



REPUBLIC OF KENYA



**Haji v Jillo & 3 others (Environment and Land Appeal E065 of 2023)  
[2023] KEELC 22498 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22498 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E065 OF 2023  
EK WABWOTO, J  
DECEMBER 19, 2023**

**BETWEEN**

**FATUMA MOHAMED HAJI ..... APPELLANT**

**AND**

**KORE NASIRJI JILLO ..... 1<sup>ST</sup> RESPONDENT**

**AFRICN BANKING CORPORATION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SAHRA KHALIF YUSUF ..... 3<sup>RD</sup> RESPONDENT**

**ABDIAZIZ BISHAR HAPI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the order issued by Hon. A. Muma (Vice  
Chairperson) on 2nd June, 2023 in Nairobi BPRT Case No. E881 of 2022))*

**RULING**

1. This Ruling is in respect to three applications, the first application being the Appellant's application dated 13<sup>th</sup> June, 2023 wherein the Appellants seeks inter alia for an order of stay of execution of the ruling and orders of the Business Premises Rent Tribunal issued on 2<sup>nd</sup> June, 2023 in respect to BPRT Case No E881 of 2022. The second application is the application dated 4<sup>th</sup> August 2023 filed by the 1<sup>st</sup> Respondent which seeks to stay the proceedings and setting aside of the interim orders issued by this court on 14<sup>th</sup> June 2023. The third application is the application dated 9<sup>th</sup> October, 2023 filed by the 4<sup>th</sup> Respondent which seeks an order/and or directions as to whom the Applicant shall pay rent for the premises pending the hearing and final disposal of this Appeal.
2. The Appellant's application dated 13<sup>th</sup> June, 2023 was premised on the grounds that on 2 June 2023, Honourable A. Muma (Vice Chairperson) issued ordered allowing the 1<sup>st</sup> Respondent's application dated 18th October 2022 and directed the 3<sup>rd</sup> and 4<sup>th</sup> Respondents (tenants) to hand over vacant possession of the suit property known as Land Reference No 36/11/48 within Eastleigh on or before



- 15<sup>th</sup> June 2023 failing which the 1<sup>st</sup> Respondent would break in and evict the tenants with the assistance of the Officer Commanding Station (OCS) Eastleigh North Police Station.
3. The Appellant contended that the Honourable Vice-Chairperson lacked the requisite jurisdiction to issue eviction orders against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, who were tenants of the Appellant, the Landlord and the Appellant herein has filed an appeal herein to challenge and set aside the said orders.
  4. It was contended that the Honourable Tribunal issued the said eviction orders in favour of the 1<sup>st</sup> Respondent when there existed no landlord tenant-relationship between the 1<sup>st</sup> Respondent herein and the tenants (the 3<sup>rd</sup> and 4<sup>th</sup> Respondents). In so doing the Vice Chairperson erroneously arrogating to himself jurisdiction.
  5. It was further contended that the Honourable Vice-Chairperson presiding over, entertained and issued contra orders to Milimani High Court Commercial Suit No 327 of 2017 Fatuma Mohamed Haji v African Banking Corporation & 3 others which had issued status quo ante orders over the suit property on 17th September, 2020 which orders preceded the illegal sale of the Appellants property by the 2<sup>nd</sup> Respondent herein in December 2021.
  6. In allowing the 1<sup>st</sup> Respondent's (1<sup>st</sup> Interested Party) application dated 18th October 2022, the Honourable Vice-Chairperson vested the suit property in the 1<sup>st</sup> Respondent which property was in possession of Appellant as a landlord thereby exceeding his jurisdiction as provided under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws of Kenya.
  7. The Appellant argued that the orders of the Tribunal effectually vested in the 1<sup>st</sup> Respondent the suit property through the back door which property is the subject of an active case before the superior court and thereby erroneously elevating him to the position of a landlord capable of seeking audience before the Tribunal.
  8. It was the Appellant's apprehension that unless this Honourable Court intervenes, the Appellant shall stand to lose her property in execution of orders issued by the Tribunal without jurisdiction should her appeal be successful.
  9. It was averred that documents in possession of the Appellant reveal that the 1<sup>st</sup> Respondent charged the suit property to the 2<sup>nd</sup> Respondent for a facility of Kshs. 100,000,000.00. Unless the orders of stay of execution are issued the Appellant shall suffer substantial loss of her very valuable property which has been erroneously vested in the 1<sup>st</sup> Respondent and who will adversely deal with the same in a prejudicial and adverse manner to the interests of the Appellant as the Landlord.
  10. The Appellant reiterated that unless the orders sought herein are granted and the appeal herein succeeds, the appeal shall be rendered nugatory and an academic exercise.
  11. It was averred that the instant application has been filed without unreasonable delay and that the Appellant is ready and willing to deposit security for the due performance of the orders of the court.
  12. The said application was opposed by the Respondents. The 1<sup>st</sup> Respondent vide an affidavit sworn on 4<sup>th</sup> August 2023 deposed that the only remedy available to the Appellant is damages which is already a question for determination in High Court Milimani Commercial Case No 327 of 2017 since the current proceedings are masked as an Appeal but in real sense is a challenge on the statutory power of sale of the suit property. It was also deposed that the 1<sup>st</sup> Respondent is an innocent purchaser for value from a public auction and has title to the suit property which was lawfully acquired from the 2<sup>nd</sup> Respondent while the Appellant has none, the same having been sold in a public auction in December, 2021. It was contended that the Appellant will not suffer any substantial loss and that the



