



**Maxgame Limited v Sayani Investments Limited & 2 others (Environment and Land Appeal E030 of 2023) [2023] KEELC 22028 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22028 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E030 OF 2023**

**JO MBOYA, J  
NOVEMBER 23, 2023**

**BETWEEN**

**MAXGAME LIMITED ..... APPELLANT**

**AND**

**SAYANI INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MUVANS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**GOLD LAKES INVESTMENT CO. LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction and Background**

1. The Ruling herein relates to two [2] Applications, namely, the Application dated the 17<sup>th</sup> October 2023; and the Application dated the 27<sup>th</sup> November 2023; which have been filed by the Appellant and the 1<sup>st</sup> Respondent, respectively.
2. In respect of the Application dated the 17<sup>th</sup> October 2023; the Appellant/Applicant has sought for a plethora of reliefs, namely;[verbatim]:
  - i. ....Spent.
  - ii. This Honorable Court be pleased to stay execution of the Ruling delivered on the 17<sup>th</sup> October 2023; and consequential orders therein be issued against the Respondents or their agents prohibiting them from executing the orders and more particularly, stopping them, their agents, or any body acting on their behalf from Evicting the Appellants from Ground Floor of Philadelphia House (Hakati Lane Wing) comprising Square Feet 593 in Nairobi pending the hearing and determination of this Application.



- iii. This Honorable Court be pleased to stay execution of the ruling delivered on the 17<sup>th</sup> October 2023; and consequential orders therein be issued against the Respondents or their agents prohibiting them from executing the orders and more particularly, stopping them, their agents, or any body acting on their behalf from Evicting the Appellants from Ground Floor of Philadelphia House (Hakati Lane Wing) comprising Square Feet 593 in Nairobi pending the hearing and determination of this Appeal.
  - iv. The Honorable Court be pleased to grant an order of Status Quo (that the Appellant is in actual occupation of the suit premises known as from Ground Floor of Philadelphia House (Hakati Lane Wing) comprising Square Feet 593 in Nairobi pending the hearing and determination of this Application and the Appeal.
  - v. That any order of this court do issue as it may deem fit and expedient in the interests of justice.
  - vi. Costs of the Application be provided for.
3. The instant Application is premised on the various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by two [2] sets of affidavits, namely, the Supporting Affidavits sworn on the 27<sup>th</sup> October 2023; and the Further affidavit sworn on the 7<sup>th</sup> November 2023, respectively.
  4. Suffice it to point out that upon being served with the instant Application, the 1<sup>st</sup> Respondent responded thereto vide a Replying Affidavit sworn on the 27<sup>th</sup> October 2023; whilst the 3<sup>rd</sup> Respondent filed two [2] sets of affidavits, one sworn by Johnson Mukui Mate on the 1<sup>st</sup> November 2023; and another sworn by Dr. Anatoly Kovalenko sworn on the 6<sup>th</sup> November 2023, respectively.
  5. The second Application is the one dated the 27<sup>th</sup> November 2023; and which has been filed by the 1<sup>st</sup> Respondent and wherein same has sought for the following reliefs;[verbatim]:
    - i. THAT this Honourable Court be pleased to certify this Application as Urgent.
    - ii. THAT be pleased to set aside, vacate and/or discharge ex debito justitiae the orders given 23rd October 2023.
    - iii. THAT this Honourable Court be pleased to grant such other orders as it deems fit and just.
    - iv. THAT the costs of this Application be provided for.
  6. The instant Application is premised on a plethora of grounds which have been alluded to at the foot thereof. Furthermore, the Application is supported by the affidavit of James Githinji, sworn on even date and wherein the Deponent has contended, inter-alia, that the Appellant/Applicant herein has never been a tenant in the suit property and hence the orders which were procured by the Appellant/Applicant were obtained by non-disclosure of material facts.
  7. Furthermore, the instant Application(s) came up for hearing on the 8<sup>th</sup> November 2023; whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Applications by way of oral submissions. Consequently and in this respect, the Honourable court gave directions pertaining to and concerning the hearing and disposal of the Appeal by way of oral submissions.
  8. For coherence, the two [2] sets of Applications were thereafter canvassed vide oral submissions and which submissions are on record.



