



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. APPLICATION NO. 7 OF 2019

SUN PALM LIMITED.....1ST APPLICANT

AFRICA KIVULINI MANAGEMENT LTD.....2ND APPLICANT

VERSUS

DAVID PIUS MUGAMBI.....RESPONDENT

RULING OF THE COURT

(stay of execution of a decree-substantial loss-security for due performance-undue delay)

RUEBEN NYAKUNDI, J.

Background

1. The Notice of Motion applicant before me, dated 15th February 2019 sought an order for a stay of execution, of the order of Hon. Mbichi Mboroki, the Chairman of Businesses Rent Tribunal made on 13th February 2019 pending *interpartes* hearing and determination of this application. That the Court be inclined to grant any other interim orders or relief, pending the hearing and determination of these proceedings as may be deemed just and expedient by the Court in the circumstances and that costs of this application be in the cause.
2. The Application is premised on the grounds couched on its face and further grounds encapsulated in the supporting affidavit of **ELEONORA COZZI**, dated 15th February, 2017. The grounds are that the Respondent herein filed a suit at the Business Premises Rent Tribunal, in Tribunal Case No. 15 of 2019 under a Certificate of urgency against the Applicant.
3. In the said Tribunal case, the Respondent sought orders that the landlord be allowed to levy distress for rent against the tenants herein for arrears of rent dating back to July, 2017 at 15, 000 Euros per month; that the Honorable Tribunal do order the tenant herein to vacate the premises in land parcel number KILIFI/JIMBA/669 for non-payment of rent and that the Tribunal do order that the service and distress be effected with assistance of OSC Watamu Police Station.
4. Further grounds that the Honorable Tribunal certified the application as urgent and matter was set for on 13th February 2019; the Respondent served the Applicant with the Tribunal's order on 6th February 2019; that on 12th February 2019, the Applicant filed a Notice of Preliminary Objection dated 11th February 2019 challenging the Respondent's application for the following reasons: that there does not exist any landlord-tenant relationship between all the parties as contemplated under **section 2(1) AND 2(3)** of the landlord and Tenant (shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya. That the landlord did not issue the 1st Tenant/Respondent with a Notice of Termination of Tenancy contrary to **Section 4(1) and 4 (2)** of the Landlord and Tenant (shops, Hotel and Catering Establishments) Act, Cap 301 Laws of Kenya.
5. It is indicated that, despite there being a Notice of Preliminary Objection to the Respondent's application, the Honorable Tribunal proceeded to hear the matter and consequently granted the orders to the effect that the landlord was allowed to levy distress against the 1st Tenant for arrears of rent dating back to July, that the tenant herein is ordered to vacate the premises in L.R No. KILIFI/JIMBA/669 for non-payment of rent and that the service and distress is to be effective with the assistance of the OCS Watamu Police Station.
6. It was indicated that the Tribunal failed to consider the Applicant's notice of preliminary objection was prejudicial and went against the tenets of natural justice. It was also indicated that the Applicant is severely aggrieved by the said Orders and has sought the assistance of this Court on account of its inherent jurisdiction and discretion; that to facilitate the filing of the appeal, the Applicant has since requested for certified copies of the proceedings and order; that the applicant has an arguable appeal with overwhelming chances of success.
7. Additionally, it was deposed that the Applicant is ready, able and willing to abide by the conditions that this Court may impose for

granting of the orders sought and that this application has been made without unreasonable delay given the circumstances of this case.

The Applicants' Case

8. The filed submission based on the above grounds in support of the Application. It is indicated that the issues for determination herein are whether this Court ought to stay the execution of the orders issued on 13th February 2019 pending the hearing and determination of the intended appeal and whether the 1st Applicant has an arguable appeal with high chances of success.

9. On the first issue the Applicant humbly submitted that this Court ought to stay the execution of the orders by the Tribunal pending the hearing and determination of the Applicant's pending appeal. The Memorandum of Appeal is annexed to the Notice of Motion application dated 15th February 2019.

10. The same brought pursuant to order **42 Rule 6** of the Civil Procedure Rules 2010. The Applicant cited the said provision of law and therefore, humbly submitted that it satisfies the conditions for the grant of a stay of execution as out its terms. It is submitted that failure by this court to stay execution of the orders of the tribunal will result in substantial loss.

11. The Applicants states that it is the registered proprietor of the hotel premises known as Sun Palm Limited which stands on the parcel of land known as Kilifi/Jimba/408. Further that Sun Palm Hotel does not stand on the parcel of land known as Kilifi/Jimba/669 as alleged by the Respondent. In addition, it was indicated that the said hotel has never been acquired by the Respondent and neither has the 1st Applicant been a tenant of the Respondent.

12. It was submitted that the should the court this court fail to issue orders for stay of execution against the Respondent, the Respondent will proceed to forcefully evict the Applicants from the Sun Palm Hotel and consequently take ownership of Kilifi/Jimba/408; thereby causing loss of business to the Applicants, and also, that would be illegal acquisition of the 1st Applicant's parcel of land. It therefore humbly submitted that that the Tribunal's orders will not only prejudice the 1st Applicant, it would also accession the committal of a great injustice against the 1st Applicant depriving it of its right to property.

13. On the 2nd issue of whether the application was made without unreasonable delay; the 1st Applicant submits that there was no delay in filing this application seeking stay of execution. It was elaborated that the Respondent filed Tribunal Case No.15 of 2019 under a certificate of urgency at the aforesaid tribunal on 1st February 2019.

14. The Application was heard and determined on 13th February 2019 and the application for stay of execution pending appeal was consequently filed on 15th February 2019. That amounts to two days after the Business Premises Rent Tribunal had granted the order dated 13th February 2019. Hence, according to the applicant, there was no delay in making the application.

15. On security, the 1st Applicant submitted that there cannot be security as to costs as there is no landlord tenant relationship between the 1st Applicant and the Respondent. In addition, it is indicated that the orders granted were in respect to Kilifi/Jimba/669 and not Kilifi/Jimba/408 on which Sun Hotel stands. Counsel cited the case of **Butt vs Rent Restriction Tribunal (1982) KLR 417** which enumerates the applicable principles to be considered by a court in exercising its discretion in determining an application for stay of execution.

16. On whether the applicant's appeal is arguable, the 1st Applicant submitted humbly that its intended appeal raises triable issues that ought to be canvassed by this Honourable Court in depth to ensure that justice is dispensed without prejudice. He attached the memorandum of appeal which encapsulates the grounds that the Applicant is relying on. I have perused the grounds.

17. It was therefore the Applicant's contention that should the court fail to issue orders for stay of execution pending the hearing and determination of the intended appeal, its purpose would be defeated. He cited the case of **Bloomingdale Rose (k) Limited v Gladys Kathure Nteere (2018) eKLR** and **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another (2015) KLR** to advance its position.

18. In conclusion the 1st Applicant humbly submitted that the orders be granted in the interest of justice for the parties to be able to ventilate its case through the issuance of an order staying the execution of the orders of the Tribunal.

The 2nd Applicant's Case

19. The 2nd Applicant filed a replying affidavit sworn by its General Manager, **Mr. Raffaele Coniglio** dated 7th March, 2019. The 2nd Applicant therefore relies on the same as well as well as submission dated 20th March 201, in support of the Application.

20. It is stated that the orders made by the tribunal ought to be stayed as they are draconian and if executed against **SUN PALM LIMITED** it will be greatly prejudiced their company which is currently managing hotel. It is further averred that the decision of the Tribunal was erroneously issued since it was issued without hearing the 1st Applicant's Notice of Preliminary Objection dated 11th February, 2019. (annex RC-3 is copy of the said notice of preliminary objection).

21. It is indicated in the 2nd Applicant's affidavit that the Respondent had approached the Tribunal with unclean hands as he has totally misled it to believe that he is the owner of the land in which **SUN PALM BEACH RESORT** therefore entitled to distress for rent.

22. Further that the chairman of the Tribunal did not consider the fact that the Respondent does not have the locus to distress for rent and that Mr. Mugambi, the Respondent has no capacity to distress for rent in his application at the Tribunal for reasons that he is an imposter Landlord as he does not own **SUN PALM BEACH RESORT** as the said resort is built on plot No. KILIFI/JIMBA/408 owned by **SUN PALM LIMITED** and not on plot No. KILIFI/JIMBA 669 as claimed by the respondent. (*annex RC-4-is the copy of the title deed for KILIFI/JIMBA/408*)

23. It is indicated that the defendant failed to demonstrate that the said hotel is built on plot No. KILIFI/JIMBA/40 and the 1st Respondent to entitle the Business Rent Tribunal grant the orders to distress for rent and vacant possession. It was brought to the attention of the court that the 2nd Applicant is the entity which is currently operating the said **SUN PALM BEACH RESORT** which is built on plot **No.KILIFI/JIMBA/408** after entering into a management contract on the 13th June 2014 which **SUN PALM LIMITED** the legal proprietor of the said hotel.

24. Further that the said contract is still in force as it is a duration of a period of 6 years which will lapse on 14th June 2020. It was also indicated that the 2nd Applicant has and continued to pay rent to SUN PALM LIMITED the legal proprietor of the hotel. (*annex RC-5 Management contract dated 13th June 2014*).

25. It was also stated that there is no privity of contract (Landlord-Tenant relationship/Tenancy) between **AFRICA KIVULINI MANAGEMENT LIMITED** and the Respondent. The 2nd Applicant denied having been at any time a tenant of the Respondent and thus it has never rented any premises on plot No. KILIFI/JIMBA 669. It was also asserted that there exists no lease and/or tenancy agreement between the 2nd Applicant and the Respondent.

26. It is also argued that the purported termination notice dated 30th October 2018 marked as RC-6, annexed in the Respondent's affidavit is illegal and improper as it does not conform to the mandatory requirements contemplated in **section 4** of the Landlord and Tenant (shops, hotels and catering establishments) Act Cap 301 Laws of Kenya. Further that the same cannot stand in law for the want of tenancy between the Applicant and the 2nd Applicant.

27. It also alleged that the Respondent has no locus standi to distress for rent in the absence of the Land-lord tenant relationship between him and the 2nd Applicant. Further that there are issues of title that ought to be settled by the Environment and Land Court in Malindi and not before a tribunal. As a result, the deponent holds the view that this court ought to stay the execution of the orders issued by the Tribunal.

28. It is also indicated that the 1st Applicant has an arguable appeal with high chances of success, the respondent will not be prejudiced if the court grants the orders sought by the Applicants as there is no Landlord-Tenancy Relationship and that the application has been brought without unreasonable delay. Further, the appeal shall be rendered nugatory and merely an academic exercise if the application is not allowed.

2nd Applicant's Submissions

29. The 2nd Applicant submitted on three issues for determination which include whether this application meets the conditions set out in terms of **order 42 Rule 6(2)** of the Civil Procedure rules, to warrant the grant of the stay order; whether this court has the Jurisdiction to issue the sought prayers and whether there exists any privity of contract between the applicants and the respondent.

30. On whether the instant application meets the criteria set out in terms of **order 42** aforementioned, the counsel for the 2nd Applicant cited **order 42 rule 6(2)** in support of its contention. He invited this court to be guided by the case of **Kiplagat Kotut vs Rose Jebor Kipngok (2015) eKLR** which quoted the case of **Antoine Ndiaye vs African Virtual University (2015) eKLR, High Court at Nairobi, Civil Suit No.422 of 2006** which lays down the prerequisites for stay of execution.

31. It was humbly submitted that equity helps the vigilant and not the indolent, that the application was filed timeously without any delay. It was also submitted that the 2nd Applicant is the entity currently which is currently operating the suit property after entering into a management contract. It was submitted that the 2nd Applicant paid rent for 6 years. Further that if the application is not allowed as prayed the applicants will suffer substantial loss as the Respondent will proceed to execute the draconian orders issued by the Tribunal. Learned Counsel cited the case of **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) (2002) KLR 63** to buttress his view.

32. The Counsel for the Applicant further cited **section 107** of the **Evidence Act, Cap 80** of the Laws of Kenya to advance position that he who alleges must prove. It was therefore humbly submitted that the Applicants proved by not only stating the facts but by also adducing evidence to ascertain that the applicants risk suffering substantial loss. Further that if the prayers sought are not granted, the appeal shall be rendered nugatory and merely an academic exercise.

