



Michael Aruwa t/a Kenya - The Smart Cathedral Nairobi v Thuku (Environment and Land Appeal E007 of 2023) [2023] KEELC 22455 (KLR) (22 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E007 OF 2023
MD MWANGI, J
DECEMBER 22, 2023**

BETWEEN

**MICHAEL ARUWA T/A KENYA - THE SMART CATHEDRAL
NAIROBI APPLICANT**

AND

PETER MWANGI THUKU RESPONDENT

(In respect of the Appellant's application dated 31st July, 2023)

RULING

Background

1. This ruling is in respect of an application dated 31st July, 2023 by the Appellant/Applicant seeking for the following orders that:
 - a. Spent.
 - b. The Honourable court be pleased to issue an order for stay of execution of the Ruling and orders issued by the Honourable G. Chege, Vice Chairperson of the Business Premises Rent Tribunal, in BPRT Case No. E 059 OF 2023, both on the 2nd March, 2023 and 25th July, 2023 and any other consequential orders arising therefrom.
 - c. The Honourable Court be pleased to set aside and or vary the ruling/orders issued by the Honorable G. Chege, Vice Chairperson of the Business Premises Rent Tribunal, in BPRT Case No. E059 of 2023, both on the 2nd March, 2023 and 25th July, 2023 and any other consequential orders arising therefrom.
 - d. The costs of this Application be provided for.



2. The application is supported by the grounds on the face of it and the supporting affidavit sworn by Michael Aruwa Adipo dated 31st July, 2023 restating the assertions contained in the grounds. The Applicant's case is that he leased the suit property from Joel Mwaura Thuku who was married to Nancy Njoki Gatura, who died in the year 2017 and left the properties to his wife Nancy Njoki Gatura.
3. The Applicant states that on 1st August, 2022, the Respondent herein issued him with an eviction notice. The Applicant protested to the notice vide the Letter dated 18th August, 2023. Despite the protest, the Applicant continued engaging his Landlord, Nancy Njoki, who informed him of an ownership dispute over the suit property. She further informed him that the Respondent herein had taken over ownership of the suit property. The Applicant then wrote to the Respondent requesting for more time to vacate vide the Letter dated 15th September, 2022. However, the Respondent served him with an application for eviction.
4. The Applicant states that while still waiting for a response from the Respondent, Nancy Njoki informed him that the dispute involving the suit property had been solved and as such, he should continue paying rent to her. With the said information, the Applicant never bothered to reply to the application for eviction lodged by the Respondent. It is only upon being served with a Hearing Notice on 8th February, 2023 that he realized that the dispute was never solved. His advocates then moved to file an application to be allowed to file a Reference against the intended eviction.
5. On 2nd March, 2023, however, when the matter came up for hearing, Hon Chege, Vice Chair of the Business Premises Tribunal, issued eviction orders and condemned the Applicant to costs of Kshs. 20,000/= to be paid to the Respondent. He asserts that the orders are prejudicial to him as there was no Landlord Tenant relationship with the Respondent.
6. The Applicant being aggrieved by the said orders, filed an application dated 9th March, 2023 for stay and or setting aside the said orders. On 27th July, 2023, the Tribunal delivered its ruling on the said application dismissing it with costs of Kshs. 10,000/= to the Respondent herein.
7. As such, the Respondent is now at liberty to evict the Applicant anytime from the suit property. The Applicant avers that he uses the suit property for church services hence he stands to suffer irreparable harm. The eviction will be prejudicial to them as they have not had enough time to prepare themselves and look for alternative premises.

Respondent's Replying Affidavit

8. The Respondent, Peter Mwangi Thuku, vehemently opposed the application through the Replying Affidavit deposed on the 7th September, 2023. The Respondent's case is that he is the registered proprietor of the suit premises as evidenced by the annexed Title Deed No. Dagoretti/ Riruta/7313. He avers that the Tribunal correctly found that the Appellant who was lawfully served with a Notice to terminate his tenancy failed to file a Reference to oppose the termination notice.
9. He states that, under the *Landlord and Tenant (Shop, Hotels and Catering Establishment) Act*, Cap.301, a tenant aggrieved by a notice of termination is obligated to challenge the Notice within the statutory period. In default, the tenant becomes a trespasser. The Appellant herein has not demonstrated that he had filed a Reference in the Business Premises Tribunal. The Application herein is therefore a scheme to delay the eviction.
10. The Respondent avers that he intends to develop the suit property. He states that the Applicant has had time; over 2 years after he was served with the termination notice on 1st August, 2022 to relocate his church.



