



Accra Restaurant v Mwangi & another (Legal representative of Estate of the Late John Mwangi (Deceased)) (Environment and Land Appeal E039 of 2023) [2023] KEELC 21554 (KLR) (14 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E039 OF 2023
AA OMOLLO, J
NOVEMBER 14, 2023**

BETWEEN

THE ACCRA RESTAURANT APPELLANT

AND

SUSAN NYOKABI MWANGI 1ST RESPONDENT

SOLOMON IRUNGU MWANGI 2ND RESPONDENT

**LEGAL REPRESENTATIVE OF ESTATE OF THE LATE JOHN MWANGI
(DECEASED)**

(Being an appeal against the ruling and orders dated the 3rd day of February, 2023 of the Honourable Mr. Gakuhi Chege the Vice Chair of the Business Premises Rent Tribunal at Nairobi in Tribunal Case Number E928 of 2022)

JUDGMENT

1. The Applicant filed the notice of motion application dated 23rd April, 2023 seeking the following orders;
 - a. Spent
 - b. The Honourable court does grant the appellant leave to appeal out of time and the memorandum of appeal filed herein be deemed dully filed and served upon the respondent.
 - c. That the Honourable Court stays the ruling and orders made by the Vice Chair the honourable Mr. Gakuhi Chege in the Business Premises Rent Tribunal at Nairobi Tribunal Case Number E928 of 2022 on 3/2/2023 pending the hearing and determination of the appeal herein.



- d. That the proceedings in the Chief Magistrate's court at Nairobi (Milimani Commercial Courts) Miscellaneous Application Number E 465 of 2023 (Susan Nyakabi Mwangi & Solomon Irungu Mwangi vs. Monicah Gathoni Ndungu T/A The Accra Restaurant) which seeks adoption and execution of the above mentioned ruling and orders of the Business Premises Rent Tribunal be stayed pending the hearing and determination of the appeal herein.
 - e. That the costs of this application be in the appeal.
 - f. That I am advised
2. The application is supported by the affidavit of Monica Ndungu and the grounds listed on its face inter alia;
- i. The appellant had gotten tired with squabbles concerning the said Accra Hotel whereby there were 2 factious fighting over the administration of the said Accra Hotel each with separate grant of letters of administration and claiming to be the one entitled to collect rent of the said Accra Hotel.
 - ii. The appellant had not seen the need to lodge an appeal and had decided to go along with orders of eviction until the 27th day of March, 2023 when she was served with a notice of motion application in Chief Magistrate's Court at Nairobi (Milimani Commercial Courts) Miscellaneous Application No. E465 of 2023 and then realized that the ruling at the tribunal had ordered her payment of the sum of Kshs.3,600,00 and costs to the alleged landlords/ applicants the respondents herein.
 - iii. By the said 27th day of March, 2023 the 30 days allowed for appeal since the 3rd February, 2023 had already elapsed.
 - iv. That the Honourable Tribunal therefore clearly lacked jurisdiction to entertain and handle the matter before it.
 - v. That the appellant herein had a tenancy relationship in the suit premises with Zaweria Wangari Mwangi, Francis Mwangi Kingori and Antony Maina Kingori being the legal representatives of the estate of the late Laban Kingori Macharia (deceased) while the respondents are the widow and child of the late Laban Kingori Macharia (deceased).
 - vi. The appellant has an arguable basis for appeal with high chances of success which might be rendered nugatory if this application is not allowed by the honourable court.
3. The Respondent swore affidavit in reply dated 15th May 2023 in opposition to the application. Mr. Irungu Mwangi deposed that the Applicant has not given reasons why they were unable to lodge an appeal soon after the delivery of the judgment. He deposed thus;
- a. That as regards stay of execution, the decree herein is a money decree and there is no way the appeal could be rendered nugatory as the amount is defined and can be recovered without any substantial loss to the applicant at all if it were to succeed in the appeal. I state this on the following grounds;
 - i. This suit emanated from landlord tenant relationship. We own the building located in the Nairobi Central Business District in which the applicant was a tenant. We collect rent. We also conduct business in the said building where the applicant is fully aware.



