G.H.Tanna & Sons Holding Limited & another v Wabuyele (Environment and Land Appeal 6 of 2022) [2022] KEELC 3155 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3155 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 6 OF 2022

FO NYAGAKA, J

MAY 31, 2022

BETWEEN

G.H.TANNA & SONS HOLDING LIMITED ..... 1ST APPELLANT

F.G. NJUGUNA T/A FEMFA AUCTIONEERS ..... 2ND APPELLANT

AND

ANDREW BIKETI WABUYELE ..... RESPONDENT

RULING

(On stay of proceedings in the Business Premises Tribunal pending Appeal)

1. The applicants herein were respondents in the Reference filed in the Nairobi Business Premises Rent Tribunal (herein referred to as BPRT or Tribunal) Case No. E669 of 2021 that was between Andrew Biketi Wabuyele (vs) and, G.H. Tanna & Sons Holding Limited & Another. In the the Respondent herein, while claiming to be a Tenant of the 1st Respondent, made a Reference to the BPRT challenging his eviction by the 1st Respondent from the business premises allegedly situate on the 6th Floor of a building property known on LR. No. 2116/8/IV (I.R No. 998). The business premises are said to be owned by the 1st Respondent. It was stated that the 1st Respondent instructed the 2nd Respondent to break into, carry away and purport to auction property allegedly belonging to the Applicant, in a bid to realize unpaid rents that had accrued over time.

2. The Application before the Tribunal, which was determined jointly with a Preliminary Objection by the Respondents therein, was dated 11/11/2021 and 18/12/2021 respectively. The Tribunal rendered itself on both in a ruling delivered on 04/03/2022. It dismissed the preliminary objection and granted the Application as prayed. It then ordered the Tenant's Reference dated 11/11/2021 to be fixed for hearing within sixty (60) days and a Rent Inspector to visit the premises within thirty (30) days and make a report on the status of the premises and rent payment.

3. It is instructive to note that the prayers in the said Application decided on 04/03/2022 were, in summary, one for an injunction against the 1st Respondent and its agents being the 2nd Respondent from alienating, selling or interfering or disposing the tenant's goods and property pending the determination of the Reference, and another order injuncting the 1st Respondent from re-letting and/or possession of the suit premises "which were previously occupied by the Applicant T/A Martini's Ultra Lounge." It was the said ruling that prompted the Appeal herein in which the instant Application was filed. The Appeal herein and instant Application were filed by Ms. Kidiavai & Co. Advocates, counsel of the Appellants.

4. Thus, upon filing the Appeal, by a Notice of Motion dated 29/03/2022, the Applicants moved this Court under sections 3A and 63(e) of the *Civil Procedure Act*, order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules,* 2010, and (what they termed as) all other enabling provisions of law. They sought the following orders, namely:

    1. ...spent.

    2. ...spent.

    3. That there be a stay of proceedings in Nairobi Business Premises Rent Tribunal Case No. E669 of 2021; Andrew Biketi Wabuyele vs G.H. Tanna & Sons Holding Limited & Another pending the hearing and determination of this Appeal.

    4. Thatthe costs of this Application be borne by the Respondent.

5. The Application was based on a number of grounds stated on the face of it. These were replicated in the Affidavit sworn by one, Paresh Tanna, on 29/3/2022 in his capacity as the Managing Director of the 1st Appellant Company. This Court will summarize both the grounds and depositions in the Affidavit jointly. They included, among others, that the Respondent was a former tenant of the 1st Appellant/Applicant, who was the owner of that building known as Amigo Plaza, standing on LR. No. 2116/8/IV (I.R. No. 998) in Kitale town; that by way of an oral lease given in October 2018, the 1st Appellant handed over to the Respondent, possession of a part of the said building for the purpose of running a bar, lounge and restaurant. The Respondent took occupation of the premises and started trading therein as Martini's Ultra Lounge.

6. It was further contended that soon after, the Respondent defaulted in payment of rent, locked and abandoned the premises, and left for an unknown place. Afterwards, the 2nd appellant, acting on the instructions of the 1st appellant, obtained a break-in order from the Chief Magistrate's Court at Kitale in CMCC Misc. Civil Appl. No. 40 of 2021. It authorised him to break into the premises and levy distress to recover the arrears of rent due and owing from the Respondent to the 1st Appellant. The 1st Appellant did so and proclaimed the Respondent's assets recovered from the premises.

