



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC APPEAL NO E001 OF 2021

ADVENTURE ADRENALIN AFRICA LIMIT APPELANT

VERSUS

HELLEN KAY HARTLEY.....RESPONDENT

RULING

- 1 By a Notice of Motion dated 8/11/2021 the applicant herein Adventure Adrenalin Africa Limited seeks the following orders;
 - a) Spent
 - b) Spent
 - c) That pending the hearing and determination of the Appeal herein, a stay of execution of the judgement and orders of the Business Premises Rent Tribunal [Mombasa] dated 5th November 2021 B.P.R.T 17 of 2021, Adventure Adrenalin Africa Limited vs Hellen Kay Hartley and all consequential orders be issued and/or granted.
 - d) That this honourable court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
 - e) That the costs of this application abide the outcome of the Appeal.

2 The Notice of Motion application is brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules,2010 and Sections 1A,1B and 3A of the Civil Procedure Act.

The Applicants Case

3 The application is supported by the Affidavit of Anjali Dayaramani the Applicants, Director of the Applicants sworn on the 6th November 2021. There is also filed a supplementary affidavit sworn on 11/11/2021. It is the Applicants case that they have been the Respondents tenants from the year 2014 with a formal lease executed on 1/05/2015. The lease period was for two years, the user was a guest house and rent payable was Kshs. 50,000 monthly which the Applicant has duly paying until the dispute herein arose. The suit premises were on Title No. Kwale/Diani Beach Block/808.

5. It is also deposed that on 1/5/2017 following the end of the two-year term, the Respondent gave notice to the Appellant/applicant to vacate the premises and thereafter also refused to accept rent. The Applicant filed BPRT No. 70 of 2017. The Tribunal confirmed that the tenancy was a controlled one and would remain in force until termination by the Tribunal and or by mutual consent of the parties. Aggrieved, the Respondents filed Civil Appeals No. 28 of 2018 and 29 of 2018 in ELC Mombasa which were subsequently dismissed.

6 After the dismissal of the Civil appeals the Respondent gave the Applicant a notice dated 24th November 2020 to terminate the tenancy on the basis that she intended to occupy the premises as family residence. The Appellant/Applicant responded thereto indicating that it would not comply with the notice. The Applicant then filed a case before the Tribunal being BPRT No 17 of 2021 Adventure Adrenalin Africa Limited Vs Hellen Kay Hartley where judgement was delivered on 5/11/2021. The Tribunal dismissed the Applicant's reference and upheld the Respondents notice to terminate the tenancy and further issued an eviction order against the applicant. The appeal before this court is subject of the said decision of the Tribunal.

7 The Applicant filed a Memorandum of Appeal dated 9/12/21 on grounds that the Tribunal erred in law and in fact; -

- a) In finding that the Respondent proved her intention to occupy the premises as her residence for a period of not less than one year.

- b) When it lowered the threshold of proof which the Respondent had to meet in order to prove that she intended to occupy the premises as her residence for a period of not less than one year.
- c) In re-opening and considering the issue whether the tenancy was in fact controlled whereas the issue had been considered and determined in ELC Civil Appeals No. 28 of 2018 and 29 of 2018.
- d) When it upheld the Respondents Notice dated 24/11/20 after considered grounds which were not specifically pleaded therein specifically the one of effluxion of time of the lease agreement and which ground was res judicata.
- e) When it upheld the Respondents Notice dated 24/11/20 when the same was defective.
- f) When it held that the issues raised in the appellant's submissions were determined earlier by the Tribunal and Superior court but later delved into the same in its own judgement.
- g) When it held that the Respondent was entitled to issue a notice to terminate the tenancy when a period of two years had lapsed after delivery of judgement in earlier references filed by the Respondent.
- h) When it ignored and failed to consider pending proceedings between the Appellant and the Respondents regarding the termination of the tenancy.
- i) In failing to hold that the Notice to terminate the tenancy dated 24th November 2020 was an abuse of court process.
- j) In finding that the Respondent was entitled to vacant possession of the premises when the reasons given to terminate the tenancy were not genuine.
- k) In issuing an immediate eviction order against the Appellant without giving it a grace period to vacate the premises.
- l) When it considered extraneous matters when arriving at its decision and which was in any event against the weight of evidence.
- m) In not following the correct and proper legal principles and thereby arriving at a bad decision.