## **Parties' Submissions:**

### **a.Appellant's/applicant's Submissions:**

9. The Applicant herein adopted the grounds contained at the foot of the Application dated the 17<sup>th</sup> October 2023; as well as the contents of the Supporting affidavit and the Further affidavit, respectively.
10. Furthermore, Learned counsel for the Applicant thereafter raised, highlighted and canvassed three [3] pertinent issues for consideration by the Honourable court.
11. Firstly, Learned counsel for the Applicant has contended that the Applicant herein filed and or lodged a Reference before the Business Premises Rent Tribunal, which Reference was thereafter heard and disposed of by the tribunal vide the Ruling rendered on the 17<sup>th</sup> October 2023. Instructively, Learned counsel added that the Tribunal proceeded to and dismissed the Reference which had been filed by and on behalf of the Applicant.
12. Additionally, Learned counsel for the Applicant has submitted that the Honorable Tribunal also proceeded to and decreed that the Applicant herein be evicted from the suit Property forthwith. In this regard, Learned counsel for the Applicant has contended that the Applicant herein, is now disposed to be evicted from the suit property, unless an order of stay of Execution is granted.
13. Besides, Learned counsel for the Applicant has contended that the Applicant herein has established and demonstrated that same is disposed to suffer Substantial loss, unless the orders sought beforehand are granted.
14. Consequently and in this regard, Learned counsel has invited the Honourable court to take cognizance of Paragraph 6 of the Supporting affidavit; as well as Paragraph 17 of the Further affidavit, respectively.
15. Other than the foregoing, Learned counsel for the Applicant has also cited and relied on, inter-alia, the holding in the case of Kenya Women Micro Finance Ltd vs Martha Wangari Kamau (2020)eKLR, Century Oil Trading Company vs Kenya Shell Ltd ; Nairobi HCC No. 1571 of 2004 [UR.]; and Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another (1986)eKLR.
16. Secondly, Learned counsel for the Applicant has submitted that the Applicant herein has since filed and mounted an Appeal against the Ruling and decision of the Honorable Tribunal and that the Appeal so far filed raises pertinent and arguable grounds.
17. Further and in addition, Learned counsel for the Applicant has contended that to the extent that the Applicant has since filed an Appeal before this Honorable court, it is imperative that the court be pleased to grant the orders of Stay of Execution sought at the foot of the current Application, so as to ensure that the Appeal which has since been filed is not rendered (sic) academic.
18. Further and at any rate, Learned counsel has further contended that the filing of the Appeal constitutes and/or demonstrates the existence of a Sufficient cause which ought to facilitate the grant of an order of stay of Execution in the manner sought.
19. Thirdly, Learned counsel for the Applicant has submitted that the Applicant herein is ready and willing to offer and provide security, on such terms and conditions, as the Honourable Court may deem just and expedient.



20. For coherence, Learned counsel for the Applicant has thereafter invited the Honourable court to take cognizance of the contents of Paragraph 19 of the Supplementary affidavit, wherein the Applicant has adverted to and highlighted her readiness and willingness to provide security.

**b. 1<sup>st</sup> Respondent's Submissions:**

21. The 1<sup>st</sup> Respondent herein adopted and reiterated the contents of the Replying affidavit sworn on the 27<sup>th</sup> October 2023; and the annexures thereto and thereafter same raised, highlighted and amplified three [3] issues for due consideration by the Honourable court.
22. First and foremost, Learned counsel for the 1<sup>st</sup> Respondent has submitted that the mere filing of an Appeal by and on behalf of the Applicant herein, does not ipso facto constitute a basis to warrant the grant of an order of stay of execution, either as sought or at all.
23. Secondly, Learned counsel for the 1<sup>st</sup> Respondent has also submitted that it was incumbent upon the Appellant/Applicant to demonstrate that same is disposed to suffer Substantial loss. However, Learned counsel has contended that the Applicant herein has neither established nor demonstrated the likelihood Substantial loss or at all.
24. Thirdly, Learned counsel for the 1<sup>st</sup> Respondent has submitted that execution is a lawful process and hence the mere fact that the 1<sup>st</sup> Respondent is disposed to commence execution proceedings against the Appellant/Applicant, does not by itself [ ipso facto] constitute substantial loss.
25. Other than the foregoing, Learned counsel for the 1<sup>st</sup> Respondent has also contended that the Appellant/Applicant herein has never been a tenant of the 1<sup>st</sup> Respondent in the suit property. Instructively, Learned counsel has added that it was the 2<sup>nd</sup> Respondent who was a tenant in the suit property, but whose tenancy was lawfully terminated and thereafter same vacated the premises.
26. To the contrary, Learned counsel for the 1<sup>st</sup> Respondent has submitted that the Applicant herein merely entered upon and took possession of the suit property pursuant to and arising from an Ex-parte order which had been issued by the Tribunal, but which order was subsequently vacated/ discharged by the tribunal.
27. Consequently and in view of the foregoing, Learned counsel for the 1<sup>st</sup> Respondent has therefore invited the Honourable court to find and hold that the Appellant/Applicant herein is not entitled to the various orders sought at the foot of the Application dated the 17<sup>th</sup> October 2023.

**c. 3<sup>rd</sup> Respondent's Submissions:**

28. The 3<sup>rd</sup> Respondent herein adopted and reiterated the contents of the Replying affidavit sworn by Johnson Mukui Mate on the 1<sup>st</sup> November 2023; and Dr. Anatoly Kovalenko; sworn on the 6<sup>th</sup> November 2023 respectively; and thereafter raised and highlighted three [3] issues for due consideration by the Honourable court.
29. Firstly, Learned counsel for the 3<sup>rd</sup> Respondent has submitted that the Applicant herein was neither a tenant in the suit premises or at all. To the contrary, Learned counsel has contended that the Applicant herein entered upon and took possession of the suit property allegedly after same purchased the business of the 2<sup>nd</sup> Respondent; and wherein the Applicant now contends that the business purchased was inclusive of the premises that had hitherto been demised to and in favor of the 2<sup>nd</sup> Respondent.
30. To the extent that there was no tenancy between the Applicant and the 1<sup>st</sup> Respondent, which position was confirmed by the Tribunal, Learned counsel for the 3<sup>rd</sup> Respondent has therefore contended that



the Honorable tribunal was not seized of the requisite Jurisdiction to entertain the Reference which was filed by and on behalf of the Applicant.

31. Additionally, Learned counsel for the 3<sup>rd</sup> Respondent has submitted that to the extent that the Honourable tribunal did not have the requisite Jurisdiction to entertain the Reference which was filed, it equally means that this court, is similarly divested of the requisite Jurisdiction to entertain and adjudicate upon the Appeal beforehand.
32. Secondly, Learned counsel for the 3<sup>rd</sup> Respondent has submitted that there is a dispute between the Applicant herein and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, which is pending before the High Court, [Commercial Division], pertaining to and concerning the nature of the business which the 2<sup>nd</sup> Respondent sold to and in favor of the Appellant/Applicant.
33. Furthermore, Learned counsel for the 3<sup>rd</sup> Respondent has also submitted that there is also an issue in the same matter pending before the High Court, wherein the Appellant/Applicant herein has sought for Compensation for loss of business. Consequently and in this regard, Learned counsel for the 3<sup>rd</sup> Respondent has contended that the issues being raised by the Applicant herein are therefore live before the High Court; [Commercial division].
34. Thirdly, Learned counsel for the 3<sup>rd</sup> Respondent has submitted that the Appellant/Applicant herein has neither established nor demonstrated the existence of Substantial loss, which has been contended/ submitted to be the cornerstone to granting an order of stay of execution pending an appeal.
35. Instructively, Learned counsel for the 3<sup>rd</sup> Respondent has submitted that in the absence of evidence of Substantial loss, the orders sought by and on behalf of the Applicant herein cannot therefore issue and/or be granted.
36. Finally, Learned counsel for the 3<sup>rd</sup> Respondent has submitted that the 3<sup>rd</sup> Respondent entered into a tenancy agreement with the 1<sup>st</sup> Respondent over and in respect of the suit property, which is currently being held onto by the Appellant/Applicant, albeit without there being any tenancy agreement.
37. Further and in addition, Learned counsel for the 3<sup>rd</sup> Respondent has similarly contended that the 3<sup>rd</sup> Respondent has been paying rents over and in respect of the suit property, but same is yet to be placed in possession. Consequently, and in this regard, Counsel has therefore contended that it is the 3<sup>rd</sup> Respondent who is disposed to suffer extreme prejudice and injustice, if the orders sought are granted.
38. Arising from the foregoing, Learned counsel for the 3<sup>rd</sup> Respondent has therefore invited the Honourable court to find and hold that the Appellant/Applicant has not been able to meet and/or satisfy the requisite threshold, to warrant the grant of the orders sought or at all.