7. By that break-in and removal of the Respondent's items from the premises, the 1st Appellant regained entry and took possession of the premises. After that, the Respondent filed a reference in Nairobi Business Premises Rent Tribunal Case No. E669 of 2021. It was between Andrew Biketi Wabuyele (as the tenant), and G. H. Tanna & Sons Holding Limited & another, as the Landlord and Auctioneer respectively. In it he claimed to have been illegally evicted from the premises, illegal re-entry into and repossession of the premises by the 1st Appellant, illegal break into the premises and illegal distress of goods, and an order of his reinstatement into them. He annexed to the Affidavit a copy of the Reference, dated 11/11/2021, and marked it as "PT-1. The front page of the Reference contains all the above claims.

8. It was stated further that the Respondent also filed an Application dated 11/11/2021 accompanying the Reference, in which he sought an order of injunction restraining the 1st Appellant from re-letting the premises, among others. The summary of the prayers in the Application were reproduced in paragraph 3 above. The Appellant in the instant Application annexed to the Supporting Affidavit a copy of the application made in the tribunal, the replying affidavit and the preliminary objection and marked them as "PT-2", "PT-3" and "PT-4", respectively.

9. In the tribunal, the appellants herein raised a preliminary objection on the jurisdiction of the tribunal to entertain the reference on the ground that there was no landlord-tenant relationship between the 1st appellant herein and the respondent, since the latter admitted in his supporting affidavit of his application dated 11/11/2021, that he was no longer in possession of the premises. The Objection was heard together with the said Application. The Objection was dismissed and the application allowed as summarised in paragraph 2 above. The reference was set down for hearing. He annexed a copy of the Ruling and marked it as "PT-5".

10. Aggrieved by the finding of the Tribunal, the Appellants filed the appeal herein. Upon filing the Appeal, they moved this Court vide the instant Application, which this Court is now determining. Basically, they implored this Court to stay the proceedings of the Tribunal pending the hearing and determination of the Appeal herein. They still challenged the Tribunal's step to proceed with the Reference and argued that it did not have jurisdiction to recover possession of premises from a landlord and the Respondent's reinstatement. They termed the intended proceedings before it as a waste of judicial time. They argued that Application had been brought in good faith and was filed without undue delay. They then asked that the proceedings before the Tribunal be stayed pending the instant Appeal.

11. Surprisingly and contrary to the Rules of procedure, the Applicants deponed on three authorities (which are basically matters of law) that they relied on in their Application. This was unusual because this Court thinks, and rightly so, that Affidavits should always be strictly confined to depositions on issues of fact; Matters of law should be enumerated in grounds of opposition, preliminary objections and or comments by way of submissions. I will not reproduce the particulars of the case law deponed on their content as I wind up about the contents of the affidavit.

12. Theapplication was opposed very strongly through the Affidavit of one, Andrew Biketi Wabuyele, sworn on 26/04/2022. It was filed through his Advocates, Ms. Koki Mbolu & Co. Advocates. Strangely, and as if the drafter of the Replying Affidavit though being of a law firm of a senior practitioner and even of experience in academia, the drafter copied from the same script as the Appellants. He/she drew paragraphs 7, 8, 9 and 10 of the Affidavit containing depositions purely on the law. In particular, each paragraph cited a case or authority and its holding in regard to specific provisions of law. This is one example of poor drafting or, in the least, a lean understanding of how Affidavits should be drawn, or a lackadaisical practice of law. As stated time and again by this Court in other decisions, it is time learned Counsel did the right thing. They should similarly exhibit professionalism and diligence so that even non-lawyers can take cue from them. That notwithstanding, I will confine myself to the real issues before me and focus on the interests of justice since poor drafting of pleadings may be cured by the 'hyssop' that flows from the spirit and tenor of article 159(2)(d) of the 2010 *Constitution*. I do so as I continue below.

