



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ess Pee Investment v Deegisat Services Limited (Environment and Land Appeal E56 of 2021) [2022] KEELC 3663 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3663 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E56 OF 2021**

**LL NAIKUNI, J  
JULY 28, 2022**

**BETWEEN**

**ESS PEE INVESTMENT ..... APPELLANT**

**AND**

**DEEGISAT SERVICES LIMITED ..... RESPONDENT**

**RULING**

**I. Introduction**

1. The Appellant/Applicant filed a Notice of Motion application dated 28<sup>th</sup> September 2021. It is brought under the dint of Order 42 Rule 6 and Order 22 Rule 22 of the *Civil procedure Rules*, Section 3A of the *Civil procedure Act*, Cap. 21. The Appellant - Ess Pee Investment is the landlord, while Deegisat Service Limited is the tenant. The Respondent/Tenant moved into the suit premises on 5<sup>th</sup> October 2018 under a two and a half tenancy which expired on 6<sup>th</sup> May 2021. The Respondent was evicted from the suit property on 18<sup>th</sup> May 2021 and a new tenant occupied the suit premises.
2. It seeks for the following prayers:
  - a. Spend.
  - b. Spend
  - c. That this honorable court be pleased to issue an order for stay of execution of the ruling/order dated 30<sup>th</sup> August 2021 in Mombasa Business Premises Rent Tribunal Cause Number 293 of 2020 pending the hearing and determination of this appeal filed herein.



- d. That there be a stay of further court proceedings in Business Premises Rent Tribunal Cause Number 293 of 2020 Mombasa pending the hearing and determination of this appeal.
- e. That costs of this application be provided for.

## **II. The Appellant/Applicant's case**

3. The Application is founded on the grounds, testimonial facts and averments of the 12 Paragraphed Supporting Affidavit of Sharda Guptasworn and dated 28<sup>th</sup> September, 2021. It is together with four (4) annexures marked as "SG 1 to 4" annexed hereto. He deposed that he was the Co – Director in the Appellant's Company and hence conversant with the facts of this case and hence competent to swear this affidavit.
4. He informed Court that the Respondent/Tenant filed a Notice of Motion dated 31<sup>st</sup> May 2021 at the Business Premises Rent Tribunal Cause No. 293 of 2020 Mombasa (hereinafter referred to as The BRPT). On 30<sup>th</sup> August 2021 the Vice Chair of the Tribunal allowed the application in favour of the Respondent/Tenant herein.
5. Being dissatisfied by the ruling of BRPT, the Appellant/Landlord filed this suit to appeal against the said decision. Historically, the facts of the case were that the Land Lord and the Respondent herein entered into a tenancy agreement on 5<sup>th</sup> October, 2018 for a period of two and half years. According to him, the agreement provided termination Clause upon expiration of the tenancy period. He said that by the time of the eviction from the premises, on 18<sup>th</sup> May, 2021, the tenancy agreement had already expired on 6<sup>th</sup> May, 2021. Furthermore, a new tenant had already occupied the shop premises.
6. The present application had been made to stay the execution of the orders issued on the ground that the Respondent was using the court order to evict and harass the new tenant occupying the suit premises. The Appellant argued that unless a grant of stay of execution is issued, they stood to suffer irreparable loss and damages and the present appeal would be rendered nugatory. The Appellant had maintained that the application had been brought without any unreasonable delay and the Respondent stands to suffer no prejudice if the orders were granted. He held that the appeal was arguable and had a high chance of success.

## **III. Submissions**

7. On 28<sup>th</sup> April, 2022 while in the presence of all parties, they were directed to have the Notice of Motion application dated 28<sup>th</sup> September, 2021 be canvassed by way of written submissions. Pursuant to that, all parties complied. Thus, this Court reserved a date for the delivery of the ruling.

### **A. The Appellant's written Submissions**

8. On 12<sup>th</sup> May 2022, the Counsel for the Appellant/Applicant the Law firm of Messrs. Angeline Omollo & Associates Advocates filed their written submissions dated the same date in support of their application. M/s. Omollo Advocate submitted that the Appellant was entitled to stay in accordance with the provision of Order 42 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules, 2010. The Counsel argued that the Appellant, though their Memorandum of Appeal dated 10<sup>th</sup> September, 2021 had established that their appeal had a good arguable grounds and high likelihood of success. To support the point, the Counsel relied on the decisions of "*HGF – Versus – SM*, Civil Appeal No. 20 of 2020" to the effect that under Order 42 Rule 4 of the Civil Procedure Rules that a notice of appeal was not required for the purposes of an appeal to the High Court from the Sub – ordinate Court and



and “*RWW – Versus -EKW*(2019) eKLR where the court held that:- ‘The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right to appeal are safeguarded and the appeal is successful is not rendered nugatory.....’