33. On the issue of security, the applicant stated that according to the applicant, it is ready, able and willing to abide by any conditions that this court may impose for granting of the orders by any orders sought. Basing on these averments, the 2nd Applicant is convinced that the 1st Applicant is willing to comply with all the conditions to warrant this court grant the relief sought herein. It was also submitted that the Respondent will not be prejudiced if the orders sought herein are grant.

34. On whether the court has jurisdiction to issue the orders sought. It was submitted that this court has the jurisdiction to exercise its inherent discretion to stay execution of the orders issued on the 13th February, 2019 in the Tribunal case no. 25 of 2019 by dint of **order 22 rule 22 & 25** of the Civil Procedure Rules 2010. Counsel the above provision which I have also perused. Further reliance was placed in the case of **Rueben Indiatsi Nasibi vs Alfred Machoyo & Another (2007) eKLR**.

35. It is also asserted therein that the 1st Applicant has an arguable appeal with high charges of success. Reliance was placed in the case **Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hiriji (supra). The Respondent's Case.**

36. The 2nd Applicant submitted that there is no privity of contract between the applicants and the respondent. It is brought to the attention of the court that the respondent has no capacity to distress for rent in his application at the Tribunal for reasons that he is an imposter landlord as he does not own **SUN PALM BEACH RESORT**. further that there is no privity of contract between the 2nd Applicant and the Respondent due to the lack of the Landlord-Tenancy relationship/Tenancy. 2nd Applicant denied having been at any time a tenant of the Respondent and neither there exist a lease or tenancy agreement between the two. Learned Counsel for 2nd Applicant cited **section 1A (3)** Of the Civil Procedure Act Cap 21 to advance the proposition that a litigant and or an advocate have to assist the court in making a fair and just decision. Learned Counsel further relied on the case of **Owners of the Motor Vessel; "Lillian S" vs Cartex Oil (Kenya) Ltd (1989)**, to buttress the contention that the Respondent did not provide frank information with regards to privity of contract Landlord-Tenant relationship/Tenancy) between him and the 1st Applicant while seeking the orders in his application at the Tribunal.

37. In conclusion, the Learned Counsel for the 2nd Applicant submitted that the 1st Applicant has met all the requirements required for one to be awarded stay of execution and that the same should be issued as such.

38. In the said replying affidavit, it was stated that the application lacks merit as the same is unprocedural and an abuse of Court process. It is indicated that the application herein is not supported by any appeal that would help the court to ascertain whether it's an arguable appeal. In response to the applicant's averment that they filed a preliminary objection in court but they did not prosecute such objection and did not attend court. He produced land records to demonstrate that he is the sole proprietor of KILIFI/JIMBA/669 where **SUN PALM HOTEL** stands. He attached the green card and search marked **DPM (a) and (b)**.

39. It is averred that Sun Palm Limited leases to the 2nd Appellant the land shown herein and attached is an agreement marked **DPM(c)**. In response to the Applicant's preliminary objection that it was not issued with a notice of termination, the same is an admission of existence of landlord who is the Respondent. It was averred that the Honorable Tribunal issued orders on grounds that the preliminary objection was not prosecuted and his advocate on record well argued his application and thereby allowed to distress.

40. Further that the 2nd Applicant attended the Tribunal and well stated they pay rent to the applicant and he firmly believe that is why the applicant is avoiding the tribunal. it was brought to the attention of the court that the Applicant has not annexed the proceedings of the tribunal and the tribunal and the Honourable is not given a chance to look at the original record. The deponent averred that this being a money decree and distress for rent, the applicant ought to deposit the rent in Court or security worth the claim.

41. He pointed out that there was nothing prejudicial against the applicant during the hearing and proceedings in the tribunal as it is the applicant who failed to attend court. It is indicated that the Applicant did not furnished the tribunal with any proof towards the ownership of the premises named herein. It is the Respondent's belief that the applicants' intention is just buy time as she enjoys the fruits of her illegal occupation of the premises.