13. In his Affidavit, the Respondent deponed that he was a tenant of the 1st Appellant. He deposed further that he traded on the 6th floor of the suit premises as Martini's Ultra Lounge (MUL). He stated that there was no written lease agreement between the 1st Appellant and himself. Consequently, the relationship between them fell under section 2 of the *Landlord and Tenant (Shops, Hotels and*

Catering Establishments) Act, Chapter 301 Laws of Kenya as a controlled tenancy. He maintained that the tenancy still subsisted and had not been terminated since no notice had ever been served on him. He argued that his occupation of the premises or lack thereof was immaterial as long as he was the one entitled to the tenancy (emphasis mine by way of underline).

14. He contended further that the dispute before the Tribunal was on the illegal proclamation and proposed sale of his goods and the unlawful threat of his eviction from the 1st Appellant's premises. Contrary to the rules governing drawing of Affidavits, as I have noted above, the respondent also deponed that the case of JR Misc. application 435 of 2012 in *R V BPRT & another ex-parte Albert Kigera Karume* [2015] eKLR held and affirmed that any dispute on the threat of unlawful eviction and illegal proclamation of a tenant's goods in a subsisting controlled tenancy is within the purview of the jurisdiction of the Business Premises Rent Tribunal and not the Court and that was the case herein. He also distinguished that the circumstances of the present matter were different from the case of *Narshidas & Co. Ltd v Nyali Air Conditioning and Refrigeration Services Limited* [1996] cited by the Applicants/Appellants. He stated that the cited authority was only applicable to cases where there exists no landlord-tenant relationship.

15. The Respondent then argued that the Tribunal had jurisdiction to grant an injunctive relief. The one issued on 4/3/2022 was in respect of a threat of illegal eviction of the Respondent. He cited in the affidavit, the Court of Appeal decision of *John Mugo Ngunga v Margaret M. Murangi* [2014] eKLR which, to his interpretation, held that the Tribunal had jurisdiction within its area of business. His argument, in the affidavit, was that section 12 of Chapter 301 Laws of Kenya, sections 2 and 63 (c) of the *Civil Procedure Act* and article 169 of *the Constitution* which "harmoniously" define the word Court to include Tribunals. Hence, he deponed that the Tribunal acted well within its power to grant injunctive reliefs. He deponed that Chapter 301 of the Laws of Kenya does not limit the jurisdiction of the Tribunal to grant injunctive reliefs. He insisted that the jurisdiction of the Tribunal was proper since there still existed a valid landlord-tenant relationship between himself and the 1st Applicant. He then deponed that the Appeal had no chances of success and prayed that the Application be dismissed with costs.

Submissions

16. Both the applicants and respondent filed written submissions. Additionally, the applicants filed supplementary ones upon service of that of the respondent. The applicants filed theirs on 08/04/2022 and the respondent did on 04/05/2022, together with a list and copies of five authorities. The Applicants then filed their Supplementary submissions together with copies of authorities on 12/05/2022.

17. Incidentally, the submissions by the Applicants were basically a regurgitation of the grounds in support of the Application and the depositions in the Supporting Affidavit. Therefore, I will not reproduce them once more. However, the only additional submissions worth of note were that the Respondent filed in the Tribunal a Notice of Motion dated 11/11/2021 which was supported by an Affidavit sworn by him on the same date. They submitted further that at paragraphs 12 and 13 of the Supporting Affidavit to the Motion before the Tribunal, the Respondent admitted that he was no longer in possession of the premises - that he had been evicted and the 1st Appellant had repossessed and re-entered the premises. That resonated with prayer (ii) of the Application which was to the effect that the "premises were previously occupied by the Applicant T/A Martini's Ultra Lounge."

18. In regard to the contention by the Respondent that this Court lacked jurisdiction to hear this Appeal, the Applicants submitted that the Respondent had misapprehended the jurisdiction which the Appellants invoked. They stated that they moved this Court on appeal from the decision of the

BPRT when it acted in excess of its jurisdiction and made a ruling which was a nullity hence they were properly before this Court. On subsistence or otherwise of the tenancy between the 1st Appellant and the Respondent, the Applicants submitted that the contention that a tenancy still existed ran counter to and was a departure from the assertion and deposition by the Respondent before the BPRT that the 1st Appellant had (illegally) evicted him, re-entered and repossessed the premises, illegally removed his goods, furniture and fittings from the premises, and the reliefs he sought of reinstatement into the premises and an order for return of his goods removed from the premises.