- balance of convenience tilts in favour of the 1<sup>st</sup> Respondent as an innocent purchaser for value. The 1<sup>st</sup> Respondent also stated that the Appellant has not provided any security as a condition for grant of orders of stay sought. The Court was urged to dismiss the Appellant's application.
13. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by Lawrence Jaoko on 11<sup>th</sup> September, 2023. It was averred that the suit property was sold to the 1<sup>st</sup> Respondent for an open market value of Kshs 100,000,000.00 (one hundred million) where the 1<sup>st</sup> Respondent deposited Kshs 10,000,000.00 (ten million) and committed to pay the balance within 90 days. A certificate of sale was issued by the auctioneers certifying that the property was sold on 17<sup>th</sup> December, 2021 by public auction and a transfer was executed on 22<sup>nd</sup> December, 2021 and duly registered by the land Registrar on 24<sup>th</sup> December, 2021.
  14. The 2<sup>nd</sup> Respondent further averred that after the sale, the Appellant refused to grant vacant possession to the 1<sup>st</sup> Respondent. It was also averred that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein, already existing pursuant to old leases with the Appellant approached the Tribunal through references dated 28<sup>th</sup> September, 2022 and 7<sup>th</sup> October, 2022 for protection being BPRT E881 of 2022 and that their application dated 30<sup>th</sup> September, 2022 was dismissed and the restraining orders discharged. It was also contended that the Vice Chairperson delivered the Tribunal's determination on 2<sup>nd</sup> February, 2023 wherein the Tribunal noted that the property had already changed hands and there was a new owner, there was no order setting aside the public auction, it was not the right forum to determine the issue of exercise of statutory power of sale and that the tenants had the liberty to negotiate new lease with the new owner within 30 days.
  15. The 2<sup>nd</sup> Respondent deposed that, the Appellant who was not the registered owner and neither a tenant filed an application dated 23<sup>rd</sup> February, 2023 seeking to set aside the orders of the Tribunal which application was allowed through a ruling delivered on 14<sup>th</sup> April, 2023 and subsequently thereafter, hearing the application on merit. The Vice Chairperson of the Tribunal delivered his Ruling on 2<sup>nd</sup> June, 2023 granting vacant possession to the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent further deposed that the orders of vacation were issued by a duly competent Tribunal. The Court was urged to dismiss the application.
  16. The 4<sup>th</sup> Respondent equally prosecuted his application dated 9<sup>th</sup> October, 2023 and urged the Court to grant the reliefs sought herein.
  17. The Court has considered the three application and oral submissions made by Counsel for the parties and the issues for determination are as follows:
    - i. Whether the appellant is entitled to the orders of stay of execution pending appeal
    - ii. Whether the 4<sup>th</sup> Respondent's application is merited.
  18. In respect as to whether or not the Appellant has satisfied the conditions for granting of stay of execution, it is worth noting that the issue of whether to grant stay pending appeal is a matter of discretion of the court. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.



19. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), which provides:

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub-rule (1) unless—
  - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant

20. A stay of execution under order 42 of the [Civil Procedure Rules](#) is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that:

“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.

21. In considering an application for stay of execution I am guided by the case of [Butt v Rent Restriction Tribunal](#) Civil App No NAI 6 of 1979 (Madan, Miller and Porter JJA) where the following guidelines were given:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”



22. The Appellant deposed and argued that the Tribunal issued the said eviction orders in favour of the 1<sup>st</sup> Respondent wherein there existed no landlord tenant relationship between the 1<sup>st</sup> Respondent herein and the tenants (the 3<sup>rd</sup> and 4<sup>th</sup> Respondents). It was argued that the Vice Chairperson erroneously arrogated himself jurisdiction. It was further argued that the Appellant stands to lose her property in execution of orders issued by the Tribunal and that if the orders sought herein are not granted, the Appeal shall be rendered nugatory.
23. In considering this application, the Court has to also consider whether or not the appeal is arguable. The Court has to consider whether there is at least a single bona fide arguable ground that has been raised by the Appellant. An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the Court. In the instant case, the Appellant has averred that she has already filed the Memorandum of appeal which has raised five (5) grounds. One of the grounds being that the Tribunal erred in law by issuing eviction orders in favour of the 1<sup>st</sup> Respondent when there existed no land lord –tenant relations. It was also averred that the Tribunal erred in law by presiding over, entertaining and issuing contra orders to Milimani High Court Commercial Suit No 327 of 2017 *Fatuma Mohammed Haji v African Banking Cooperative & 5 others* which had issued *status quo ante* orders over the suit property on 17<sup>th</sup> September, 2020 which orders preceded the illegal sale of the Appellant’s property by the 2<sup>nd</sup> Respondent herein in December, 2021. Without saying more, the Appellant stands to be evicted from the suit premises and the appeal may be rendered nugatory should the stay orders not be issued.
24. In view of the foregoing, this Court is inclined to grant the stay orders sought.
25. In respect to the orders sought by the 4<sup>th</sup> Respondent as per the application dated 9<sup>th</sup> October, 2023 seeking an order or directive as to whom the rent should be paid in respect to the suit premises pending the disposal of the appeal, this Court has considered the fact that the issues in respect to the ownership of premises being core to this appeal and the same being yet to be determined the said order would be untenable and cannot be granted at this stage.
26. In conclusion therefore, this court makes the following disposal orders in respect to applications dated 13<sup>th</sup> June, 2023, 4<sup>th</sup> August 2023 and 9<sup>th</sup> October, 2023:
- i. A Stay of execution of the Tribunal orders issued in respect to BPRT Case No E881 of 2023 on 2<sup>nd</sup> June, 2023 is hereby issued pending the hearing and determination of this Appeal.
  - ii. The Appellant is hereby directed to compile, file and serve her record of appeal within 30 days from today.
  - iii. In default of compliance of order (ii) above, the stay granted herein shall automatically lapse and the appeal shall stand dismissed.
  - iv. The orders sought in the 4<sup>th</sup> Respondent’s application are declined.
  - v. Costs to abide the outcome of the appeal

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**E. K. WABWOTO**

**JUDGE**