## **Rejoinder Submissions:**

### **a.Applicant's Rejoinder Submissions:**

39. Learned counsel for the Applicant raised and amplified three [3] issues in response to the various submissions highlighted by the Respondents. Firstly, Learned counsel for the Applicant admitted and acknowledged that the Applicant herein was never served with a Notice to Terminate Tenancy by the 1<sup>st</sup> Respondent or at all.
40. Furthermore, Learned counsel submitted that the Notice to Terminate Tenancy was served on the 2<sup>nd</sup> Respondent, but nevertheless, the Appellant/Applicant herein is the one who proceeded to and filed the Reference before the Business Premises Rent Tribunal.



41. Secondly, Learned counsel for the Applicant has submitted that the Reference, which was filed before the Business Rent Premises Tribunal was anchored and premised on the provisions of Section 12(4) of The Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301, Laws of Kenya.
42. Be that as it may, Learned counsel for the Applicant therefore acknowledged and admitted that though the Reference (sic) was filed to pursuant to Section 12(4) of the Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya, no Leave to appeal was ever sought for and obtained.
43. Lastly, Learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated that same is disposed to suffer Substantial loss, if the orders sought are not granted. In this regard, Learned counsel has emphasized that unless the orders sought are granted, the Applicant shall be evicted from the suit property, which according to Learned counsel, constitutes substantial loss.
44. In a nutshell, Learned counsel for the Applicant has therefore impressed upon the Honourable court to find and hold that the Applicant has established and demonstrated the requisite ingredients to warrant the orders sought.

#### **Issues For Determination:**

45. Having reviewed the two [2] sets of Applications which are the subject of the instant Ruling and the Responses thereto; and upon consideration of the oral submissions made by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;
  - i. Whether the Appellant/Applicant has established and/or demonstrated the existence of Sufficient cause or at all.
  - ii. Whether an order of stay of execution pending appeal can issue in the circumstances of the instant matter or otherwise.
  - iii. Whether the Appellant/Applicant has demonstrated that Substantial loss is likely to accrue and/or arise, if the orders sought are not granted.

#### **Analysis And Determination**

##### **Issue Number 1**

##### **Whether the Appellant/Applicant has established and/or demonstrated the existence of Sufficient cause or at all.**

46. It is common ground that the Appellant/Applicant herein has approached this Honourable court and same is seeking for, inter-alia, an order of stay of execution of the Ruling and decision of the Honorable tribunal, which was rendered on the 17<sup>th</sup> October 2023, and wherein the tribunal proceeded to and dismissed the Reference which had been filed by the Appellant/Applicant.
47. Having been aggrieved by the Ruling and decision of the Tribunal, the Appellant/Applicant herein proceeded to and filed the instant Appeal, wherein same seeks to impeach and/or impugned the Ruling of the tribunal.
48. Be that as it may, in the course of making her rejoinder submissions, Learned counsel for the Appellant/Applicant acknowledged and admitted that the Appellant/Applicant had not been served with the



Notice to Terminate Tenancy pursuant to Section 4(2) of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya.

49. Furthermore, Learned counsel for the Appellant/Applicant also conceded that it was the 2<sup>nd</sup> Respondent who was served with the Notice to Terminate Tenancy. Be that as it may, counsel proceeded to and contended that even though it was the 2<sup>nd</sup> Respondent, who was served with the Notice to Terminate Tenancy, the Appellant/Applicant nevertheless, proceeded to and filed the Reference before the Business Premises Rent Tribunal.
50. Additionally, Learned counsel for the Appellant/Applicant also submitted that the Reference filed before the Business Premises Rent Tribunal was filed pursuant to and in line with the provisions of Section 12(4) of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act, Chapter 301, Laws of Kenya.
51. Arising from the foregoing, it is therefore evident that the Appeal beforehand touches on and or concerns a Reference/Complaint lodged pursuant to and in respect of Section 12(4) of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya, which therefore means that (sic) the Appeal ought to have been filed with Leave of the court and not otherwise.
52. Suffice it to point out that the provisions of Section 15 of Landlord & Tenants [Shops, Hotels & Catering Establishment) Act, Chapter 301 Laws of Kenya, only provides for a Right of Appeal where the decision or order being appealed against arose from a Reference filed pursuant to Section 6 of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya; and not otherwise.
53. For brevity, it is impetrative to reproduce the provisions of Section 15 of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act, Chapter 301, Laws of Kenya.
54. Same are reproduced as hereunder;
  15. Appeal to court
    - (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court: Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
    - (2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.
    - (3) Deleted by Act No. 2 of 1970, s. 13.
    - (4) The procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act: Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.
55. Further and to underscore the position that no Appeal lies as of right in a matter pertaining to and/or arising out of a Reference/Complaint filed pursuant to the provisions of Section 12(4) of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya, it suffices to take



