



**Wahito & another v Huduma Realtors Limited & another (Civil Appeal
6 of 2023) [2023] KEELC 22099 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL 6 OF 2023
MD MWANGI, J
DECEMBER 8, 2023**

BETWEEN

ANN WAHITO 1ST APPELLANT

BRYAN YONGO 2ND APPELLANT

AND

HUDUMA REALTORS LIMITED 1ST RESPONDENT

KEYSIAN AUCTIONEERS 2ND RESPONDENT

RULING

(In respect of the Notice of Motion Application dated 20th September, 2023 seeking a stay of execution order pending hearing and determination of the appeal).

Background

1. The Appellants/Applicants herein filed an appeal by way of a Memorandum of Appeal dated 28th September, 2023 against the ruling delivered by Honourable S.A. Opande, P.M. on 22nd September, 2023. The Appellants have raised numerous grounds in the Memorandum of Appeal and ultimately pray for orders that the ruling dated 22nd September, 2023 in respect to findings specific to the 1st Respondent's application dated 6th July, 2023 particularly orders (c) and (d), be set aside in its entirety and the impugned orders be replaced with an order dismissing the 1st Respondent's application dated 6th July, 2023 with costs.
2. The Memorandum of Appeal was filed in the High Court on 6th October, 2023. Lady Justice Meoli transferred the appeal to this Court. The learned Judge noted that the appeal was wrongly filed in the High Court while intended to be filed in the Environment and Land Court. Besides, as she stated, the dispute appears to have arisen from a subsisting tenancy.



3. Alongside the Memorandum of appeal, the Appellants filed an application for stay of execution. In the said application, the Appellants pray for orders:-
 - i. Spent
 - ii. That pending the hearing and determination of this application, inter-parties, this Honourable Court be pleased to grant an order of stay of execution of the ruling delivered on 22nd September, 2023 in Milimani MCCC No. E 10159 of 2021 and any attachment and consequential orders flowing therefrom be stayed.
 - iii. That this Honourable Court be pleased to issue any order it deems fair and just in the circumstances of this case.
 - iv. That the costs of and incidental to this application be costs in the cause of the Appeal.
4. It is apparent that the Appellants/Applicants forgot to include a prayer for an order seeking stay of execution pending hearing and determination of their appeal. However, from the supporting affidavit, it is clear that the intention of the Appellants/Applicants was to seek stay of execution pending hearing and determination of their appeal. I note that the Appellants/Applicants are acting in person. Since their intention is clearly stated in their supporting affidavit, in the spirit of article 159(2)(d), of the Constitution, to administer justice without undue regard to procedural technicalities, I will treat their application as one for stay pending appeal.

Court's Directions

5. The court's directions were that the application be canvassed by way of written submissions. The Appellants/Applicants and the 1st Respondent complied. I have had the opportunity to red through the said submissions.

Issues for Determination

6. The sole issue for determination is whether the Appellant/Applicants have satisfied the grounds for the grant of an order of stay of execution pending appeal; and off course depending on the finding, the terms and conditions of the order of stay.

Analysis and Determination:

7. In making the decision in this matter, I consider two decisions cited by the parties relevant and extremely useful. One has been cited by the Appellants and the other by the 1st Respondent.
8. The 1st one is in the case of Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR which has been cited by the Appellants in their submissions. In the said case, the Court held that:

“The right of appeal, it has been held time and again, is a Constitutional right which is the Cornerstone of the rule of Law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under article 50 of the Constitution which latter right cannot be limited under article 25 of the said Constitution.”
9. The 2nd decision which has been cited by the 1st Respondent is in the case of Tanui Robert & Another v Jessica Adikinyi Afwande [2021] eKLR, where the High Court held that it was obligated to balance the Applicant's undoubted right of appeal against the Respondent's right to enjoy the fruits of her judgment.



10. Further, I have it at the back of my mind, as so categorically put by Cotton L.J in the old English case of *Gilbert v Eden* (1878) 9 Ch. D, that what is before me is merely an interlocutory application which is not meant to decide the rights of Parties. He defined interlocutory applications as those applications;