42. It is pointed out that the grounds in support of the application herein do not support a case of staying execution or setting aside the orders. Further that failed to prosecute the preliminary objection in the tribunal and in so doing relinquished his right of being heard. In addition, it is stated that the tribunal can not be faulted for not hearing the applicant when she and her advocate were absence.

Respondent's Submissions

43. It was contended by the Counsel for the Respondent that it is trite law that for a stay of execution pending appeal to succeed, one has to prove that they have arguable appeal with likelihood of success; they will suffer damage that the respondent is not capable of compensating and the applicant is able to offer substantive security or deposit the decretal amount in court.

44. The learned Counsel for the 2nd Respondent argued that no appeal has been filed in this matter and no reason has been advanced for lack of an appeal in court. For that reason, the Respondent holds the view that stay of execution cannot be granted. Further that there no proceedings have been attached or produced to give the court a feel of what is arguable in the intended appeal neither are there any grounds that have been set out for the court to consider.

45. It was pointed out that the Applicant does not dispute owing rent or not being a tenant and the issue, they raised is that there is no landlord/tenant relationship but does not explain how they are sitting in the Respondents premises if not as tenants. On point raised by the Applicant that there was no notice to terminate the tenancy, the Response questioned how the Applicant demand notice of termination of tenancy when he is not a tenant. The Respondent therefore submitted that it is on the basis of the contradictions that they submit that the same defeats the applicant's claim and the application ought to be dismissed on the basis of the contradiction.

46. It was also pointed out that the applicants have not extracted any order or decree from the court has been extracted or certified for contradiction of this court. The lack of such plus the proceedings defeats the merits of this application.

47. Regarding security, the counsel for Respondent contended that what is before this court is a money decree which is unpaid rent for over one year in premises remitted for over 15 000 euros per month. He highlighted that the 2nd applicant in their averments in the tribunal stated that they are subtenants who have paid rent to the 1st applicant. The Respondent urged that if at all the Applicants received such rent the most preferable way is to deposit the same as security in court or ray the respondent.

48. It is further argued since the 1st Applicant has subleased the premises to the 2nd applicant there is no reason why he should not be ordered to pay the said rent. Counsel also brought to the attention of the court that the ownership of such property makes the respondent a man of

means who can payback the deposited rent in the event of losing the case.

49. As regards the ownership of the property, the Learned counsel has annexed in the replying affidavit evidence of ownership of the premises which is not in dispute in any event that was not an issue even in the tribunal. It is further argued in the submissions that the applicant has come before court with unclean hands and have sub-rented the Respondent's premises and received over Kshs. 34, 000,000 (thirty-four million) in rent from a subtenant but neglected to pay the rent to the landlord. There is no evidence that they have tried to liquidate that date.

50. It was therefore submitted that the escalation of the debt is now likely to move to an amount that the applicant may not be able to pay.

The Law

51. An application for stay of execution is made by way of Notice of Motion under **Order 42 rule 6** of the Civil Procedure Rules, 2010. A grant for stay must meet various requirements:

(i) *The applicant has to show that he will suffer substantial loss if the application is not granted;*

(ii) *The application has been made without delay; and*

(iii) *The applicant has provided security for the due performance of the decree.*

52. An applicant seeking a stay of execution must also demonstrate that the unless the application is allowed the intended appeal, or appeal, if successful would be rendered nugatory. This test is subjective to the circumstances of each case as was stated in **Reliance Bank Limited v Norlake Investments Ltd [2002]1 EA 227**. Along with this, the Court must also be satisfied that the application for stay of execution must not be frivolous meaning that it is arguable.

53. Further, an application for stay of execution should not be seen to defeat the ends of justice. This was buttressed in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where the Court held;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order”

54. The court cannot grant an order for stay of execution the application of which is only meant to delay the trial process in the suit filed in the lower court. (**Alfred Wekesa Kizito v Nick Wafula Walela (2007) eKLR**).

Discussion and Analysis

55. On the principle that the application should be brought without unreasonable delay, it has been demonstrated by the Applicants that the 1st applicant filed this application within 2 days after judgment. The orders the subject of the present applicant was brought was delivered on 13th February, 2019 and the application herein was filed on 15th February, 2019. This application satisfies this principle.

