



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC MISCELLANEOUS APPLICATION NO. E049 OF 2021**

**SMART CONNECTIONS E.A. LIMITED.....1<sup>ST</sup> TENANT/APPLICANT**

**FALCON COMMUNICATION LIMITED....2<sup>ND</sup> TENANT/APPLICANT**

**GLOBENET HOLDING (K) LIMITE.....3<sup>RD</sup> TENANT/APPLICANT**

**VERSUS**

**GIETO HOLDINGS (K) LIMITED.....RESPONDENT**

**RULINGS**

1. The application dated 26.11.2021 seeks for a stay of execution of the ruling dated 5.8.2021 in **BPRT Meru No. 38 of 2019** pending hearing and determination of the intended appeal.
2. The second prayer is for leave to appeal out of time against the aforesaid ruling that the draft memorandum of appeal dated 26.11.2021 be admitted as filed in time and the accompanying record of appeal. The application is supported by a replying affidavit of Stephen K. Ringera sworn on 26.11.2021.
3. The grounds upon which the application is based are the application for injunction against a proclamation notice dated 12.2.2021 was dismissed on 5.8.2021; there is an intention to appeal out of time; a notice to vacate the premises was issued by the landlord on account of rent arrears; delay is not inordinate; the delay was occasioned by illness of the managing director of the tenant with Covid 19 until the discharge on 21.9.2021 and that it will be in the interest of justice to grant the orders since there will be no prejudice occasioned to the respondent.
4. For an applicant to be entitled to stay of execution, there must be proof of substantial loss and damage, the application should be brought within reasonable time and security must be offered for the due performance of the decree should the appeal not succeed.
5. As regard leave to appeal out of time under **Section 79 G of the Civil Procedure Act**, the applicant must demonstrate sufficient cause why the appeal was not filed within time and secondly that the application has been filed timeously.
6. The decision complained about was made on 5.8.2021 while the application was filed on 30.11.2021. The delay of three and half months has been sufficiently explained that the managing director of the applicants was allegedly diagnosed with Covid 19 and admitted in hospital. A medical report to that effect was attached to the affidavit in support.
7. In my view, the reasons given are sufficient and hence I allow prayer 4 of the application guided by ***Ivita –vs- Kyumbu [1984] KLR 441.***
8. Coming to the prayer for stay of execution, the applicants allege they were given a notice to vacate by 30.11.2021. The notice to do so was issued by the respondent on 29.4.2019. On 1.9.2021, the tribunal ordered the applicants to vacate by 30.11.2021.
9. The notice was received by the applicants' lawyers on 19.11.2021. It is not clear why the applicants waited until the last day of the notice to file this application. Be that as it may, the court order indicates the applicants were ordered to vacate after attempts to levy distress became futile.
10. Annexure marked **SKR 6** to the affidavit indicate rent of Kshs. 121,194, was received on 12.8.2021 and Kshs. 362,582 on 6.8.2021 respectively.
11. Out of Kshs. 1,033,673 alleged to have been outstanding as at February, 2021, it is not clear what the balance was. See ***Mohamed Salim Bashir –vs- Shami Trading Co. Limited [2013] eKLR.***

12. The respondents have not opposed the application and similarly no evidence has been availed if the eviction was ever carried out by 30.11.2021. That notwithstanding and given the admission of outstanding rent arrears, coupled with the delay in moving to court for stay orders, I find the applicants have demonstrated no substantial loss, there is no offer for security, and lastly that it would not be in the interest of justice to grant any stay at this stage. **See Haron & Another –vs- Uchumi Services Ltd [2012] eKLR, Nicholas Kigo Wambugu –vs- Miriam Nyawira Mwaniki [2016] eKLR.**

13. Save for the prayers 4, 5 and 6, the rest of the prayers to the application are dismissed.

14. The appeal together with the record of appeal shall be filed and served within 30 days from the date hereof.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Orao for applicant

Menye & Kirima Advocates – absent

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**