19. As for the Respondent he submitted, insisting that this Court lacked jurisdiction to hear and determine the instant Application and appeal; that there was no justification for this Court ordering a stay of the proceedings before the Tribunal. He relied on the cases of *Narshidas & Company Limited v Nyali Air Conditioning Services Limited* [1996] eKLR wherein the Court of Appeal restated the procedure for the termination of a Controlled Tenancy. He submitted that the relationship between him and the 1st Applicant was one of a controlled tenancy. He relied on the Court of Appeal cases of *Manaver N. Alibhai Va Diani Boutique vs. South Coast Fitness & Sports Centre Limited*, Civil Appeal No. 203 of 1994 1995 eKLR and *Tiwi Beach Hotel v Julian Ulrke Stamm* [1990] 2 KAR wherein the Court restated the mandatory procedure for terminating controlled tenancies. He also relied on JR Misc. Application 435 of 2012 in R *V BPRT & another ex parte Albert Kigera Karume* [2015] eKLR, arguing that the Tribunal could issue an injunction as per section 12 of Chapter 301, sections 2 (sic) and 63 (c) of the *Civil Procedure Act* and Article 169 of *the Constitution*.

20. He submitted that he was never served by the 1st Applicant with a termination notice of the controlled tenancy as required by law hence the tenancy had not been terminated. He then added that his goods, fixtures and fittings were still in the premises. His further submission was that by virtue of section 2 of Chapter 301, a tenant's occupation of the let premises or lack thereof was immaterial in determining the existence of a tenancy relationship. He then submitted that his absence from the premises did not terminate the landlord-tenancy relationship between them.

21. His view was that an order of stay of proceedings in the BPRT pending appeal would constitute an injustice to him. On this submission he relied on the Court of Appeal holding in Civil Appeal Number 57 of 1996 in Julianne Ulrike Stamm v Tiwi Beach Hotel Limited which he stated was mandatory.

22. He summed it up that the issues before the Tribunal were in respect of the illegal proclamation of the Respondent's goods and a threat of his unlawful eviction from his premises, hence the Tribunal had jurisdiction on the matter. His view was that instead, this Court lacked jurisdiction over the matter. His view was that the ratio decidendi in *Narshidas & Co. Ltd v Nvali Air Conditioning and Refrigeration Services Limited* (supra) was that a landlord must comply with section 4 of the relevant Act. He then submitted that the 2nd Applicant had only proclaimed his goods, but illegally and that did not result in an eviction.

23. With regard to issuance of injunctive reliefs, the Respondent relied on the case of JR Misc. Application 435 of 2012 in *R V BPRT & another ex parte Albert Kigera Karume* (supra). Furthermore, he submitted that the Court of Appeal has stated that there is no statute that limits the jurisdiction of the Tribunal to issue injunctive reliefs. He summed it that the proceedings before the Tribunal were proper and the instant Application lacks merit while the Appeal had no chances of success. He urged this court to dismiss the Application with costs and strike out the Appeal.

Analysis and Determination

24. I have anxiously considered the Application, the affidavits in support and opposition to the Application, the annexures to both, the rival submissions, the law and case law relied on. I am of the view that only two issues are for determination before me at this stage. These are:

    a. Whether there is sufficient cause for the Court to stay the proceedings pending before the Business Premises Rent Tribunal pending the hearing of the Appeal herein;

    b. Who bears the costs of the Application?

25. The parties herein put a lot of effort, skill and intellect in convincing this Court about the merits or demerits of the decision rendered by the Business Premises Rent Tribunal on 04/03/2022 in Nairobi BPRT Case No. E669 of 2021. In my view, while it was important to do so in order to demonstrate whether or not the Appeal herein had high chances of success and would be rendered nugatory if the order was not granted, the parties literary concentrated on expended their energies on that issue while leaving out the more relevant arguments in regard to the instant Application.

26. The Application before me at this stage was a simple one: whether or not to stay of the proceedings before the Tribunal pending the determination of the Appeal herein. Sight should not be lost on this. This the provisions of order 42 rule 6 of the *Civil Procedure Rules* guide this court on the course to take and decision to give. I start the analysis with a discussion by first analyzing the legal principles the court ought to consider in considering whether or not to stay proceedings in any suit.