cognizance of the holding in the case of *Re-Hebtulla Properties Ltd (1979)*eKLR, where the Court stated and held thus;

“The powers specifically conferred can be exercised on a reference which is defined in section 2 as “a reference to a tribunal under section 6 of this Act”.

In addition, the tribunal may investigate any complaint made by a landlord or tenant. A clear distinction is made throughout the Act between a “reference” and a “Complaint”.

Section 15(1) reads as follows:

Any party to a reference aggrieved by any determination or order of a tribunal made therein may within thirty days after the date of such determination or order, appeal to the High Court...

There follows a proviso which is not material for the purposes of this application; but the following proviso to section 15(4) is relevant:

Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.

A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. Mr Gautama argued that, in this context, “reference” must be given a wider meaning and must include a complaint; but in a provision conferring a right of appeal I have no doubt that word “reference” was used in its technical meaning as defined in section 2.

For this view I derive some support from the wording of the appeal provisions before they were amended by Act No 2 of 1970. Appeal then lay to the Court of a Senior Resident Magistrate or Resident Magistrate, with a further and final appeal to the High Court. Section 15(1) then commenced, “any party aggrieved by the determination or order of a tribunal may within fourteen days appeal against the same ...”.

56. My understanding of the holding in the decision (*supra*) as well as the provisions of Section 15 of the Act; is to the effect that it is only a Party to a Reference pursuant to Section 6 of Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws, who is imbued with and seized of a right of appeal; and not otherwise.
57. Having found and held that the Appellant/Applicant herein required Leave to appeal, if at all, by dint of the provisions of Order 43 Rule 1 of the Civil Procedure Rules 2010, and having found that no such Leave was procured and/or obtained beforehand, there is doubt, as to whether (*sic*) the Appeal before this Honourable court is competent.
58. Nevertheless, I am alive to the fact that what is before me is an application for stay of execution pending appeal and not the substantive appeal. Consequently, and in the premises, it is not within my Jurisdiction to proclaim substantive orders as pertains to the competence, or otherwise, of the appeal. However, I am within the law to take cognizance of the perceived competence or otherwise, with a view to discerning whether there is sufficient cause, which one of the critical ingredients before an order of stay of execution can be granted.
59. Further and in any event, it is not lost on this Honourable court that sufficient cause denotes the existence of a good cause and/or basis, which can anchor and/or premise the grant of the kind of orders, which are being sought by the Appellant/Applicant herein.



60. Without belabouring the point, the meaning and import, tenor of what constitutes sufficient cause was highlighted in the case Wachira Karani versus Bildad Wachira [2016] eKLR, where the court held thus;

“It’s important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-

“Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes ‘sufficient cause’ to prevent a defendant from appearing in Court, and what would be ‘fit conditions’ for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions”

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term “sufficient cause” mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

In Daphene Parry vs Murray Alexander Carson[10] the court had the following to say:-

‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, .....”(Emphasis added)

61. Taking into account the import and meaning of what constitutes sufficient cause, which has been illuminated in terms of the excerpts reproduced hereinbefore; and taking into account that no Leave was sought for and or obtained; it is my humble conclusion that the Appellant/Applicant herein has neither established nor demonstrated any sufficient cause and/or basis, which is a critical ingredient to be addressed by a court of law prior to and before invoking its Jurisdiction as pertains to the grant of an order of stay of execution pending appeal.