#### IV. Analysis and Determination

9. The Honorable Court has keenly considered the filed application, affidavits, written submissions the cited authorities, the relevant provisions of statute and the Constitution of Kenya, 2010. In order to arrive at an informed, just, fair, reasonable and equitable decision, the Honorable Court has framed the following three (3) issues for its determination. These are:-
  - a. Whether the Notice of Motion application dated 28<sup>th</sup> September, 2021 by the Appellant/Applicant herein meets the threshold to be granted stay for execution pending appeal under the relevant provisions of the law.
  - b. Whether the parties are entitled to the relief sought.
  - c. Who will bear the Cost of the Application

**Issue No. a). Whether the Notice of Motion application dated 28<sup>th</sup> September, 2021 by the Appellant/ Applicant herein meets the threshold to be granted stay for execution pending appeal under the relevant provisions of the law.**

10. Under this Sub – heading, the Appellant is seeking to stay the orders made on 30<sup>th</sup> August 2021 before the Mombasa Business Premises Rent Tribunal Cause Number 293 of 2020 pending the hearing and determination of this appeal. The tribunal prohibited the Appellant/Landlord from evicting the Respondent/Tenant or interfering with the tenant’s quiet enjoyment of the suit property pending the hearing and determination of the suit at the tribunal. The Landlord/Appellant being dissatisfied with the orders of the tribunal has appealed to this court and seeks to stay the tribunal orders pending the hearing and determination of the appeal. The Appellant contends that unless the application for stay is granted the new tenant who has since moved into the suit premises will suffer irreparable loss and damages and the present appeal will be rendered nugatory. The Application is unopposed as the Respondent/Tenant failed to comply with the directions of court issued on 28<sup>th</sup> April 2022 to place a copy of their Replying Affidavit by close of business.
11. The power of court to grant a stay pending appeal is unfettered, the jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules 2010 states that:
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

12. In considering whether to grant the stay of execution and/or

temporary injunction, the High Court based on the doctrine of “Stare Decisis” relies on settled decisions or precedents and the set out principles under the above provisions of the law. There are plethora of decided cases on the issue of grant of stay of execution pending appeal. For instance, in the Civil Appeal No. 107 of 2015 – *Masisi Mwita – Versus - Damaris Wanjiku Njeri* [2016] eKLR the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another – Versus - Thornton & Turpin Limited* where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Court’s discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may 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 *Hassan Guyo Wakolo – Versus - Straman E.A. Ltd.*[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded then the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other.

The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of *Vishram Rouji Halal – Versus - Thornton & Turpour* Civil Appeal No. 15 of [1990] KLR 365,

13. To strengthen this legal position further, I also make reference to the case of *Canvass manufacturers Limited – Versus - Stephen Reuben Korunditu* Civil application No. 158 of 1994 [1994] LLR 4853 – where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised” Further in the case of *Stephen Wanjiku – Versus - Central Glass Industries Limited*. Nbi) HCC No. 6726 of 1991 the court held that:-

Therefore, it follows that for the court to order a stay of execution, there MUST four (4) fundamental ingredients to be met to qualify for the said orders. These are:-

- a. There being sufficient cause of action
- b. There being substantial loss likely to be suffered by the Applicant if not granted the orders.
- c. The application should be made without inordinate and unreasonable delay.
- d. For he performance of the appeal there should be security for costs to be placed and/or undertaken by the Appellant.

14. Based on the above graphically set out principles, in the instant case, this Honorable court will then proceed to determine whether the Appellant/Applicant herein has satisfied the required standard



for granting of stay orders pending appeal. Firstly, the Appellant/Applicant must show that it may suffer substantial loss. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. While considering all these ingredients the Honorable Court must always be privy and not far from being informed that the party who succeeded in getting a judgment in his or her favour should not be denied unnecessary from enjoying the fruit of their judgment.

15. While considering these conditions, the court also takes into consideration the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21, Sections 3, 13 and 19 of the Environment & Land Act, No. 19 of 2011 and whether the intended appeal is arguable and not frivolous. The Appellant must demonstrate to court that the application for stay ought to be allowed by court to prevent from rendering the intended appeal nugatory. Although the Respondent did not file a response to the application, making it unopposed, but despite that the court still has to determine the application on its merits. In the case of *Christopher Were Barasa & another – Versus - Joseph Ndichu Ngige* (2021)eKLR, it was held that:-

‘It is therefore important that the court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before court on equal footing and see where the scale of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court so not render nugatory the ultimate end of justice. The court, in exercising its discretion should therefore always opt for the lower rather than the higher risk of injustice.’