“ which do not decide the rights of Parties, but are made for purposes of keeping things in status quo till the rights (of parties) can be decided or for purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”
11. Ringera J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani HCCC 1234 of 2002) also affirmed that in an interlocutory application, the court is not required to make any conclusive or definitive findings of facts or law on the basis of contradictory affidavit evidence or disputed propositions of law.
12. This Court is now in that unenviable situation. While it must uphold the Applicant’s right of appeal, it must balance the same against the 1st Respondent’s right as a Landlord.
13. The Court of Appeal in the case of *Visbram Ravjiltalai v Thornton & Turnip* (Civil Application No. Nai 15 of 1990 [1990] KLR 365 observed that whereas the Court of Appeal’s power to grant stay pending appeal is unfettered, the High Court’s (and now, Courts of equal status’) jurisdiction to do so under order 41 Rule 6 (now order 42 rule 6) is fettered by 3 conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.
14. It is not in dispute that the 1st Appellant is tenant of the 1st Respondent on the premises known as Carry on Villas No. A2 of LR 3734/540 in Nairobi.
15. The fundamental responsibility of a tenant in a tenancy agreement is payment of rent in the manner and time agreed in the tenancy agreement.
16. In her supporting affidavit sworn on 28th September, 2023, the 1st Appellant herein, Ann Wahito deposes that the substratum of the suit before the Milimani Chief Magistrates’ Court (MCCC E10159 of 2021) was a tenancy dispute, the plank being the rent payable and monies paid to the 1st Respondent but not appropriately credited. She further deposes that the lower Court had on 9th June, 2023 allowed her application conditionally. The condition was payment of Kshs 1,670,000.00, which she complied with.
17. The impugned ruling of 22nd September, 2023 arose out of an application by the 1st Defendant dated 6th July, 2023 which the Court combined with all other pending applications. Whereas the Court held that the 1st Defendant’s Application did not meet the threshold for review, the Court, according to the deponent, held that the basis of its order for distress for the disputed sum of Kshs 2,223,830.00 was premised on the fact that the objector had not rebutted the same on oath.
18. The deponent contends that the rent payable was Kshs 200,000.00 as verbally agreed with the Landlord. The agreement between her and the Landlord expired on 14th September, 2020.
19. The deponent pleads that unless a stay is granted she stands to suffer irreparable loss and damage since the 1st Respondent is keen on evicting her from the suit premises by dint of the impugned ruling.
20. The 1st Respondent vide the replying affidavit sworn by Johnal K. Mugambi asserts that the rent payable is Kshs 230,000.00 per month. He states that as at 24th October, 2023, the rent arrears due



and owing from the Appellants amounted to Kshs 3,143,830.00. The Appellants are still tenants and continue to be in default.

21. Further, the Respondent asserts that on 2nd November, 2022, the Applicants undertook to pay a sum of Kshs 1,670,000.00. However, from that time, they have only paid a sum of Kshs 1,380,000.00 as particularized in paragraph 7.3 of the Replying Affidavit. They are in default for over 13 months' worth of rent.

Determination

22. From the supporting affidavit of Ann Wahito, it is clear that the dispute between the parties herein and which is before the Magistrate's Court is pegged on 2 issues only; the rent payable, and the amounts allegedly paid and not appropriately credited. The 1st Appellant alleges that the rent payable is Kshs 200,000.00 per month whereas the Respondent insists it is Kshs 230,000.00 per month. That is not for this court to determine. It is one of the issues to be determined by the trial Court.
23. The 1st Respondent urges the Court, if it is to grant the orders sought, to order a security. The deponent of the Replying Affidavit at paragraph 4 thereof deposes that this Court has the power to order the Appellants to deposit such security for the due performance of the decree. The Appellant on the other hand in her supporting affidavit at paragraph 15 deposed that she was ready and willing to furnish security by way of a bank guarantee.
24. The appeal before me is not from a judgment, rather is an appeal from an order issued pursuant to an interlocutory application. The case before the Magistrate's court is yet to be determined.
25. Having considered the matter before me in its entirety and the applicable law, I am persuaded, in order to give the parties an opportunity to canvass their appeal, to grant a conditional stay of execution order.
26. The condition for the stay will be that the Appellants/Applicants will pay a lump sum amount of Kshs 1,200,000.00 to the 1st Respondent; the equivalent of rent for 6 months at the rate of Kshs 200,000.00 (being the undisputed monthly rate) on or before the 31st January 2024. Thereafter, on the 5th day of each subsequent month beginning 5th March, 2024, to pay rent at the rate of Kshs 200,000.00 without fail to the 1st Respondent pending the hearing and determination of this appeal or the case before the Magistrate's Court whichever will be earlier. In default, this order of stay will automatically lapse.
27. The Costs of this application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Brian Yongo – 2nd Appellant/Applicant in person

No appearance for the 1st Appellant/Applicant

Mr. Adano for the 1st Respondent.

No appearance for the 2nd Respondent

Court Assistant: Yvettee