- ii. I therefore state that if the intended appeal were to succeed, the decretal amount in the honourable tribunal and lower court of Kshs.3,600,000/= is not too much for me to refund.
4. The Respondent averred that if the order of stay is granted, they will suffer substantial justice as they will be kept away from enjoying the fruits of their judgment. Further that the Applicant has not demonstrated that she will suffer substantial loss if the orders are not given.
5. I have proceeded to read and consider the submissions rendered by the parties and render my determination premised on the two issues this court is called upon to answer to;
 - a. Whether time should be extended for filing an appeal.
 - b. If answer to (a) is yes, whether the order of stay of execution ought to issue.
 - c. Who bears the costs of the application.
6. The applicant explained the reason for delay that initially she did not intend to appeal against the eviction order because she was unaware that an order had been made for payment of Kshs.3.6 million to the Respondent. That when she learnt of this limb of the order, the time for filing the appeal had lapsed. The Applicant also averred that her intended appeal has high chances of succeeding on the basis that there was no landlord-tenant relationship between her and the Respondents. Further, she submitted that the Respondent will not suffer any prejudice if the orders are granted. She supported the argument by citing the case of Commissioner of Domestic Taxes Vs. Kiambu Club Limited and Another (2020) eKLR.
7. On his part, the Respondent cited the case of Mwangi vs. Kenya Airways Limited (2003) eKLR where the Court of Appeal expressed itself thus;

“ It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant’s affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application.”
8. Guided by the Mwangi vs. Kenya Airways Limited supra, I find for the Applicant in so far as extending time. This is so because the delay in bringing the application was only two months. The Applicant has raised the issue of whether there exists a landlord-tenant relationship as one of the grounds of appeal which sounds plausible. In the case of Stanely Kinyanjui Vs. Tony Ketter & 5 Others (2013) eKLR, the Court of Appeal stated that:-

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised”.

and in the case of University of Nairobi Vs Ricatti Business of East Africa (2020) eKLR the Court of Appeal held that:

“ An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”.



9. In answering the question whether or not to strike out the draft memo of appeal filed, I am persuaded to take the direction taken by my learned colleagues in the case of *Evans Kiptoo V. Reinhard Omwonyo Omwoyo* (2021) eKLR where Justice Olga Sewe adopted the reasoning of Emukule, J. in *Gerald M’limbine Vs. Joseph Kangangi* [2008] eKLR, who stated that;

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period.”

10. The second limb of the application is whether to grant the order of stay of execution. The principles governing the grant of stay orders are laid out in Order 42 rule 6 of the Civil Procedure Rules. The Respondent stated that this court cannot stay a decree which does not exist. The Respondent also submitted on the heading of sufficient cause, substantial loss and furnishing of security.

11. Taking note of the issues raised by the Respondent and in particular, being denied the fruits of their judgment, I reach the decision that this court shall grant a conditional stay on terms that the Applicant shall deposit 50% of the decretal sum of Kshs.3.6 million to be held in an escrow account to be opened in the joint names of the Counsels on record.

12. In conclusion, I allow the application on the following terms;

- a. The Honourable court does grant the appellant leave to appeal out of time and the draft memorandum of appeal filed herein is deemed dully filed and served upon the Respondent upon payment of the requisite court fees.
- b. That the ruling and orders made by the Vice Chair the honourable Mr. Gakuhi Chege in the Business Premises Rent Tribunal at Nairobi Tribunal Case Number E928 of 2022 on 3/2/2023 shall be adopted as an order of the Court in the proceedings in the Chief Magistrate’s court at Nairobi (Milimani Commercial Courts) Miscellaneous Application Number E 465 of 2023 (*Susan Nyakabi Mwangi & Solomon Irungu Mwangi vs. Monicah Gathoni Ndungu T/A The Accra Restaurant*) pending the hearing and determination of the appeal herein.
- c. Despite the permission to have the BPRT order adopted, this court does issue forthwith an order of stay of execution against the decree once adopted and or as issued by the Tribunal; pending hearing and determination of the appeal, provided the Applicant shall within a period of Ninety (90) days from the date of this ruling shall cause to be deposited in an escrow account in the joint names of the advocates on record for the parties Kshs 1,800,000. If no such account is opened within the Ninety-day period, the deposit shall be made in Court.
- d. The monies deposited shall be held as security until the appeal is heard and determined or as the Court shall further direct.
- e. In the event the Applicant fails to comply with order c) above, the stay granted shall automatically lapse.
- f. Costs of this application is ordered in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2023

A. OMOLLO

JUDGE