8 It is the Applicant's case that they have a serious and arguable appeal as they operate a guest house and hotel on the suit premises and which are occupied by paying guests. That they are bound to suffer substantial and irreparable damage since its guests would be evicted and they would be exposed to endless litigation. They also feared for their reputation. The Appellant/applicant prayed for the orders as per the application and stated that the respondent would not suffer any prejudice or any damages that cannot be compensated by way of costs in the event that the application was allowed.

Respondents Case

10 The application is opposed by the Respondents who filed a replying affidavit on 26/11/2021 sworn on the 25/11/2021 by Hellen Kay Hartley the Respondent. The depositions are largely echoed in the Respondents submissions herein.

SUBMISSIONS

11 The application was canvassed by way of written submissions. The Applicant filed theirs on 20/12/21 dated 16/12/20 and the Respondents on 20/12/21 dated 17/12/21.

Applicants Submissions

12 The Applicants submissions revolved around the conditions set out under Order 42 Rule 6 of The Civil Procedure Rules. It was submitted that the appeal raises arguable grounds and that it was filed timeously and without any undue delay on 9/11/21 after judgement was delivered on 5/11/21.

13 On substantial loss Counsel urged that the business premises are commercial and not residential premises. That therefore the reasons given by the Respondents for residential occupation were not available in law since the Act only provided for business premises. Further it had not been disputed that there were guests in the premises yet the tribunal did not give the tenant any grace period to vacate the premises or give vacant possession of the premises. It instead gave orders for immediate possession by the Respondents and failure to which the Appellant was to be forcibly evicted and removed therefrom. It was pointed that the effect of the judgement was that the appellant and its workers as well as the paying guests would be evicted, the latter without notice giving rise to endless litigation from the guests as well as suppliers to the business. In addition, there will be damage to reputation which the Appellant has built over the years making it difficult to undertake similar business in future. Others were cancellations of bookings and the cost thereof and the complete shut down of the Appellants business resulting into substantial loss.

14 In addition, it was contended that since the Respondent had deposed that she was homeless and did not have any gainful employment she would not be able to compensate the Applicant were the appeal to succeed. That while the Appellant has undertaken to compensate she does not disclose her source of funds. Substantial loss in law should be to the Appellant and not the Respondent. The Appellant Company will also not exist to receive the said compensation since its operations will have been completely grounded. Furthermore, if the Appellant is evicted and subsequently the appeal succeeds, the appellant will have a barren decree since it will not be possible to be reinstated into the

premises. Counsel relied on the case of **James Wangalwa & Another V Agnes Naliaka Chesoto Misc Application No 42 of 2011[2012] eKLR; Headmistress Loreto Convent Msongari & Another v LMW [2017] eKLR and Tamarind Meadows Limited V Wibeso Investments Limited & 6 Others [2020] eKLR** to support these arguments.

15 On security for costs, it was the Applicant's submission that the court had directed them to deposit a sum of Kshs. 350,000 and they had complied. That the Respondent in urging the court to impose an upfront security deposit of Kshs. 900,000 being the Respondents alternative accommodation cost was misplaced. Citing the court's ruling in **Rwakiseeta Vs. Lonhro Cotton (U) Ltd (2002) EA 587** counsel further urged that there was no legal requirement that the value of the security should be exactly equivalent to the whole of the decretal sum. The court only had to ensure the security was reasonable. Furthermore, the Applicant had demonstrated that she was unemployed and homeless and hence it would be difficult for her to compensate the Applicant for the loss suffered in the event that the applicant is successful in the appeal. Counsel relied on **Hall Equitorial Vs. Abdul Rahim (2020) eKLR** in this regard.

