



**Bermac Limited & 2 others v Kibia & another (Environment and Land Appeal E066 of 2023) [2023] KEELC 22147 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22147 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E066 OF 2023**

**J OMANGE, J  
DECEMBER 7, 2023**

**BETWEEN**

**BERMAC LIMITED ..... 1<sup>ST</sup> APPELLANT**

**1749 LIMITED ..... 2<sup>ND</sup> APPELLANT**

**DBASS TYRE CENTRE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GEORGE NGUGI KIBIA ..... LANDLORD**

**AND**

**LOISE WANJIRU KIBIA ..... LANDLADY**

*(Being an appeal against the Judgement /Decree of the Honourable Andrew Muma Vice Chairperson of the Business Premises Rent Tribunal in NAIROBI delivered on the 9<sup>th</sup> June 2023 in BPRT Case No 1195 of 2022)*

**RULING**

- 1 Vide Notice of Motion application dated 12<sup>th</sup> June 2023 the Appellants seeks the following orders:
  - a. Spent
  - b. Spent
  - c. There be an interim ex parte order of stay of execution of the judgement and decree given in the Business Premises Rent Tribunal in Nairobi Case No E2295 of 2022 on 9<sup>th</sup> June 2023 against the Appellants /Applicants pending the inter partes hearing and determination of the appeal herein .



- d. That the court be pleased to grant the orders sought subject to any condition as the court may deem fit.
  - e. Costs of the application.
2. The Appellants case is that they have lodged an appeal against the decision of the learned Tribunal Chair. The 2<sup>nd</sup> Appellant application was supported by an affidavit sworn by the 2<sup>nd</sup> Appellant/Applicant herein who deponed that the 7 days notice period is too short for them to vacate the premise as they are an established business that have set up permanent structures which might require time to dismantle. He averred that if the order is not stayed, their appeal would be rendered nugatory. Lastly, he stated that the appellants are willing to abide by whichever conditions the court gives for security pending hearing and determination of the appeal.
  3. In response to the application the Respondents filed a Replying Affidavit sworn by George Ngugi in which he deponed that a termination notice was issued in compliance with the Landlord and Tenants (shops ,hotels, and catering establishment Act) Cap 301. The notice which was issued on 30<sup>th</sup> November 2021 was to take effect on the 1<sup>st</sup> March 2022. Mr Ngugi deponed that the notice was acknowledged by the Appellants who did not vacate several months later. This prompted the filing of an application to the Business Premises Rent Tribunal on the 9<sup>th</sup> December 2022 seeking to uphold the terms of the termination notice.
  4. The Appellant in their submissions relied on order 42 rule 69(2) of the *Civil Procedure Rules* and also placed reliance on the case of [\*RWW Vs EKW \(2019\)\*](#) eKLR wherein it was held that the purpose for stay of execution pending appeal was to preserve the subject matter in dispute so the rights of the Appellant exercising the right of appeal are safeguarded and the appeal is not rendered nugatory in the event of success. They submitted that if the stay orders are not given they would suffer substantial loss as they would lose their business which could not be salvaged in the event the appeal was successful.
  5. Counsel for the Respondent submitted that the Appellants had not met the threshold set out in order 42 rule 6(2) of the *Civil Procedure Rules* to warrant orders of stay of execution pending appeal. Counsel argued that substantial loss had not been proved nor that the appeal would be rendered nugatory. He further argued that the appeal had no chance of success as the Judgement in the Tribunal had correctly found that the respondents had followed the law to the letter in issuing the termination notice.
  6. The issue before the court for determination is whether the Appellants have satisfied the requirements as set forth in order 42 rule 6 for grant of stay.

Order 42 Rule 6 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 subrule (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.

11. The Appellants are required to establish that if the application is not allowed, substantial loss would result. Substantial loss has been defined in several judicial pronouncements. In the case of *Francis K. Chabari & another vs Mwarania Gaichura Kairubi [2022]* eKLR, Justice C. K. YANO quoted *Geoffery Muriungi & another v John Rukunga M'imonyoso* as to define substantial loss as follows;

“the undisputed purpose of stay pending appeal is to prevent a successful Appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful Appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal”

12. In *Silverstein –vs- Chesoni [2002]1 KLR 867* the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

13. The above position was further reinstated in the case of *Shell Ltd –vs- Kibiru & Another*, Civil Appeal No. 97 of 1986, Nairobi where it was stated that:-

“The application for stay made before the High Court failed because the 1<sup>st</sup> of the conditions was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

14. The onus on the Applicant to prove substantial loss was similarly addressed in *Antoine Ndiaye –vs- African Virtual University [2015]* eKLR; in which the court indicated as follows:-

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; it follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

15. In the present case, the Appellants aver that if the Respondents execute the Judgement and decree, their business will suffer substantial loss that cannot be compensated by any orders issued in case of success of the appeal. The Respondents dispute this and argue that the business is one that can be carried out at any other location not necessarily the current location. Although the Appellants aver they have an established business they do not indicate the nature of business or prove that it can only take place in the current location and nowhere else.

16. Order 42 Rule 6 does not include a requirement that the court considers whether or not the appeal is arguable. It however a requirement that the Applicant proves sufficient cause. Oxford Law Dictionary defines sufficient cause as “a set of conditions, factors, or events sufficient to produce a given outcome”



This can be translated to mean that the evidence presented by the Applicant should be sufficient to produce the outcome he desires.

17. The court notes that it is the uncontroverted averment of the Appellant that notice had been given in compliance with the law. The Appellants did not challenge this averment as they did not file a further affidavit in spite of leave to do so having been granted. The appellate process would thus seem to have been invoked in this instance simply to grant the Appellants more time than they had already enjoyed to vacate. Indeed, from their own pleadings they reiterate that the 7 days notice was too short.
18. The Appellants argued that they had paid rent for the month of June. However, this turned out to be untrue as the Respondents have averred that they were in rent arrears which they only cleared in June. A party who wishes to benefit from the discretion of the court should present all the facts truthfully.
19. Having considered all of the forgoing I find that the application has no merit and is dismissed. Costs shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

Mr. Omwao for Appellants

Mr. Ongoto for Respondents

Steve - Court Assistant

