



REPUBLIC OF KENYA



Mwai t/a Jamaica Stores v Nkatha & another (Environment and Land Appeal E032 of 2023) [2023] KEELC 22398 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E032 OF 2023
CK NZILI, J
DECEMBER 13, 2023**

BETWEEN

JANET KAIMURI MWAI T/A JAMAICO STORES APPLICANT

AND

LUCY NKATHA 1ST RESPONDENT

JOHN M'MBIJIWE T/A BEALINE AUCTIONEERS 2ND RESPONDENT

(Application dated 4.10.2023, the appellant seeks execution of the ruling or order by the Business Premises Rent Tribunal issued on 8.9.2023)

RULING

1. By an application dated 4.10.2023, the appellant seeks to stay the execution of the ruling or order by the Business Premises Rent Tribunal issued on 8.9.2023. In the supporting affidavit sworn by Janet Kaimuri Mwai on 4.10.2023, she deposes that she is a tenant in a Plot situated at Nkuene Township, which the 1st respondent owns. She indicated that she had challenged the landlord's notice to evict her as per the attached copy of an application and a response by the respondents before the tribunal annexed as JKM "2" and "3" respectively.
2. The applicant avers the Business Premises Rent Tribunal heard the parties and delivered its decision on 8.9.2023, a copy attached as JKM "1". Her major complaint is that the tribunal failed to consider vital materials she had presented to support her application.
3. As a result, the applicant is apprehensive that the respondent will commence the execution process unless this court intervenes; the appeal will be a mere academic exercise. The applicant has been a tenant on the premises since 1982; hence, evicting her and levying distress for unproven rent arrears would result in immeasurable loss and damage.



4. It is averred that the applicant obtained a copy of the ruling on 2.10.2022, since the decision was delivered without notice to her lawyers on record.
5. The application was served upon the respondents' advocates on 9.10.2023, as per an affidavit of service by Mark Murithi, advocate sworn on 16.10.2023. No response was filed to oppose the application.
6. A party seeking a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules has to apply without unreasonable delay, prove substantial loss, offer security for the due realization of the decree should the appeal fail, and lastly, demonstrate it is in the interest of justice to grant the orders sought.
7. In *Jaber Mohsen Ali & another vs Priscillah Boit & another (2014)* eKLR, the court said the unreasonable delay depended on the surrounding circumstances of each case since even one day's delay could be unreasonable depending on the court's judgment. The court cited with approval Christopher Kendagor vs Christopher Kipkorir Eldoret ELC No. 919 of 2012, where the applicant had been given 14 days to vacate the land, only for him to apply a day after the 14 days. The court declined to grant the orders, stating that the applicant ought to have come before the expiry of the period given to vacate the land.
8. In *James Wangalwa vs Agnes Naliaka Cheseto (2012)*, eKLR, Gikonyo J held that putting on motion the execution process by itself did not amount to substantial loss since it was a legal process. The court said an applicant must establish other factors to show that the execution will irreparably affect or negate the essential core of the applicant as the successful party in the appeal. The court cited with approval Silverstein vs Chesoni (2002) 1 KLR 867 and Mukuma vs Abuoga (1988) KLR 645 that substantial loss was the cornerstone for stay of execution, and it was what had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
9. In *RWW vs EKW (2019)* eKLR, the court said it has to balance the two undisputed rights to enjoy the fruits of the judgment on the one hand and that undoubted right to appeal for the opposite party, so that no party suffers prejudice that an award of costs cannot compensate.
10. Regarding security, the court in *Visram Ravji Halai vs Thorton & Turpin Ltd (1963) Ltd Civil Application No. Nai 15 of 1990*, the court said an order for security is aimed at ensuring that it is adequate for the decree-holder to realize the fruits of his litigation. Further, in *Arun C. Sharma vs. Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & others (2014)* eKLR, the court said security serves the purpose of granting the due performance of the decree but not to punish the judgment debtor since, in civil process, judgment was like debt.
11. In *Josephine Moraa vs Ken Sagini & others (2010)* eKLR, the court granted a stay of a decision from the Business Premises Rent Tribunal since the respondent, apart from filing grounds of opposition, had not countered the averments of the application.
12. Guided by the case law discussed above, the appeal herein was filed on 6.10.2023, together with the application for a stay of execution. The handover of the suit premises, or break-in as the case may be, was to occur on 8.10.2023. Therefore, the applicant came to the court before the expiration of the 30 days. The memorandum of appeal has raised several grounds which are arguable.
13. The respondents have not countered the averments in the affidavit on substantial loss should she be evicted. The grounds of appeal, among other things, raise the question of whether the eviction notice sufficiently complied with the law. In *Kamau Muchua vs The Ripples Ltd C. In Appeal No. 186 of 1992*, the court said as far as possible a party should not be allowed to retain a position of advantage obtained through a planned blatant unlawful act. Looking at the circumstances of this application, I



think the interest of justice militates in favor of granting a stay; otherwise, the appeal shall be rendered nugatory should the eviction occur.

14. Consequently, I grant the application on condition that the applicant deposits rent of six months with the Deputy Registrar of this court as security within 30 days from the date hereof; otherwise, the orders shall lapse.
15. The Business Premises Rent Tribunal file to be availed by 15.1.2024 for further directions.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 13TH DAY OF DECEMBER 2023**

In presence of

C.A Kananu/Mukami

Mr. Murithi for the applicant

Mutua Mwangi for respondent

HON. CK NZILI

JUDGE

