



**Nyambura & 2 others v Director, Kenya African National Union (KANU) (Environment and Land Miscellaneous Application E004 of 2021) [2022] KEELC 15603 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 15603 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2021**

**AK BOR, J  
JUNE 28, 2022**

**BETWEEN**

**ELIZABETH NYAMBURA ..... 1<sup>ST</sup> APPLICANT  
MOFFAT MUYA ..... 2<sup>ND</sup> APPLICANT  
TIMOTHY BUNDI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**DIRECTOR, KENYA AFRICAN NATIONAL UNION (KANU) .. RESPONDENT**

**RULING**

1. What is before this court for determination is the application dated 29/11/2021 brought under Order 42 Rule 6 of the Civil Procedure Rules seeking an order for stay of execution of the judgment delivered by the Honourable A. Mumma- Vice Chairperson of the BPRT on 12/11/2021 in Nyeri Business Premises Rent Tribunal (BPRT) Case Numbers 49, 50 and 51 of 2018. The grounds on which the application is based are set out on the application and in the supporting affidavits sworn by Mr. Mwangi Kariuki, the advocate for the Applicants on 29/11/2021 and 15/12/2021. In the first supporting affidavit Mr. Mwangi deponed that he was yet to receive the copies of the proceedings and judgment from the BPRT. The orders made by the BPRT were to take effect on 1/12/2021.
2. Mr. Kariuki averred that the BPRT erred by awarding the Respondent rent amounts which are far in excess of it prayed for and urged that the Applicants stand to suffer irreparable harm if those rents are allowed to stand pending the determination of the appeal because the Applicants may not be in a position to pay those amounts, leading to loss of business and livelihood. He averred that the Respondent will not suffer prejudice because if the intended appeal were to fail, the rent ordered will be payable from the date the BPRT made the order and payment can be enforced by execution. Mr. Mwangi subsequently obtained copies of the proceedings and the judgment of the BPRT which he annexed to his further affidavit together with the memorandum of appeal.



3. The Respondent opposed the application through the replying affidavit of Mr. David Mulwa Malamu sworn on 10/12/2021. Mr. Malamu deponed that the Applicants have not demonstrated that they will suffer irreparable harm which cannot be compensated if orders of stay are not granted. He averred that the application is incompetent and based on a non-existing memorandum of appeal and further that the issues raised in the application ought to have been canvassed in an appeal. He averred that the Applicants had not offered to deposit any security.
4. The Respondent filed a further affidavit which was sworn by its advocate, Mr. Bwonwong'a N. William on 14/2/2022 where he deponed that the Applicants had already filed Nanyuki Civil Appeal Number 2 of 2021 and that this matter was an abuse of the court process. Further, he contended that the application for stay should have been filed in the appeal and urged the court to dismiss the miscellaneous application dated 29/11/2021.
5. Parties filed written submissions which the court considered together with the application and the affidavits. Through the submissions dated 4/3/2022, the Applicants urged the court to follow the decision in *Mohamed Alwy & Another v EN Group (K) International Limited* [2022] eKLR except for the order to deposit the amount of rent ordered by the court appealed from. The Applicants reasoned that the BPRT in this case ordered payment of increased rent in line with the Respondent's valuation report instead of the amounts set out in the Landlord's Notices which the Respondent had issued to the Applicants. They contended that that amounted to giving the Respondent a relief which it had not claimed. The Applicants urged the court, if it sees it fit, to make an order for the furnishing of security based on the amounts stated in the notices. The Applicants relied on the cases of *Feisal Amin Janmohammed t/a Dunyia Forwarders v Shami Trading Co. Ltd* [2014] eKLR and *Abdulahi Ismael Nurow v Stanley Okioga Michieka* [2021] eKLR.
6. The Applicants argued that the application was properly before court seeing that at the time they brought it they had not received the proceedings and judgment from the BPRT. They added that in any event, any defect can be cured by article 159(d) of *the Constitution*.
7. The Respondent filed submissions dated 22/2/2022 in which it raised two main issues for determination, that is whether the Applicants should be granted an order of stay of execution pending appeal and whether the miscellaneous application is properly before the court under Order 42 rule 6(6) of the *Civil Procedure Rules*. The Respondent submitted that the Applicants have not demonstrated what loss they will suffer if an order for stay of execution is not granted. It relied on the decisions in *Daniel Gicheru Karangu v Richard Gicheru Irungu* [2015] eKLR and *Coast Brakes & Clutch Limited v Muslim Association Mombasa & Another* [2014] eKLR. Further, it submitted that the Applicants had neither offered any security for costs nor had they suggested that they were willing to furnish security as required by Order 42 Rule 6 of the Civil Procedure Rules. The Respondent contended that the Applicants were using the application and the intended appeal to deny it the fruits of its judgment.
8. The respondent submitted that the Applicant did not follow the procedure spelt out in Order 42 rule 6(6) of the Civil Procedure Rules and Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and that the application was improper. It argued that the Applicants ought to have filed a Memorandum of Appeal and contended that they have not lodged a proper appeal before the court. The Respondent submitted that the application is incompetent and urged the court to dismiss it and award it costs.
9. The court has considered the application, the affidavits and the submissions filed by both parties. The issue for determination is whether the Applicants have met the conditions for the grant of an order for stay of execution. The law regarding stay of execution pending appeal is to be found in order 42 rule 6 of the *Civil Procedure Rules*. Under order 42 rule 6(2) of the *Civil Procedure Rules*, the court



