



REPUBLIC OF KENYA



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Gogni Rajope Construction Company Limited v Dennis (Environment and Land Appeal 2 of 2022) [2022] KEELC 3232 (KLR) (4 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL 2 OF 2022**

**AA OMOLLO, J
AUGUST 4, 2022**

BETWEEN

GOGNI RAJOPE CONSTRUCTION COMPANY LIMITED APPELLANT

AND

KUJAJU NDIGIRO DENNIS RESPONDENT

RULING

1. The appellant brought this application under order 51 rule 1, order 42 rule 6(1) of the [Civil Procedure Rules](#), section 3A of the [Civil Procedure Act](#), sections 13(2), 16A and 26(4) of the [Environment and Land Court Act](#) on the 17th of February, 2022 for orders that:-
 - a. Spent;
 - b. Spent;
 - c. There be a stay of execution orders on the judgement dated January 11, 2022 together with all consequential orders pending the hearing and determination of the appellant's appeal;
 - d. The honorable court do issue any other orders as it deems fit and just to meet the ends of justice;
 - e. The costs of the application be provided for.
2. The application is supported by the affidavit of Hannington Raburu Jumadated February 16, 2022 who deposed that he is apprehensive if the stay orders are not granted, the appeal will be rendered nugatory. He deposed further that the appellant is unaware of the respondent's means to refund the decretal sum of Kshs.1,402,000 should the appeal succeed. That the applicant has an arguable appeal



and the present application has been brought without undue delay. They application is also premised on the following grounds;

- a. That, on the 11th of January, 2022 judgement was entered in favor of the respondent against the applicant for K.Shs.672,000 being mesne, K.Shs.230,000 being repair charges, K.Shs.500,000 being general damages, costs and interest on each sum;
- b. That, the applicant being dissatisfied with and aggrieved by the entire judgement, filed an appeal on February 10, 2022;
- c. That, it is highly probable that if an order for stay of execution is not granted, the respondent will at any time proceed to execute the decree and execute rendering the appeal nugatory;
- d. That, the appellant has an arguable appeal which is not frivolous as set out in its duly filed Memorandum of appeal dated February 10, 2022;
- e. That, the applicant is unaware of the respondent's means and in the event that the decretal sum is paid over to the respondent, the same will be irrecoverable and out of the applicant's reach if the appeal succeeds. As such the respondent will suffer irreparable and substantial loss;
- f. That, the applicant is willing to furnish a bank guarantee as security for the due performance of the decree;
- g. That, the application has been made without delay;
- h. That, there will be no prejudice occasioned to the respondent should this honorable court grant the orders sought.

3. The respondent opposed the application on the grounds filed on the 8th of March, 2022 which are:

- a. The tenancy was terminated on the 30th of November, 2018 when the appellant handed over the premises to the respondent in the presence of their respective advocates. The trial court was thus correct in assessing rent up to the said date;
- b. If the premises were vacated in October, 2012 then why were the premises being handed over on the 30th of November, 2018 in the presence of the advocates of both parties?;
- c. At the handover the appellant agreed to carry out the repairs within two weeks. The appellant failed to repair the premises as agreed and the Respondent got somebody else to carry out the repairs. Documents were produced amounting to KShs.230,000;
- d. The rent calculated at KShs.14,000/- per month in respect of the two rooms that the appellant had not handed over. The appellant had rented three rooms one of which had been handed over earlier;
- e. The above clearly shows that the appellant's appeal has no chance of succeeding as it is merely a delaying tactic;