11. He argues that the Appellant has no arguable appeal since he never filed a Reference to oppose the termination notice. The Appellant only requested for 6 months to vacate vide the Letter dated 15th September, 2022. Upon having a meeting with the Appellant in my Advocate's offices on 8th July, 2022, the Respondent granted the Appellant 4 months' notice to vacate the premises but he never vacated despite the lapse of the agreed time.
12. The Respondent therefore argues that the Appellant is not deserving of the orders sought as it is clear he does not respect the sanctity of title. In any event, the Appellant has not given a security for costs as required. That on a balance of probabilities, the Respondent stands to lose greatly as he intends to develop the property to be able to earn rental income. As such he prays that the application be dismissed with costs.

Court's directions

13. The Court directed that the application be canvassed by way of written submissions. Both parties complied. The Appellant/ Applicant's submissions are dated 11th October, 2023 whereas the Respondent's submissions are dated 15th September, 2023. The Court has had a chance to read through the said submissions and considered them accordingly.

Issues for determination

14. The issues for its determination in this matter are: -
 - a. Whether the Applicant has satisfied the requirements for the grant of an order of stay of execution as set out under Order 42 rule 6 of the Civil Procedure Rules.
 - b. Who will bear the Costs of the application?

Analysis and Determination

a. Whether the Applicant has satisfied the requirements for the grant of an order of stay of execution as set out under Order 42 rule 6 of the Civil Procedure Rules.

15. In the case of Consolidated Marine – Vs - Namprijad & Another Civil Appeal No. 93 of 1989 Nairobi, the court stated that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

16. Regarding the granting of stay of execution pending appeal, there are a plethora of decided cases setting out the principles.

17. In the Civil Appeal No. 107 of 2015 – *Masisi Mwita –VS Damaris Wanjiku Njeri [2016]* eKLR the court held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Court's discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition,



the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –vs- Straman E.A. Ltd. [2013] as follows: -

“In addition, the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal –VS- Thornton & Turpour Civil Appeal No. 15 of [1990] KLR 365”.

18. It is not in dispute that the Appellant/Applicant leased the suit property from Joel Mwaura Thuku (now deceased) who was married to Nancy Njoki Gatura. It was submitted by the Appellant/Applicant that upon the demise of Joel Mwaura in the year 2007, the Appellant/Applicant continued to pay rent to his wife Nancy Njoki Gatura. The Respondent on the other hand was issued with a Title Deed on the 20th April, 2021. He is therefore the lawful proprietor of the suit property.
19. Upon acquisition of the proprietary rights over the suit premises the Respondent issued the Appellant an eviction notice which notice the Applicant protested vide the Letter dated 18th August, 2023. Despite the protest, the Appellant never filed a Reference to challenge the eviction notice as provided in the applicable law.
20. It was only upon being served with an application for eviction that the Appellant in turn filed an application seeking leave to file a Reference out of time. The Honourable Tribunal declined and dismissed the application on 2nd March, 2023. An application for stay of execution was equally declined by the Tribunal.
21. The Appellant/Applicant in his own words stated that there was no valid tenancy between him and the Respondent. Having arrived at that conclusion, the Applicant should have reconsidered his litigation strategy. Was the Tribunal the appropriate forum for him?
22. I am conscious that the appeal is pending hearing before this court. I will say no more in order not to prejudice its hearing.
23. I find this application contradictory. At one point, the Applicant faults the Tribunal for finding that there was a tenant-landlord relationship; on the other hand, he accuses the Tribunal of failing to grant him leave to file a reference out of time and respond to the “Landlord’s application.”
24. This court’s finding is that the Appellant/Applicant has not satisfied the conditions for grant of an order of stay of execution pending appeal.
25. Consequently, this court finds that the application dated 31st July, 2023 lacks merit. The said application is dismissed with costs to the Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY DECEMBER, 2023.

M. D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Ongoto for the Respondent



N/A for the Appellant/Applicant

Yvette: Court Assistant.

M. D. MWANGI

JUDGE.