must be satisfied that the applicant will suffer substantial loss if an order for stay is not granted; that the application was made without unreasonable delay and lastly, that the applicant gives such security as ordered by the court for the due performance of the decree or order. In addition to the three conditions, the applicant must also prove that the intended appeal will be rendered nugatory if stay is not granted and the appeal eventually succeeds. The intended appeal should also be arguable (see *Hassan Guyo Wakalo v Straman East Africa Ltd* [2013] eKLR).

10. In deciding whether or not to grant orders for stay of execution, the court has to keep in mind the party who succeeded in the proceedings before the subordinate court or tribunal. Being discretionary, such orders must not deny a successful litigant the fruits of their judgment (see *Kenya Shell Limited v Kibiru & Another* [1986] eKLR).
11. The judgment of the BPRT which the Applicants are aggrieved by was delivered on 12/11/2021 and the orders made were to take effect from 1/12/2021. The application for stay of execution was filed on 29/11/2021. The application for stay of execution was brought without delay.
12. The award made by the BPRT for the tenants to pay monthly rent at the rate of Kshs. 110/= per square foot would result in much higher figures in their respective rents compared to the figures stated in the Landlord's Notice. Those notices were their basis for lodging the cases before the BPRT. The Applicants averred that they may not be in a position to pay the amounts awarded by the BPRT which could lead to loss of business and livelihood. If an order for stay of execution is not granted, the Applicants stand to suffer substantial loss. Looking at the memorandum of appeal annexed to the Applicants' further supporting affidavit, it raises arguable issues. On the last condition for grant for orders of stay of execution, the court notes that the Applicants have expressed their willingness to furnish security.
13. The other point which the Respondents took up in their submissions is that the Applicants sought stay of execution through a miscellaneous application instead of filing an appeal. The reason the Applicants gave for proceeding in this manner was that by the time they brought this application, the proceedings and judgment of the BPRT had not been supplied to them. The Respondent argued that the application was improper because it ought to have been filed within the appeal. In the further supporting affidavit sworn on 15/12/2021, the Applicants' advocate exhibited a memorandum of appeal which was filed on 9/12/2021. The reasons given by the Applicants for filing a miscellaneous application instead of making the application for stay within the appeal are satisfactory since the Applicants did not have the requisite documents which would have enabled them to lodge the appeal at that time.
14. The application dated 29/11/2021 is allowed and an order for stay of execution of the orders of the Nyeri BPRT in Tribunal Case Numbers 49, 50 and 51 of 2018 is issued on the following conditions:
  - a. The Applicants are directed to continue paying the old monthly rent;
  - b. In addition, the Applicants will furnish security every month being the difference between the rents they are currently paying and the sums stated in the Landlord's Notices dated 9/5/2018. The money will be deposited in an interest earning bank account to be opened in the joint names of the Advocates for the Applicants and the Respondent.
  - c. The security is to be furnished with effect from the date of the BPRT judgment.
  - d. The Applicants are directed to file and serve the record of appeal within 30 days of the date of this order.
  - e. The costs of the application to be in the cause.



**DELIVERED VIRTUALLY AT NANYUKI THIS 28<sup>TH</sup> DAY OF JUNE 2022.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Mwangi Kariuki for the Applicants

Mr. William Bwonwong'a for the Respondent

Ms. Stella Gakii- Court Assistant