27. However, first, on the issuance of injunctive reliefs by the Tribunal, the Respondent submitted that the Tribunal had jurisdiction to entertain an Application of such a nature. He relied on the case of JR Misc. Application 435 of 2012 in *R V BPRT & another ex parte Albert Kigera Karume* (Supra). This Court agrees with him to the extent that the decision is on point in cases where there exists a tenancy relationship in a dispute before the Tribunal. Furthermore, he submitted that the Court of Appeal has previously held that there is no statute that limits the jurisdiction of the Tribunal to issue injunctive reliefs. That I agree with too. Even then, these are issues which the parties would have to take up during the hearing of the Appeal that has been preferred herein and depending on the facts as were placed before the Tribunal, this Court would then pronounce itself on them. As of now the points can only go into aiding the Court in considering whether or not the Appeal has high chances of success. This sets this Court's mind to the issues identified for determination.

(a) Whether there is sufficient cause to stay the proceedings pending before the Business Premises Rent Tribunal pending the hearing of the Appeal herein

28. This court bears in mind that the grant of an order of stay of proceedings in any suit is discretionary. When exercising discretion, a Court must always apply its mind judiciously to the issue before it and the facts of the case. The circumstances of each case are paramount. Above all, the Court ought to consider the interests of justice to all parties. This is because on one hand is a party anxious to have his/her rights determined on merits, while on the other, there is one wishing the Court to slow down the process and attend interlocutory issue(s) which he/she feels could determine the matter in another way altogether other than by way of merits. This calls for a delicate balancing of the rights of the parties, bearing in mind also that matters ought to be disposed of expeditiously and in the most cost-effective manner and the overriding duty of the Court - to do justice to all equally.

29. The law cautions that an Appeal from a judgment, order or decision of a Court does not of itself give rise to an automatic stay of execution or proceedings. There ought to be "sufficient cause" to warrant grant of such an order. 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."

30. The phrase "sufficient cause" may present difficulty to a casual reader or listener. Thus, it is worth defining it. The phrase forms a bulwark of a proper reason given by a party to the satisfaction of the court. The satisfaction does not have to and must not be a conviction beyond reasonable doubt lest the standard be raised to be so high that it is equated to that expected in criminal cases. However, the reason must be clear, genuine and convincing: one which moves the party from a plane of inaction to one where he shows the Court that absent of any other reasons to the contrary he would suffer prejudice and it would be unreasonable and unjust if the order was not granted.

31. In P*arimal v. Veena*, (2011) 3 SCC 545, the Supreme Court of India tried to define the terms by stating that:-

> "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

32. Thus, in *Christopher Ndolo Mutuku & another v CFC Stanbic Bank Limited* [2015] eKLR, the Court stated:

> "...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...".

33. In the same case, the court summarized the principles applicable in an application for stay of proceedings in a matter pending the hearing and determination of other issues that arise in the interim. The Judge held as follows:-

> " a. The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.
>
> b. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.
>
> c. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order.
>
> d. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously."

34. In *Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi* Civil Appeal No. 326 of 2013 [2014] eKLR, the Court laid down the following guiding principles in an Application of such a nature. It stated that the Court has to consider:-

> " a) Whether the Applicant has established that he/she has a prima facie arguable case;
>
> b) Whether the application was filed expeditiously and;
>
> c) Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought."

35. *In Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 Ringera, J (as he then was) held as follows:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

1. Similarly, last but not least, in the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd* [1990] eKLR the Court of Appeal has held that:

> The application must of course, be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:

> " In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."
>
> These two principles go hand in hand and failure to prove one dislodges the other."

36. It is my view that the principles the Court should consider should then be summarized as below. Whether:

    i. there is a valid Appeal preferred against a decision;

    ii. there is sufficient cause to the satisfaction of the Court for grant of the orders;

    iii. the Applicant moved the Court expeditiously;

    iv. it is in the interest of justice that judicial time be saved by the order being granted;

    and consider further that:

    v. none of the parties would be prejudiced by the slowing down of the proceedings if the order was granted;

    vi. where there is a demonstration of a semblance of bias or leaning towards one side in the trial Court an appellate Court should intervene by staying the proceedings to avoid injustice being committed;

    vii. the Applicant shall not abuse the order of the Court by going to sleep after it is granted;

    viii. the grant of the order is a matter of discretion based on justice being served and given to all equally.