## Issue Number 2

### **Whether an order of stay of execution of Execution pending appeal can issue in the circumstances of the instant matter or otherwise.**

62. Other than the necessity to establish and demonstrate the existence of sufficient cause, there is also no gainsaying that prior to and before an order of stay of execution pending appeal can be sought for and/or granted, the Applicant, the current Applicant not excepted, is obligated to prove that there is a Positive order, which has been issued and/or granted by the court.
63. Suffice it to point out that the discretion to issue and/or grant an order of stay of execution, pending the hearing and determination of appeal can only be exercised, where it is demonstrated that an Applicant has been called upon to perform and/or undertake an Act, the occurrence which may prejudice/inconvenience the Applicant.
64. Put differently, where a court of law has dismissed a suit and in this case a Reference, what comes out of the dismissal is a negative order, which does not thus lend itself to stay of execution, either in the manner sought or at all.
65. Be that as it may, it is not lost on this court that the order that was made by the tribunal and which forms the basis of the current Application relates to the dismissal of the Applicant's Reference dated the 26<sup>th</sup> April 2023. Consequently and in this regard, what is evident and apparent is that the tribunal issued a negative order, which is incapable of attracting an order of stay of execution, either in the manner sought or otherwise.
66. As concerns whether dismissal order, which is negative in nature, is capable of being stayed, it suffices to take cognizance of the holding in the case of *Western College of Arts & Applied Technology versus Oranga (1976)eKLR*; where the Court of Appeal stated and held thus;
- “But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered”.
67. Most recently, the Honorable Court of Appeal pronounced itself with clarity on the same issue in the case of *Registered Trustees Kenya Railways Staff Retirement Benefit Scheme Versus Milimo, Muthoni & Co. Advocates & 2 others 2022 KECA* where the court stated thus:-
17. We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences*



vs Oranga & Others (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”

68. Arising from the foregoing, what comes out clearly is to the effect that an order of stay of execution pending the hearing and determination of an appeal (intended appeal), cannot issue in a situation where the order that was made by the court below is a dismissal order which by itself is a negative order.
69. Before departing from the issue herein, it is worthy to mention and state that an Appellant, like the one beforehand, who has mounted an appeal from a decision, Judgment and/or ruling of the subordinate court and/or tribunal, is at liberty to apply for the grant of an order of temporary injunction pending the hearing of an appeal, provided the process of such an appeal has been commenced and/or taken. [ See Order 42 Rule 6(6) of the Civil Procedure Rules 2010].
70. Nevertheless, it is important to underscore that the Applicant herein did not seek for an order of temporary injunction, but sought for an order of grant of stay of execution, [which is separate and distinct from stay] which has been dully addressed in terms of the preceding paragraphs.
71. In a nutshell, I come to the conclusion that the orders of stay of execution of the Ruling which was delivered by the tribunal; and which essentially, dismissed the Reference was therefore a Negative Order, and thus incapable of being stayed, either in the manner sought or at all.

### **Issue Number 3**

#### **Whether the Appellant/Applicant has demonstrated that Substantial loss is likely to accrue and/or arise, if the orders sought are not granted.**

72. To the extent that the Appellant/Applicant herein was/is seeking for an order of stay of execution, pending the hearing and determination of the appeal beforehand, it was therefore incumbent upon the Applicant to establish and demonstrate that Substantial loss, is likely to accrue and/or arise, if the orders sought are not granted.
73. Remarkably, Substantial loss has been stated to be the cornerstone upon which the orders of stay of execution pending the hearing of an appeal, is anchored and/or predicated.
74. Consequently and in the circumstances, it thus behooves every Applicant, the current Applicant not excepted to ensure that same places before the Honourable court plausible and cogent evidence touching and concerning the likelihood of substantial loss occurring.
75. To this end, it is appropriate to recall and reiterate the dictum in the case of *Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another* (1986)eKLR, where the Court of Appeal stated thus;