56. As regards the principle that substantial loss may result, I refer to the 1st Applicant's submissions in support of application. In paragraph 6,7,8 and 9 sought to demonstrate that it stands to suffer substantial and irreparable injury in the event that this court fails to stay the execution of the impugned of the Honorable Tribunal. Further that the same would not be adequately compensated by way of damages. The condition on substantial loss had clearly found its way in the case of **Joseph Gachie versus Simon Ndeti Muema 2012 eklr** where the court held that.

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted, since by granting stay would mean that statusquo should remain as it were before judgment and that would be denying a successful litigant of the fruits of the judgment which should not be done if the applicant has given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

57. The 1st Applicant told the court that it is the registered proprietor of the hotel premises known as **SUN PALM LIMITED** which is situated on land parcel known as **KILIFI/JIMBA/408**. It is further averred that **SUN PALM HOTEL** does not stand on the parcel of land known as **KILIFI/JIMBA/669** as alleged by the Respondent.

58. The 1st Applicant urged this court to grant the orders sought, failure of which, the Respondent will proceed to forcefully evict the Applicants from **SUN PALM HOTEL** and consequently take ownership of the **KILIFI/JIMBA/408**. It is further averred that if it's allowed to happen; the applicants will not only suffer from loss of business but also with the illegal acquisition of the 1st Applicant's property and would deprive them of the right to property.

59. The 2nd Applicant supported the 1st Applicant's quest for the issuance of the orders sought herein. On page 4 of the 2nd Applicant's submissions, it is averred that the 2nd Applicant is the entity currently operating **SUN PALM BEACH RESORT** which is situated on **KILIFI/JIMBA/408** after entering into a management contract for a period of 6 years which will lapse in 2020. If the order of stay is denied,

the 2nd applicant says it will suffer substantial loss.

60. The substantive dispute between the parties involves rent which has fallen into arrears to the tune of 34 million Kenya shillings. The Respondent holds a money decree issued by the Tribunal which is unpaid rent by the 1st Applicant for over a year. I'm in agreement with the Learned Counsel for Respondent that the rent in arrears is not paid and the debt is allowed to escalate. The Applicants may not be able to pay up. Further that there is no evidence that the 1st Applicant have tried to liquidate the rent arrears since the default was brought to their attention.

61. The Applicants have not demonstrated that the Respondent is a man of straw and for that reason he would not be able to pay back the decretal amount in the event the appeal is decided in their favor. The burden to prove this fact resides with the Applicants. However its also true as stated in the case of **National Industrial Credit Bank Ltd Versus Aquinas Francis Wasike** CA Number 238 of 2005 the duty also is on the respondent to show that he has the financial muscle to refund the decretal amount in the event an appeal succeeds. The stay of execution of valid judgment pending intended appeal, particularly a money decree is a serious and fundamental question which the court must anxiously ponder before granting the orders of interrupting proceedings. The respondent has proved that there exist a legal right on the basis of the decision from the chairman of the tribunal that an outstanding rent arrears remain unpaid since 2017. It follows therefore that the remedy the applicants seek to stay enforcement of the decree will undoubtedly prevent the respondent from enjoying the fruits of his judgement. Its trite that lodging a notice of intention to appeal or the actual appeal does not operate as a stay unless there is evidence it would be rendered nugatory. From the draft memorandum of appeal the applicants fails to address the question that directly impeaches the decree of the tribunal. The applicants seem to be desirous of introducing new friable issues which could have been subject of litigation within the purview of the tribunal. This being money decree arising out of due and outstanding rent arrears there is no valid ground averred in the applicants affidavits for the court to exercise discretion to grant stay of execution of the decree. The right of access to an appeal court should not be used as an alternative remedy for the unsuccessful litigant to try and delay decree holder from enjoying the fruits of the judgement. I therefore reject the Applicants contention that they may suffer substantial loss if the orders sought herein are not granted.

62. I note that the 1st applicant had not provided security for the due performance of the decree or any expressed willingness to furnish security. In terms of **order 42 rule 6(2)(b)** of the Civil Procedure Rules, it is stated that no order for stay of execution shall be made under **sub-rule (1)** unless such security as the court orders for due performance of such decree or order as may ultimately be binding on an applicant has been given.