37. This court has borne in mind the totality of the above principles. With regard to the submission that the 2nd Appellant had only proclaimed the Respondent's goods, but illegally and that the act did not result in an eviction, in my view, that is the subject of the Appeal that has been preferred herein. Whichever way the Court would find on it upon consideration of the Appeal, that would also go to the root of the argument regarding whether or not the Tribunal had jurisdiction to hear and determine the Reference. While this Court is not called upon to make a determination on that point at this stage because it would amount to pre-empting the Appeal, the Court is of the view that this is an arguable issue of the present appeal. The first ground of Appeal is squarely on that point.

38. Factually, that issue renders the Appeal a strongly arguable one with high chances of success. However, it is clear from the Affidavit sworn on 11/11/2021 that the Respondent clearly stated that he had been evicted from the premises and that the same was "previously occupied by (him) T/A Martinis Ultra Lounge." The submission by the Respondent is contrary to his deposition on oath. This should be the contention in the instant Appeal. These issues show that the Appeal is arguable.

39. But one thing that the Respondent may not be aware or is ignorant of, is that submissions do not form part of a party's pleadings and evidence. They are a marketing language of the party and cannot be used to introduce new or substitute the existing evidence. On this the court refers the respondent to

the Court of Appeal holding in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & another* [2014] eKLR where it was held:

> " Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

40. The parties spent much time arguing on whether or not this Court has jurisdiction to entertain the Application and Appeal herein. The contention was that since the issues in the Reference were whether or not the Tribunal would lawfully grant the reliefs it did on 04/03/2022, then, this Court's jurisdiction is called into question. On the part of the Applicants' argument furthered, this Court had jurisdiction to hear an Appeal arising from the Tribunal's orders. As for the Respondent, the argument was that since the Tribunal had jurisdiction, this Court lacked jurisdiction to entertain the Appeal and the present Application. I found this argument ingenious but ignoring an important fulcrum of the instant Appeal.

41. The Respondent and/or his learned Counsel failed to understand that at this juncture, this Court was approached by the Applicants in its appellate jurisdiction. The issue before the Court at this stage was not the merits or otherwise of the Appeal but an Application to stay proceedings before the Tribunal. Be that as it may, section 15 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301, Laws of Kenya provides that "(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:"

42. When the above provision is read together with order 42 rule 6(1) of the *Civil Procedure Rules* in regard to Applications for stay of proceedings, it is clear that this Court is vested with the requisite jurisdiction to determine with the instant Application. Having ascertained that, I shall now move into the merits or demerits of the Application.

43. Having stated as I have above and bearing in mind the provisions of law and the holdings of case law thereon as deciphered, I am of the considered view that the Application is merited and should be granted. This is because, among other factors, the Application was brought timeously, there is a valid Appeal herein, the Appeal is arguable (it does not have to be meritorious), the Applicants would be greatly prejudiced if the Tribunal were left to proceed with the Reference as though it has jurisdiction yet that is contested, and which issue is what the Applicants challenge in the instant appeal. In any event, it would be a waste of the precious judicial time for the Tribunal to invest its mind and time in determining the Reference only for it to turn out in the end that it did not have jurisdiction to handle it were this Court to find the Appeal successful. By so stating I am not in any way alluding to an imagination that the Tribunal did not have jurisdiction: what I mean at this point is that whether or not it had jurisdiction is a matter to be taken up and argued on appeal. All these make the court to be inclined to find the application wholly meritorious.

44. Before the I make the final orders, I wish to point out that in my view, order 42 rule 6(1) of the *Civil Procedure Rules*, 2010 envisages a situation where an Applicant ought to have sought the order of stay of proceedings in the Tribunal in the first instance and depending on the outcome thereof move this Court either for variation or issuance of the orders sought. That is the proper procedure. The defining phrase of the provision is that, "...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...". It is clear that a party has to approach the Court (or tribunal for that matter) that made the decree or order appealed from first. After refusal or grant of the order, he then moves the appellate Court. The Order is notably silent as to the consequences of the failure to move the Court or Tribunal first. It does not state whether the Application in the appellate Court would be incompetent or premature. The Rules Committee need to consider specificity on this issue.