**Issue No. b). Whether the parties are entitled to the relief sought.**

16. In the current suit, the Appellant/Applicant is seeking to stay the orders issued by the BPRT delivered on 30<sup>th</sup> August 2021. The application for stay was filed in court on 28<sup>th</sup> September 2021, which was 29 days after the orders were issued. Although, the law provides for at least 14 days, there was no undue delay on the Appellant’s part in filing the application. The application was made within a reasonable time frame. On the substantial loss, the Appellant claims that they stand to suffer substantial loss if execution proceeds since there is a new tenant occupying the shop. It was argued that that the Respondent was evicted and a new tenant is in occupation who is not a party to the suit and will be highly inconvenienced by the execution. Ideally, the supposed loss claimed by the Appellant/Applicant ought to be substantiated through empirical documentary evidence. I reiterate that the Appellant has to demonstrate to court tangible evidence of the loss they stand to suffer if stay orders are not granted. The Appellant has annexed a tenancy agreement between themselves and the Respondent dated 2<sup>nd</sup> October 2018, indicating that the tenancy is for a five (5) years period starting from 5<sup>th</sup> October 2018 till 5<sup>th</sup> October 2022, which is close to three (3) months from todate for it to lapse.
17. However, the Appellant has not to show the alleged new tenancy agreement duly executed between the Respondent and the new tenant who is said to be in occupation. It is trite law under the provision of Sections 107 to 120 of the *Evidence Act*, Cap. 80 that it is he who alleges that has to prove. As the facts remain now, the Court assumes that the status quo is as it was before. The Appellant has not been evicted as yet. Therefore, this Honorable Court find that the Appellant had not proved that they stand to suffer any substantial loss if the application for stay is not granted.
18. The Appellant are further required to offer security for cost the due performance for the order. The Honorable Court is entitled to take into consideration whether the Appellant had offered any security



or not. In the case of “*Nephat Njiru M’kuma & 8 others – Versus - Mwaniki Muthee* [2022] eKLR, it was held that:-

‘It is trite law that the purpose of depositing security is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant and this being a land matter such security serves to preserve the subject matter as the parties litigate on the appeal. However, in doing so, the court has a duty to balance the interest of both parties; that of the applicants who seek to litigate on their appeal without having it rendered nugatory by virtue of the subject matter been disposed of or interfered with and that of the Respondent who has a right to enjoy the fruits of his Judgment.’

19. The Security for Costs envisioned under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 seeks to strike a balance between rights of the Appellant to pursue the right of appeal, and in the event it succeeds it should not be rendered nugatory. Likewise, the Respondent would have the assurance that if the intended appeal was not successful, they would still execute the orders issued in their favor and enjoy the fruits of their Judgment. Security is discretionary. The onus is on the Applicant to demonstrate good faith by offering security and stating that they are ready to abide by the terms set by court if the application is allowed. However, from the record it is clear that the Appellant/Applicant has offered no security for Costs as a condition for stay. Granting stay of execution would tilt the balance of justice towards the Appellant and leave the Respondent with little or nothing as security for the due performance of the order issued.
20. Therefore, as I had already found, the Appellant has not demonstrated to court at least two (2) important requirements for granting the Stay of execution of the orders delivered by the BPRT. These are, Firstly, that they will suffer any substantial loss in the event the orders are granted, as there was no evidence to demonstrate that indeed there was a new tenant in occupation. Secondly, the Appellant/Applicant has not made any deposit of Security for Costs as required by law. For these reasons the application must fail.

#### **Issue No. c). Who will bear the Costs of the application?**

21. It is now settled law that Costs is at the discretion of the Court or Judge. Costs mean the award granted to a party at the conclusion of any legal action, cause, proceedings or process in any litigation. The proviso of the provision of Section 27 (1) of the *Civil procedure Act*, Cap. 21 holds that costs follow the event. By events here it means the results of any such legal action, cause, proceedings or process in any litigation.
22. In the instant case, although the Notice of Motion application dated 28<sup>th</sup> September, 2021 by the Appellant/Applicant has been dismissed but this considers in the interest of Justice, equity and Conscience that its just fair and reasonable that each party bears their own costs in the given circumstances hereof.

#### **V. Conclusion & Disposition**

23. Consequently, based on the analysis to the issues framed herein this Honorable Court makes the following findings. These are:-
  - a. That the Notice of Motion application dated 28<sup>th</sup> September, 2021 be and is hereby dismissed for lack of merit.
  - b. That each party to bear its own Costs.
24. It is so ordered accordingly.

**RULING DELIVERED, SIGNED AND DATED THIS.28<sup>TH</sup> DAY OF JULY .2022**



**HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)**  
**ENVIROMNENT AND LAND COURT AT**  
**MOMBASA**

**In the presence of:-**

- a. M/s. Yumnah, the Court Assistant.**
- b. No appearance for the Appellant/Applicant.
- c. Mr. Kamanza Advocate for the Respondent.