63. In the instance, in the event that the applicant loses the appeal, they will be required to pay the costs of the lower court case and of the appeal herein. What counts as a reasonable condition from the reading of **order 42 rule 6** of CPR is a bonafide disclosure on security to provide a situation in which even if the applicant succeeds in his appeal there could be no return to status quo. I am not inclined to grant stay of execution as the applicant has made no provision on security for due performance of the decree. There are two principal objectives why security for due performance of the decree is a threshold issue. In elaborating on this condition the court held as follows in the case of;

“Mayambala v Christopher Mwanje HCC NO 97 of 1993 Thus there are several measures why depositing of security by the applicant in this type of application is necessary. One reason is to maintain the statusquo among the parties, another reason is to ascertain that the purpose of the application is not intended to defeat the course of justice by delaying tactics whereby after execution has been stayed the decree holder is made to wait indefinitely for the fruits of his success. By providing security the judgement debtor is also trying to prove how serious he is in his application for stay of execution.”

64. In addition, this court is also obligated to ascertain whether the Application raises triable issues. I recognize that the letter and spirit of **order 42 rule 6** is to stay the execution of a judgement of the lower court as of necessity pending an applicant to exercise his constitutional right of appeal. That therefore calls for a memorandum formerly filed which identifies a series of serious legal questions for trial on appeal.

65. From the materials placed before me, there is no evidence of an appeal which is one of the cornerstones for the issuance of a stay of execution order. The presumption under order 42 is that whenever an application of stay execution pending appeal is made, the applicants ought to have filed the appeal. No evidence of a formal appeal was tendered in this matter.

66. The applicants have only referred to an intended memorandum of appeal which has not been formerly registered. And in my view, the 1st Applicant has only demonstrated an intention to appeal. What this court is not able to ascertain is whether this intention will be carried to its logical conclusion or culminate into an appeal. The Law requires that the right of appeal be exercise with 30 days. Given the fact that the same has not filed in a period of approximately 3 months, the intention to appeal, alone cannot therefore suffice. In the premises, the absence of an appeal negates the spirit of **order 42 rule 6**.

Conclusion

67. The upshot of this matter is that the Notice of Motion application dated 15th of February, 2019 has not met the threshold for granting the order of stay of execution. Consequently, the same fails for want for merit

68. By taking declining this application one can argue that the strength of the intended appeal had not been ventilated before me. The question to be asked is whether a decision to appeal as expressed in the intention is well founded? At the interim stage the bare statements with regard to the violation of applicants rights and interest failed the test. More importantly is the question whether in these choices of balancing various competing interest in exercise of discretion there is a likelihood for one to be faulted in one way or another.. The administration of justice can hardly thrive where there is no measure of orderliness and fairness. The precise contours of such legal lens remain in the realm of a superior court to this one. I take view that even though am convinced beyond peradventure that the mover of the motion fundamentally failed the test in terms of order 42 rule 6 of the CPR, this right of appeal may only be exercised in complying with condition three in providing security.

69. In the alternative, therefore if the Applicants still want to pursue their right of appeal, I hereby grant orders for stay of execution pending

the hearing and determination of the appeal against the order of the Business Premises Rent Tribunal issued on the 13th of February 2019, on condition that:

- a) The 1st applicant deposits the full decretal amount to tune of Kshs. 34,000,000/= (thirty-four million) in an interest earning account in the joint names of the counsels on record which is the counsels for the 1st Appellant and the Respondent.*
- b) The said sum shall be deposited within 45 days from the date of this ruling.*
- c) The so intended appeal be filed within 21 days from todays date.*
- d) In default of condition (a)(b) above execution to proceed expeditiously.*
- e) The costs of this application to abide the outcome of the intended appeal .*
- f) Each party at liberty to apply*

It is so ordered.

Dated, signed and delivered at Malindi this 27th day of May, 2019.

.....

REUBEN NYAKUNDI

JUDGE

Representation:

Mr. Ngunjiri holding brief for Gikunda present

Mr. Mbura for the 2nd applicant

Mr. Wangila holding brief for Gicharu