45. In the instant application, the applicants moved this court for orders of stay of proceedings without first approaching the Tribunal. I would have rejected the Application on that account as being premature. However, since the Application is merited in all other respects, and from the circumstances of the case, the Tribunal had given specific directions for compliance, some of which would have been fulfilled had it not been that this Court gave temporary orders of stay of proceedings and the orders of the Tribunal, and further given the silence of the Rules regarding the fate of such an Application, this Court is of the view that the interests of justice would not be served by insisting on the parties first approaching the Tribunal for similar orders. Sections 1A and 1B of the *Civil Procedure Act* under which the Rules among which the one under consideration were made, and section 13 of the *Environment and Land Court Act* all envisage a situation where proceedings are disposed of in a just, expeditious, proportionate and efficient manner by the court as it observes its duty. Each case should be decided on its own merits and facts thereof. In the instant case, it would serve no purpose for this court to refer the parties to the Tribunal to seek a similar order, while issuing a temporary one for that matter. That would serve to delay the Appeal that has been filed.

46. If there would be no prejudice to the parties, as I find it herein, the strict adherence to a curable minor infraction of the Rules should not be the norm to the detriment of substantive justice. In so concluding, I am guided by the dicta of my senior brother judges of the Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR where Kiage JA observed that;

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness..."

47. Similarly, Ouko JA (as he then was) observed in the same case that;

> " It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why *the*

Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities...."

48. I agree as much. The court ought to balance between the interests of justice, substantive justice, the prejudice to the parties if such an infraction were to be glossed over, the circumstances of the case and the overall objective of the court and the law. Moreover, the court should bear in mind at all times that it is a court both of law and equity, and equity cannot suffer a wrong without a remedy. Given that the order sought is of a discretionary nature of that the Rules have not preferred the consequence of non-adherence thereto, the Court may exercise its discretion to allow a party to proceed with the prayers without necessarily requiring strict application of the rule as long as the above principles of balancing are given due consideration. This however, ought to be done in extremely rare and exceptional circumstances.

49. For example, and to put the above view about the instant case in perspective, the Applicants approached the Tribunal with a preliminary objection which would have basically disposed of the Reference if merited. The Tribunal dismissed the preliminary objection but did not give timeline or leave to the Applicants (herein) to challenge its finding in an appellate Court. Instead the Tribunal issued strict timelines for compliance of its orders. An Appeal from the Tribunal's decision could only be filed within 30 days as per section 15(1) cap 301 Laws of Kenya. Noticeably, the Tribunal directed an inspection of the suit premises within the period by which an Appeal would be preferred. If an Appeal was filed without staying the orders of the Tribunal, that might have defeated the Appeal. If the applicants were referred further to the Tribunal to apply to stay the proceedings therein, it might in the interest of justice, require that this Court does issue a temporary order of stay while the parties revert to the Tribunal to formally apply for the orders. The process of moving the Tribunal for similar orders and if any party dissatisfied were to move this Court again over the same issue would definitely delay the entire Appeal and occasion injustice since on the one hand there is a party unsure as to whether he is in possession of the premises or if not, can be let back into possession and one the other there is one who is waiting for his (its) rent to be paid and also know whether it uses its premises for other purposes. These are extremely exceptional circumstances.

50. The upshot is that Prayer (3) of the Application dated 29/03/2022 is allowed. There shall be a stay of proceedings in Nairobi Business Premises Rent Tribunal Case No. E669 of 2021; Andrew Biketi Wabuyele vs G.H. Tanna & Sons Holding Limited & Another pending the hearing and determination of the instant Appeal on condition that the Appellants file the Record of Appeal together with the requisite certified order and documents within a period of sixty (60) days from the date of this order and move the Court accordingly, failure of which the orders herein shall lapse.

(b) Who to bear the costs of the Application?

51. Since, as section 27 of the *Civil Procedure Act* provides, the costs of any action, cause or other matter or issue shall follow the event unless for good reason to be given the Court it is directed to the contrary. I hold that the costs of this application shall be borne by the Respondent for I find no good basis to order otherwise. Prayer (4) of the instant Application is thus hereby allowed, also.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE ORALLY ONLINE AND VIA ELECTRONIC MAIL ON THIS 31ST DAY OF MAY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.