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has



to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

76. Having taken into consideration the dictum in the foregoing decision, it is now appropriate to revert back to the instant matter and to discern whether the Appellant/Applicant herein has indeed established that substantial loss, is likely to accrue and/or arise, if the orders sought are not granted.
77. To start with, it is contended that the Appellant/Applicant herein entered into an agreement for purchase of the 2<sup>nd</sup> Respondent business, which business was being carried out and/or undertaken in the suit property.
78. Furthermore, it is contended that arising from the acquisition of the business of the 2<sup>nd</sup> Respondent, the Appellant/Applicant herein now contends that the acquisition of the 2<sup>nd</sup> Respondent's business entails and/or included the premises, which were hitherto occupied and utilized by the 2<sup>nd</sup> Respondent.
79. On the other hand, the 1<sup>st</sup> Respondent who is the landlord of the premises contends that the 2<sup>nd</sup> Respondent's tenancy in respect of the suit premises terminated and was indeed brought to an end upon the issuance of Notice to Terminate Tenancy; and thereafter the tenancy in favor of the 2<sup>nd</sup> Respondent came to an end.
80. Other than the foregoing, the 1<sup>st</sup> Respondent has averred that subsequent to the termination of the tenancy with the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent herein proceeded to and entered into a tenancy agreement with the 3<sup>rd</sup> Respondent, who has since been paying rents in respect of the suit property since [w.e.f] the 1<sup>st</sup> April 2023.
81. Based on the foregoing, the 1<sup>st</sup> Respondent has contended that the Appellant/Applicant has never been her tenant and hence same shall not be disposed to suffer (sic) any substantial loss, if the orders sought are not granted.
82. Additionally, it has also been contended that there has since arisen a dispute between the Applicant and the 2<sup>nd</sup> Respondent, pertaining to and or concerning the scope of the business that was sold to the Applicant, as well as the legality thereof. For coherence, it was stated that the said dispute is pending hearing and determination before the High Court; [Commercial and Tax Division].
83. Other than the foregoing, it was also stated that vide the proceedings pending before the High Court; [Commercial Division], the Appellant/Applicant herein (who is said to be the Plaintiff therein) is also seeking for compensation for, inter-alia, loss of business.
84. Arising from the foregoing, it was submitted by the 1<sup>st</sup> and 3<sup>rd</sup> Respondent that whatever loss, if any, that the Applicant herein shall be disposed to suffer, if any, are ascertainable and quantifiable and thereafter payable in monetary terms.
85. Based on the foregoing, it has been contended that insofar as the loss to be suffered by the Appellant/Applicant is ascertainable and quantifiable, such a loss does not therefore constitutes (sic) substantial loss; either as known to law or at all.
86. Consequently and in my humble view, the fact that the Appellant/Applicant herein has not prima facie (on the face of it), established and demonstrated that same was indeed a tenant of the 1<sup>st</sup> Respondent, negates the plea that the Appellant/Applicant is disposed to suffer substantial loss.
87. On the other hand, there is also no gainsaying that looking at the claim by the Appellant/Applicant and taking into account that same has already filed a civil suit before the High Court, [Commercial



Division], it is therefore common ground that whatever loss that may arise, can very well be indemnified by way of recompense.

88. Based on the foregoing position, it is my humble view that the Appellant/Applicant herein has similarly failed to establish and demonstrate that the loss, ( if any), that may arise, shall be Substantial loss.
89. In a nutshell, having failed to establish and demonstrate that substantial loss, [in its various perspective may arise], is likely to accrue, it is imperative to state and observe that the Appellant herein, has similarly failed to prove a very critical ingredient, which anchors an application for stay of execution pending the Hearing and determination of an Appeal.

**Final Disposition:**

90. From the discourse, [whose details are elaborated upon in terms of the preceding paragraphs], what comes to the fore is that the Applicant herein has neither established nor demonstrated the requisite ingredients, necessary prior to and before the orders of stay of execution sought can be granted.
91. Additionally, it is also not lost on the Honourable court that the Appeal upon which the current Application is premised and predicated; and which was admitted to arise from a Reference pursuant to Section 12(4) of the Landlord & Tenants (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya, (sic) appears to be ex-facie incompetent.
92. Consequently and in the premises, this court comes to the conclusion that the Application dated the 17<sup>th</sup> October 2023; is devoid and bereft of merits.
93. Arising from the foregoing, the Honourable court proceeds to and Do hereby make the following orders;
- i. The Application dated the 17<sup>th</sup> October 2023; be and is hereby Dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.
  - ii. The Application dated the 27<sup>th</sup> October 2023; be and is hereby allowed with costs to the 1<sup>st</sup> Respondent only.
  - iii. The orders of Status Quo which were granted on the 23<sup>rd</sup> October 2023; and thereafter extended on the 8<sup>th</sup> November 2023; be and are hereby vacated and discharged.
94. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023.**

**OGUTTU MBOYA**

**JUDGE**

In the presence of:

Benson – court assistant

Ms. Wairimu for the Appellant/Applicant.

Ms. Cuna for the 1<sup>st</sup> Respondent.

Mr. Kamunda for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