16 Additionally the Applicant submitted on other issues raised by the Respondent though they did not form the conditions for granting a stay. That the Applicant had disclosed all material facts vide their further affidavit dated 8/12/21. To the contrary it is the Respondent who failed to disclose to the Tribunal and the Applicants that they were no longer the registered owners of the premises having disposed of the same long before the hearing of the case. The transfer was also part of the Respondents scheme to evict the appellant from the premises. That the case before the court was not for payment of mesne profits. It was an appeal arising out of a determination of a tenancy notice. The suit for mesne profits being Mombasa ELC no. 257 of 2017 is still pending in court and has never been prosecuted. The jurisdiction of the Court is mainly to deal with issues pertaining to controlled tenancy and a residency was not one of them. The Respondent having admitted that she refused to collect rent, returned rent deposited in her account from the tenant, cannot plead that the Appellant is a trespasser.

17 The applicant urged the court to find that it had satisfied the three conditions set out under Order 42 Rule 6 of The Civil Procedure Rules for grant of stay pending execution of appeal.

The Respondents case

18 In replying affidavit the Respondent averred that the applicant was notified of the intention to terminate the controlled tenancy in respect of the suit property as she intended to occupy the same with her family as she had no place to live. That the Appellant had been occupying the premises in dispute since 1/5/2017 against the Respondents wishes and operating the same as a rental facility and guest house.

19 Counsel pointed that the lease herein terminated by effluxion of time after two years on 30/04/2017 in accordance to its terms. The lease required the Respondent to apply for a new two-year agreement on terms to be agreed. There was no formal or written lease agreement thereafter between the parties neither were there new fresh terms by which the tenant was to continue occupying the premises. A controlled tenancy was imposed on the Respondent as the Landlord by operation of the Law. The Applicant thereafter insisted on paying the previous modest rent. The Respondent has never accepted the Kshs. 50,000 tendered as monthly rent by the Applicant and therefore no constructive tenancy has ever been established between the parties.

20 It was further contended that the Applicant had not paid mesne profits for 4 years and 8 months being rent for Kshs. 28,600,000/= at prevailing market rental value based on valuation report by M/s Amazon Valuers Ltd. Additionally Monthly rent loss of Kshs. 500,000 will continue to be incurred until the Applicant vacates the premises. Another loss to be incurred was cited as accommodation expenses for the Applicant in Diani estimated at Kshs. 900,000 for a period of one year.

21 The Respondent also stated that BPRT case No. 107 of 2016 was resolved by consent and the Respondent contractual notice withdrawn. The Respondent then requested the Applicant to vacate the premises upon effluxion of the 1st two-year term. The Applicant declined contrary to the spirit of the lease agreement. After this the Applicant instituted BPRT 70 of 2017 which was dismissed. The Applicant appealed against the decision in ELC Mombasa Civil Appeal 28 of 2018 which was then consolidated with a related appeal Mombasa Civil Appeal No. 29 of 2018. The Court dismissed the consolidated appeals and the applicant has never appealed against this decision.

22 It was denied that the lease of the land to the third party was intended to evict the Applicant. It was in fact intended to eke out a living for the Respondent. However, the lease also encompassed other parcels of land owned by the Applicants siblings. Th lease was ultimately surrendered vide surrender of lease in November 2020.

23 According to the Respondent the Applicant refused to comply with the orders of the final judgement herein in pursuit of their own selfish interests. The Tribunal dully dismissed the Applicants reference in view of the abuse of the court process that was evident. Indeed, the Tribunal declined the Applicants oral application for interim stay and ordered the Applicant to make a formal application before the Tribunal. Instead the Applicant without disclosing material facts that the Tribunal had dismissed the reference for the reasons that the Respondent and her family had no place to reside, misled this court into being granted temporary exparte orders of injunction. Other issues allegedly not disclosed to this court were the suit premises was a 9-bedroom private family residence where the Respondent used to reside before it was let to the Applicant as the Respondent was relocating to Naivasha. The Respondent also explained the events after relocation to Naivasha which prompted their wanting to come back to the family residence in Diani and the lack of income to support rental accommodation. Counsel urged that the Applicant having failed to make these material facts in the absence of the party who was affected, ought not to benefit from the non-disclosure. The case of **Bahadurali Ebrahim Shamji Vs. Al Noor Jamal & 2 Others Civil Appeal No.210 of 1997** was relied upon to emphasize on the importance of non-disclosure.

24 The court was urged to dismiss the application for stay of execution for lack of merit on the basis that; -

- 1) Unlike the Respondent the Applicant has an option to lease a different property to conduct its business;
- 2) The loss to be suffered by the Applicant if the stay is not granted is quantifiable due to its commercial nature and compensable by

award of damages. Moreover, no evidence had been tabled to the court to substantiate the loss in terms of guests to be evicted and the cancellations.

3) In view of the valuation of Kshs.270 million of the suit property returned by M/s Amazon Valuers, the Respondent would be more than able to compensate the Applicant.

4)The Respondent stood to suffer greater irreparable loss owing to the unpaid mesne profits and the monthly rent of Kshs. 500,000 that has been accruing and

5) From reasons earlier stated the Applicant has come to court with unclean hands. Reliance was placed upon the case of **Tabro Transporters Limited Vs. Absalom Dova Lumbasi (2012) eKLR** to support the submission that substantial loss is the cornerstone of the courts discretion to grant an order for stay of execution.

25 In addition it was submitted that the application and orders sought have been irredeemably overtaken by events as the suit property has been transferred to Kama Kawaida Property Limited and any orders issued shall be in vain largely against a 3rd party who is not a party to these proceedings with no previous existing tenancy relationship with the Applicant. The holding in **Anita Chelagat O'donovan & Others Vs. Fredrick Kwame Kumah & 2 Others (2015) eKLR**. Counsel further urged that should the court be inclined to grant the stay orders it should be conditional upon the Applicant securing of fully settling all the accrued mesne profits from 1/05/2017 – 5/11/21 when the tenancy was terminated by the Tribunal pegged on the monthly rental value being Kshs. 28,600,000. Further that pending the determination of this Appeal the Applicant to pay the monthly rent of Kshs. 500,000/= or Kshs. 1,500,000/= per quarter in advance effective 1/11/21 and Pay upfront Kshs. 10,500,000 for comparable furnished accommodation in Diani. While Counsel admitted that the suit filed by the Respondent for mesne profits being Mombasa ELC no. 257 of 2017 is still pending in court, it was his view that the same could still be determined by this court, the tenancy having been terminated and the Tribunal consequently lacking jurisdiction.

26 The Respondent submitted that the application should be dismissed with costs.

ANALYSIS AND DETERMINATION

27 I have considered the application subject of this ruling and the supporting documentation as well as Counsels submissions thereof. I have also considered all the pleadings and materials placed before this court by the Respondents including their submissions.

28 The orders sought are for stay of execution of the judgement and orders of the Business Premises Rent Tribunal [Mombasa] dated 5th November 2021 B.P.R.T 17 of 2021, pending determination of the Appeal herein. The guiding principles for grant of stay are laid out in Order 42 Rule 6 of the Civil Procedure Rules. The rules provide; -

Stay in case of appeal [Order 42, rule 6.]

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

4).....

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

29 From the foregoing provisions the Applicant must show, that an appeal has been filed and that the same has been filed timely including the application for stay. Further the Applicant shall demonstrate that they will suffer irreparable damage if the orders of stay of execution are denied by the court. This is the simple criteria and the issue for determination therefore is simply whether the Applicant has satisfied the three conditions. The other condition is the provision of security which the court must first order before an Applicant can be subjected to this criterion. This is why I have stated the criteria to be three.

The Appeal

30 I have seen a certified copy of the judgement and orders of the Business Premises Rent Tribunal [Mombasa] in B.P.R.T 17 of 2021. It

is signed and delivered on 5th November 2021. The orders were issued on 8th November 2021. The Appellant has also filed this appeal against the said judgement and orders vide the Memorandum of Appeal dated 8th November 2021 filed on 9th November 2021. I find that this criterion has been met an appeal having been filed without delay including this application for stay which was filed alongside the Appeal.

