



**Mogaka v Miyonga (Environment and Land Appeal E004 of 2022)
[2022] KEELC 3259 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

JM KAMAU, J

JULY 26, 2022

BETWEEN

DUNCAN MOKAYA MOGAKA APPELLANT

AND

KEFA N MIYONGA RESPONDENT

RULING

1. The Appellant's Application dated 16/6/2022 seeks for an order of stay of execution of the Ruling of the Business Rent Tribunal made on the 23/5/2022 in Kisii Business & Rent Tribunal Case No. E006 of 2022 pending the hearing of this Appeal. The grounds supporting the Application are that the outcome of the Appeal if in the affirmative would be rendered nugatory unless the order is granted since execution of the said order will invariably have taken place by way of eviction of the Appellant from the suit premises and that the instant Application has been made without unreasonable delay. In his Supporting Affidavit sworn on 16/6/2022, the Appellant depones that he filed a reference to the Business Premises Rent Tribunal objecting to the intended eviction by the Respondent in regard to a lease of LR Nyansiongo Township Plot No. 857 which reference was dismissed on 23/5/2022.
2. In a further Affidavit sworn on 8/7/2022 the Appellant says that rent was never an issue in the Business Premises Rent Tribunal. On the other hand, the Respondent, in his Replying Affidavit sworn on 5/7/2022 depones that he stands to lose rent arrears of 18 months at Kshs. 16,000/= per month now totaling Kshs. 304,000/= as at July 2022 which he claims is undisputed and that the Appellant has been a persistent rent defaulter since January 2021. He asks the court to order the immediate payment of the rent arrears as a condition precedent to the grant of any orders. In a Supplementary Affidavit sworn on 13/7/2022 the Respondent Mr. Kefa N. Miyonga argues that rent has always been an issue since the increased rent has not been paid and that the lease expired on 31/12/2020.
3. I have considered the Application, the supporting Affidavit, the Replying and further Affidavit s from both sides and the submissions made by counsel and I must state from the onset that the only issue



before me at this stage is whether I should grant stay of execution pending appeal and not the merit of the appeal or otherwise. As to how much rent is payable, whether there is default or whether the lease has or has not expired are issues to be considered at a later stage.

4. What then are the parameters of granting a stay of execution pending appeal?

Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:

- (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.
- (2) No order for stay of execution shall be made under sub-rule (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.”

In [Visbram Ravji Halai v Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that:

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause.....”

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. It is the business of the court, so far as possible, to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice. Warsame, J (as he then was) in [Samvir Trustee Limited v Guardian Bank Limited](#) Nairobi (Milimani) HCCC 795 of 1997 expressed himself as hereunder:

“.....The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court.”



5. I also agree with the opinion expressed in Bungoma High Court Misc. Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto* that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss is”

6. Taking all the relevant factors into account and in order not to render the intended Appeal illusory while at the same time securing the interests of the successful Plaintiff I grant conditional stay of execution to the Applicant as follows:

1. Pending the hearing and determination of the appeal filed herein this court hereby grants an order of stay of execution of the Ruling/Order of the Business Premises Rent Tribunal in Kisii Tribunal Case No. E006 of 2022 dated 23/5/2022 in general and in particular the order requiring the Appellant to vacate the demised premises on LR No. Nyansiongo Township Plot No. 857 on the following conditions: -
 - a. The Appellant to continue paying rent to the Respondent at the rate of Kshs. 16,000/= per month with effect from 1st August 2022 to be paid promptly in advance and not later than the 7th day of each succeeding month.
 - b. Failure by the Respondent to accept rent, the same to be deposited in this court on or before the 10th day of the succeeding month.
 - c. This Appeal shall be expedited and heard within the next three (3) months from today's date.
2. Failure to comply with (a) and/or (b) above at the specified time the Respondent shall be at liberty to levy distress.
3. The money already deposited in Court to remain in Court as security until the determination of this Appeal.
4. The costs of the Application are to await the outcome of the Appeal.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 26TH DAY OF JULY 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Appellant: Mr. Wesonga

Respondents: Mr. Gekombe