- f. The respondent has been out of pocket since 2014 and it is only fair that he paid a substantial part of the decretal sum while awaiting the hearing of the appeal. Bank guarantee will be of no help to the respondent.
4. During the hearing of the application on the 10th of March, 2022, the parties agreed to canvass the application by way of written submissions. The applicant filed his submissions on the 16th of March, 2022. The applicant submitted that he is apprehensive that substantial loss shall occur in the event that his appeal succeeds, making it an onerous task to recoup the decretal amount as he is unaware of the respondent's source of income. the applicant submitted further that the respondent had not specified that he would be able to reimburse the decretal sum in the event that the appeal succeeded He relied on the case of *National Industrial Credit Bank Limited vs. Aquinans Francis Wasike* Court of Appeal Civil Application No. 238/2005 cited in the case of *Edward Kamau & Another vs. Hannab Mukui Gichuki & another* (2015) eKLR in which the court held that:
- “This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the Respondent would be unable to pay back the decretal sum.....”
5. On whether the application had been brought without undue delay, the applicant submitted that he promptly filed a memorandum of appeal on the 11th of February, 2022 and filed the application for stay of execution on the 17th of February, 2022.
6. The applicant submitted that he was ready and willing to furnish security in the form of a bank guarantee which he stated is adequate security pending the hearing and determination of the appeal. That this court had the discretion to determine the manner in which security is to be given and that its major concern is to preserve the rights of both parties pending appeal. He urged this court to allow his application because he had fulfilled all the conditions set out in order 46 rule 6 (2). He relied on the case of *Ndubiu Gitabi vs. Warugongo* (1988) KLR 621; 1KAR 100 (1988-92) 2 KAR 100 and cited in the case of *Michael Ntouthi Mitheu vs. Abraham Kivondo Musau* (2021) eKLR where the Court held that:
- “The process of giving security is one which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank Guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial...”
7. The respondent filed his submissions on the 28th of May, 2022 submitting that the case before the trial court was for non-payment of rent which rent was deposited in court before being released to the respondent after the parties' consented. That the premises were then handed over in the presence of both counsel on the 30th of November, 2018. That this appeal is not an arguable one but is a delaying tactic on the appellant's part. That despite the appellant's claim that substantial loss will occur if the stay is not granted, the mesne profits accrued as a result of the applicant not paying the agreed rent for over 4 years. He relied on the case of *Kenya Shell Limited vs. Kibiru & another* (1986-1981) E.A 266 at page 271 PLATT J.A stated that:

“It is not normal in money decree for the appeal to be rendered nugatory if payment is made.”



8. On the issue of him lacking means, the respondent rebutted by submitting that he has been the applicant's landlord for a number of years. He urged this court to dismiss the application because the applicant had failed to prove substantial loss.
9. Although courts are obligated to issue orders for stay pending appeal, the same have to be issued under the conditions cited under order 42 rule 6 (2) of the Civil Procedure Rules, 2010. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that 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;
 - b. Such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the Applicant.
10. The applicant seeks to stay an execution for the award made in Busia CMCC Case No. 432 of 2014 for K.Shs.672,000 being mesne profits, K.Shs.230,000 repair charges, general damages for K.Shs.500,000/- and costs of the suit. The applicant contends that the respondents are in the process of initiating execution proceedings for the recovery of the decretal sums and in the event that that happens his appeal to this court would be rendered nugatory.
11. The Court of Appeal reiterated the provisions of order 42 in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion when granting stay of execution. The current application was brought without undue delay as the application was filed on the 17th day of February, 2022 a month after the judgement of the trial court.
12. On the question of whether or not the applicant will suffer substantial loss, the applicant submitted in the event his appeal is successful the respondent may be unable to pay him back as they are not sure of his source of income. In the most recent case of Jessikay Enterprises Ltd vs. George Kaboto Muiruri [2022] eKLR, Meoli J. stated that:

“The applicant's chief claim is that unless an order to stay execution pending appeal is granted, the respondent is likely to execute the judgment of the subordinate court thereby rendering the appeal “hopeless”. Concerning this claim, the respondent has submitted correctly that the applicant has not demonstrated with particularity how the impending execution will lead to substantial loss. Execution is a lawful process and the mere fact that it is carried out is not ipso facto evidence of substantial loss. Equally, the right of execution where it has accrued cannot be stayed, save for a just cause, and with conditions. The applicant was duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that the respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the applicants”.
13. The respondent while responding to the question of his means stated that he is a landlord and therefore capable of repaying the said amounts in the event that the applicant's appeal is successful. From the reading of the affidavits in support and against the grant of the orders of stay, the genesis of the dispute was from landlord/tenant relationship. Thus the applicant is being dishonest to state that they cannot vouch for source of the income of the respondent yet there is an automatic source comprised in the rental income.



14. It is therefore my considered view that the applicant has not proved what substantial loss they would suffer as the damages awarded can be repaid in the event the appeal succeeds. However, in order to facilitate the appellant in exercising their right to appeal and in balancing the rights of respondent who has a decree, this court grants a conditional stay. The applicant is granted a stay of execution of the decree and judgement appealed from pending hearing and determination of their appeal on condition that they pay to the respondent a part of the decretal amount in the sum of Kenya shillings Six Hundred Fifty Thousand only (Kshs.650,000=) within 45 days of date of delivery this ruling. In default, the stay automatically lapses.
15. The cost of the application is awarded to the successful party in the appeal.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 4TH DAY OF AUGUST, 2022.

A. OMOLLO

JUDGE