Substantial loss

31 The Applicant must satisfy the court before which the application for stay is made that substantial loss will occur if the successful party was to execute the decree or orders being appealed against. On substantial loss Counsel for the Applicant urged that substantial loss will result from loss of business since the guests will be evicted, bookings cancelled, endless litigation arising therefrom and its suppliers as well as reputational damage. Further that the Appeal would be rendered nugatory the business having practically collapsed as well as the slim chances of being reinstated into the premises once evicted. I'm inclined to look at the business as running business. It is not in dispute that the eviction was to be undertaken forthwith and even if there was to be notice to vacate pursuant to the judgement, the business would be closed thereafter anyway, leading to the loss of the business. What would be left after the eviction? It is to me the effect of the enforcement of the order which will lead to loss of the business. Notice would just have mitigated the losses. I have considered the Respondents submissions that to the contrary it is the Respondent who will suffer irreparable loss. I have also seen the computations thereof. The criterion for irreparable loss under order 42 is in my view only available to the party who is seeking the remedy, that is the party applying since they will be affected. It is not available to the successful party. Obviously, a successful party cannot apply to stay a decision in its favour. I therefore find that this criterion has been met.

32 The Respondent further submitted the orders for stay if granted shall not be enforceable for the reason that the suit property has been transferred to a 3rd party and presented documents in respect of the transfer of the property to Kama Kawaida Property Limited. In my view the orders being sought currently are for stay of execution of the judgement of the tribunal and this has nothing to do with the transfer of the suit property to a 3rd Party. The Applicant is in the premises and the order for stay is to stop the eviction which would lead to the losses. It would be unjust in my view to refuse the stay based on the fact that the property has been transferred to another party. The Respondent clearly knew that the tenancy is in dispute and chose to transfer the suit premises to a 3rd party, let the Respondent deal with it.

Security in case of order for execution of decree appealed from

33 As earlier indicated in this ruling security for the performance of the order or decree must be considered as required under Order 42 Rule 6(2)(a). On 9th November 2021 this court ordered the Respondent to deposit a security of Kshs. 350,000. The security is mandatory except that the terms of the same are on the courts discretion to determine. According to the Applicant the court need only ensure that the security was reasonable. The Respondents view is that in fact it should be conditional and sets out the various amounts to be deposited upfront and in view of the admission that the Applicant is not in employment. This court will look at this issue in totality of the facts placed before it that is to say the circumstances of the case. This is because it has discretion to impose the terms it deems necessary and for the ends of justice to be met. It is not in dispute that rent has not been paid since this dispute started, only 'the new' rent is in issue. The security in my view is to protect the interests of the successful party should the appeal not succeed. The Applicant has been enjoying from the premises paying nothing enjoying the proceeds of the business, though I recognise the admission that rent was not accepted by the Respondent. Given the circumstances of the case I'm inclined to review the terms of the security earlier granted upwards based on the monthly rent of Kshs. 50,000. to the date of the judgement of the Tribunal the subject of this appeal/application.

34 The upshot of the foregoing is that I find the Notice of Motion dated 8/11/2021 has merit. It is hereby ordered as follows to dispense of the said application; -

1. The Notice of Motion dated 8/11/21 is hereby allowed in terms of prayer No. 3.
2. That that the order for security granted on 9th November 2021 and issued on 10th November 2021 is hereby reviewed in the following terms; -
 - a) THAT the Applicant/Appellant shall pay to the Respondent the monthly rent outstanding at the rate of Kshs. 50,000 from 1st May 2017 to 5th November 2021 within 45 days of the date of this order.
 - b) THAT the Respondent shall forthwith but not later than 14 days from the date of this order furnish to the Applicant/Appellant the designated account for purposes of the above payment.
 - c) THAT subject to (b) above failure by the Appellant/Applicant to deposit the security as ordered in (a) above, the orders of stay shall automatically be vacated.
 - d) THAT the security deposited pursuant to the order of this court issued on 9th November 2021 shall be retained as such in addition to the security in (a) above until further orders of this court.
 - e) Costs shall follow the outcome of the Appeal.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 31ST DAY OF JANUARY 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Wainaina for the Applicant/Appellant

Ms. Gitari holding brief for Muthama for the Respondent

Mr. Denis Mwakina- Court Assistant.