



REPUBLIC OF KENYA



**Mamboleo v Kangethe (Environment and Land Appeal E038 of 2023)
[2023] KEELC 20038 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E038 OF 2023
EK WABWOTO, J
SEPTEMBER 21, 2023**

BETWEEN

JAMES MAMBOLEO APPELLANT

AND

PAULA MBUGUA KANGETHE RESPONDENT

(Being an Appeal against the judgment and decree by the Business Premises Rent Tribunal (BPRT) delivered on 2nd November 2022 and ruling dated 29th March 2023 by Vice Chairperson Hon Gakuhi Chege)

RULING

1. This ruling is in respect to the appellant’s notice of motion dated April 19, 2023. The application was supported by an affidavit sworn by James Mamboleo in which the appellant sought the following orders:
 - i) ...Spent...
 - ii) Pending the hearing and determination of this application, this honorable court be pleased to stay orders of the Business Premises Rent Tribunal against the applicant made on November 2, 2022 ordering him to vacate from LR No Nairobi/Thiboro Township/25 forthwith and in default, be evicted therefrom by a licensed auctioneer who shall be accorded security by the OCS of the Police Station within whose jurisdiction the suit premises is situate.
 - iii) The ruling of vice chairperson hon Gakuhi Chege delivered on dated March 29, 2023 be stayed pending the hearing and determination of this application.
2. The grounds on the face of the application are: -



- a) That on the November 2, 2022, the tribunal entered judgment against the Applicant in Tribunal Case No E740 of 2021, *James Mamboleo vs Paul Mbugua Kangethe*, which judgment was a result of the ex parte hearing of the defendant/landlord's case,
 - b) The appellant filed an application for review and setting aside of the judgment at the tribunal, whose ruling was given on the March 29, 2023, but the summary findings given in the ruling as pronounced in court seemed to be at cross purposes with the applicant's application.
 - c) The ruling and order of the Hon Vice Chairperson at the Nairobi Business Premises Rent Tribunal, given on April 29, 2023 has the effect of rendering the current application and intended appeal, even if successful, moot, useless and nugatory unless this honorable court grants the orders sought herein.
 - d) The respondent may enforce the decree arising from decree of the tribunal arising from the judgment delivered on November 2, 2022. The respondent had given an indication that he intends to execute the decree against the appellant any time vide and eviction notice dated November 23, 2022.
 - e) The applicant's application and his intended appeal herein may be rendered nugatory should the respondent execute the decree before the appeal is heard and determined.
 - f) The applicant stands to suffer substantial loss if the claimant proceeds to execute the said decree against him and the appeal later succeeds as the premises are a source of income.
 - g) The appellant has an arguable and meritorious appeal with a high likelihood of success.
 - h) The respondent shall suffer no prejudice if this application is allowed as prayed.
3. Pursuant to the directions issued by this court, the application was canvassed by way of written submissions. The appellant filed submissions dated July 19, 2023 in which it was submitted that the main issue was on the fair administration of justice. It was submitted that the case had a high chance of success since the applicant was denied an opportunity to re-open the respondent's case and to adduce his evidence. It was also submitted that the applicant's hearing has never began and consequently the applicant's case has never been closed. It was further submitted that the appellant was condemned unheard by the tribunal. Relying on the case of *Antonie Ndiaye vs African Virtual University* [2015]eKLR and order 42 rule 6 of the *Civil Procedure Rules*, it was argued that there was substantial loss likely to be suffered since the applicant continues to pay rent and runs his business from the premises. It was submitted that the Applicant had filed its application for stay dated April 19, 2023 which was within the reasonable time. On this premise, it was argued that the Applicant had discharged its duty in bringing the application in a timeous manner.
 5. Respondent opposed the application. He filed a replying affidavit dated June 5, 2023 and submissions dated July 7, 2023. It was submitted that while the Appellant has a right to prefer an appeal there exists no sufficient cause why stay should be granted, as such, the application was a delay tactic to prevent the landlord from enjoying the fruits of the judgment. With regards to demonstrating substantial loss, it was submitted that the applicant failed to equally recognize that the premises was also a source of income for the landlord and that the refusal to vacate the premises led to further deterioration of the same therefore inflicting future loss of income.
 6. It was submitted that there was a 4 months delay in submitting the application and memorandum of appeal which were filed on April 19, 2023. Relying on section 15(1) of the *Landlord and Tenant (Shops, hotels and catering establishments) Act*, it was reiterated that the appellant had thirty (30) days



to file the appeal. The time period lapsed on December 22, 2022. The respondent equally prayed for costs for the expenses incurred in participating in the application.

7. 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 the application dated April 19, 2023 is merited?
8. 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.
9. 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.”
10. In the instant case, the tribunal delivered a ruling against the applicant on November 2, 2022. My perusal of the court records confirms that, the applicant’s memorandum of appeal dated April 19, 2023 together with the notice of motion of same date were filed on April 20, 2023. This is nearly 5 months after delivery of the tribunal’s judgment. The appellant alleged that there was no delay since application for review was filed on November 3, 2022. I believe it is crucial to underscore this court’s extrapolation that the application for stay alluded to was actually the application for review and setting aside copy of which was not provided to this court. The copy of the application that was placed before the tribunal and led to subsequent ruling dated March 29, 2023 was also not provided to this court. On this premise, the court finds the delay was unreasonable.
11. With regards to proving likelihood to suffer substantial loss and success of an arguable appeal, the Parties each presented contrary arguments premised on their use of the premise as a source of income, on one hand as a business and on the other hand as a landlord. This court finds that undoubtedly the



premise and consequently landlord-tenant relationship has been mutually beneficial to the Parties. The appellant submitted that he continued to pay rent, but unfortunately did not provide any supporting evidence. Additionally, Paragraph 20 of the BPRT judgment addresses that no evidence was produced to confirm the renovations claimed to be done by the appellant, at his own expense.

12. The appellant argued that he was denied a right to fair hearing. Paragraph 14 and 15 of the BPRT judgment confirm that the appellant failed to comply with Order 11 of the Civil Procedure Rules and as such the Advocate addressing the court lacked locus standi to proceed with the suit. The Appellant submitted that this failure was an inadvertent mistake of his counsel. The Court of Appeal in Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others [2015] eKLR considered the duty that advocates owe to the court:

“...It is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury’s Laws of England, 4th Edn, Vol 44 at p 100-101)

13. This court finds that neither the requirement to prove substantial loss nor success of an arguable appeal have been demonstrated.
14. On the final requirement on whether or not there is an offer for security, the appellant did not offer any security. According to the Judgment of the Tribunal, the Tenant was to pay costs of Ksh 25,000 and clear any rent arrears. 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...” [Emphasis Mine]

15. In Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court



would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals.

16. From the above decisions, it is clear that the issue of security is discretionary. It is not the duty of the court to deny a successful litigant the fruits of his/her Judgment neither increase the hurdles towards dispensation of justice. Consequently, this court finds that the application dated April 19, 2023 is unmerited and the same is hereby dismissed with an order that each party to bear its own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21st DAY OF SEPTEMBER 2023

E. K. WABWOTO

JUDGE

In the presence of:

Ms. Nyachera for the Appellant.

Ms. Patrobar for Ms. Muchina for the Respondent.

Court Assistant; Caroline Nafuna.

