

15. For the foregoing reasons, this Court makes the following orders:

- i) The Applicant is hereby granted leave to file and serve his Appeal within 30 days from the date hereof.
- ii) The Applicant is hereby ordered to deposit a sum of Kshs 673,500.00 in a joint interest earning account in the name of the Parties advocates within 30 days date hereof.
- iii) In default of compliance to (i) and (ii) above, the stay of execution shall automatically lapse.
- iv) Costs of this application to abide the outcome of the Appeal.

It is so ordered.

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

E. K. WABWOTO

JUDGE

