



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

MISCELLANEOUS APPLICATION NO. 48 OF 2021

PAUL ROBO APPELLANT

VERSUS

DOMINIC NTONGAI KINGORI RESPONDENT

RULING

1. The applicant seeks leave to file a memorandum of appeal out of time and an order of temporary stay of execution of the orders in BPRT No. 79 of 2018 made on 6.10.2021. The application is supported by an affidavit sworn on 30.11.2021 by Paul Lobo.
2. The grounds in support are that judgment was entered on 6.10.2021 but out of mistake the appeal was filed at the High Court on 14.10.2021 instead of the ELC registry. The same was withdrawn; that there is risk of eviction; sufficient cause has been shown; the application is brought in good faith and that if the orders are granted, the respondent will suffer no prejudice.
3. In the supporting affidavit, the applicant has attached a notice to terminate the tenancy dated 19.12.2018 and the draft memorandum of appeal. Unfortunately the judgment of the trial tribunal has not been attached for this court to appreciate the findings.
4. In the replying affidavit sworn on 8.10.2021 by Dominic Ntongai Kingori, it is stated ignorance of the law was no defence and that vacant possession was given after the tribunal heard the matter on merits so as to carry out the proposed renovations as per his approved plans and permits hence the applicant was employing delaying tactics.
5. In any event, the respondent avers once renovations are done, the applicant would be given the first priority to lease the premises which renovations were likely to take only 6 months so as to make the premises attain modern standards.
6. Further it is stated the applicant had been given the deadline of 31.12.2021 to vacate by the tribunal but has failed to do so.
7. Additionally, the respondent avers the court lacks jurisdiction to entertain this matter based on Section 15 of the Cap 307 and the holding in **Sayani Investments Limited –vs- David Mokaya & 3 Others; Samuel Mwangi & 3 Others (Interested Parties) [2019] eKLR.**
8. For a party to be allowed to appeal out of time, he must demonstrate there was no inordinate delay in filing the application, that the intended appeal has merits, there was sufficient time in not filing the appeal on time and lastly that there will be no prejudice to the respondent if the orders are granted. See **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 6 others [2013] eKLR.**
9. As regards stay of execution, the applicant has to demonstrate substantial loss; that there was no delay in filing the application; sufficient security is offered for the due satisfaction of the decree and that it is in the interest of justice that the application be allowed.
10. In **Daniel Kihara Murage –vs- Jacinta Karuana Nyangi & Another [2015] eKLR,** the court held an applicant must show or establish facts that if execution proceeds, the results would negate the substratum of the appeal while in **Charles Wahome Gethi –vs- Angela Wairimu Gethi [2008] eKLR,** the Court of Appeal held it was not enough for a party to allege that they live or reside on the suit land but must go further and show substantial loss.
11. As a preliminary issue, the respondent filed a preliminary objection that this court lacks jurisdiction.
12. The dispute before the lower court was over the notice to terminate a tenancy agreement under **Section 6 of the Landlord & Tenant (Shops Hotels & Catering Establishments) Act Cap 301** in respect of **L.R No. Meru Municipality Block 11/61** situated in Imenti North Meru Town.

13. The jurisdiction of this court is set out in **Article 165 (2) (b) of the Constitution** which is on the environment and the use and occupation of and title to land.

14. The court under **Section 3 and 15 of the Environment and Land Court Act 2011** has both original and appellate jurisdiction on matters touching on environment and land.

15. Any appeals flowing from the Business Premises Rent Tribunal are to be made to the Environment and Land Court under **Section 15 (1) Environment and Land Act** as read together with Paragraph 9 Practice Directions on Proceedings Before the Environment and Land Court within 30 days.

16. **Section 150 of the Land Act 2012** also allows environment and land courts powers to hear and determine disputes, actions and proceedings concerning land under the **Act**. These includes leases, licenses and tenancies.

17. **Section 13 (4)** of the **Environment and Land Court Act** states in addition to the matters referred to in **Sub-section (1) and (2)**, the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

18. **Section 15 of Cap 301** states appeals from decisions of Business Premises Rent Tribunal shall lie to the Environment and Land Court.

19. In *Republic –vs- Chairman, Business Premises Rent Tribunal & another Exparte; Carrington Complex Limited [2019] eKLR Nyamweya J. now a J.A.* held the test to apply was the predominance test. In hybrid cases where there is concurrent jurisdiction by both the High Court and the Environment and Land Court as the issues cut across the exclusive jurisdiction reserved for the two courts.

20. The court proceeded to direct that the matter in issue could be competently handled by Environment and Land Court since it required an examination of the applicable land laws and specifically the right to occupy the disputed land.

21. In my view therefore, the application herein is properly before the court.

22. Turning to the issue of stay, the applicant states he was running a bar and a restaurant where he has invested immensely in renovating and or upgrading the premises. He has attached the photographs to that effect.

23. The respondent has not denied these facts.

24. In the premises, I find the application with merits. The same is allowed in terms of prayer 2 and 4.

25. The appeal shall be filled within 14 days from the date hereof together with the record of appeal.

26. The applicant shall continue paying the rent as agreed on its due date in default execution to issue for rent.

27. The stay granted shall subsist for only six months.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS

16TH DAY OF FEBRUARY, 2022

In presence of:

Omari for applicant

Kinyua for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE