



REPUBLIC OF KENYA



KENYA LAW
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Tourist Le Paradise Boutique Limited v Holiday Resort Limited (Environment and Land Appeal E040 of 2024) [2025] KEELC 3124 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E040 OF 2024**

JO OLOLA, J

APRIL 3, 2025

BETWEEN

TOURIST LE PARADISE BOUTIQUE LIMITED APPELLANT

AND

HOLIDAY RESORT LIMITED RESPONDENT

RULING

1. By the Notice of Motion dated 30th December, 2023, Holiday Resorts Limited (the Respondent) has sought the following orders:
 1. Spent;
 2. Spent;
 3. That this Honourable Court be pleased to issue an order of execution of the part of the order made by this Honourable Court on 20th December, 2024 granting the Appellant stay of execution of the order of the Tribunal made on 31st October, 2024 on condition that the Appellant deposits in Court an equivalent of six (6) months payable monthly rent for the business premises as stipulated in the terms and conditions of the subsisting and current Landlord Tenancy Agreement/Lease between the Applicant and the Respondent as security for costs for the due performance of the decree within the next twenty one (21) days from the date of delivery of this Ruling hereof, pending the hearing and determination of this application;
 4. That the part of the order made by this Honourable Court on 20th December, 2024 granting the Appellant stay of execution of the order of the Tribunal made on 31st October, 2024 on condition that the Appellant deposits in Court an equivalent of six (6) months payable monthly rent for the business premises as stipulated in the terms and conditions of the subsisting and current Landlord Tenancy Agreement/Lease between the Applicant and the



Respondent as security for costs for the due performance of the decree within the next Twenty One (21) days from the date of delivery of this Ruling hereof, be reviewed and or set aside;

5. That costs of this Application be provided for.
2. The application is supported by an Affidavit sworn by the Respondent's Group Financial Controller Alpheus Dok, sworn on 30th December, 2024 and is premised inter alia on the grounds that:
 - a. There is an error apparent on the face of the record in granting the order of stay of execution despite the Honourable Court's finding in paragraph 30 of the Ruling that:

“ However I do take note that the same prayer for stay has been overtaken by events as the appellant no longer has tenancy in the suit premises.”
 - b. The appellant vacated the premises on 8th November, 2024 and the Respondent has commenced major renovations and the suit premises are not fit for occupation;
 - c. There is no subsisting or current Landlord Tenancy Agreement/ Lease between the Appellant and the Respondent, the former having vacated the suit premises on 8th November, 2024 and therefore the parameters upon which the precondition for the grant of stay order was made do not exist;
 - d. There is sufficient reason for this Honourable Court to review and set aside the part of the order made on 20th December, 2024 as sought herein.
3. Tourist Le Paradise Boutique Limited (the Appellant) is opposed to the grant of the orders sought. In a Replying Affidavit sworn on its behalf on 23rd January, 2025 by its Director, Murtaza Abdi Hussein Haiderali, the Appellant avers that the court had in the said Ruling allowed its application dated 8th November, 2024 and granted stay of execution orders and the conditions thereof.
4. The Appellant asserts that the issue of termination of the lease is the crux of this Appeal and that the same cannot be determined through an application for review. It is further the Appellant's case that the issues regarding renovation had already been raised by the Respondent in its Replying Affidavit and the Respondent has failed to demonstrate any grounds to warrant a review of the court's Ruling delivered on 20th December, 2024.
5. I have carefully perused and considered both the application and the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
6. By its application before the court, the Respondent has sought for an order of review against a portion of the orders issued by this court on 20th December, 2024 granting the Appellant stay of execution of the orders issued by the Business Premises Rent Tribunal (BPRT) on condition that the Appellant deposits in court an equivalent of six (6) months payable monthly rent.
7. It is the Respondent's case that the said orders amounted to an error on the face of the record as the court had at paragraph 30 of its Ruling taken note that the prayer for stay had been overtaken by events as the Appellant no longer had tenancy in the demised premises.
8. On its part, the Appellant asserts that the issue of the termination of the lease is the crux of their Appeal herein. It is therefore their case that the said issue cannot be determined through an application for review such as the one put forward by the Respondent herein. It is further the Appellant's case that the issues of renovation of the suit premises had already been raised by the Respondent and the court



had taken due consideration of the same before issuing the orders of 20th December, 2024 and that the same could therefore not form the foundation of a review application.

9. On matters of review, Section 80 of the *Civil Procedure Act* provides as follows:

“Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

10. On the other hand, Order 45 Rule 1(1) of the Civil Procedure Rules, 2010, sets out the grounds for review and provides as follows:

“(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

11. In the matter herein, the Respondent has grounded its application for review on the basis that there was an error apparent on the face of the record arising from the orders issued herein by the Honourable Justice L.L. Naikuni in a Ruling delivered on 20th December, 2024.

12. As was stated by the Court of Appeal in *National Bank of Kenya Ltd. –vs- Ndungu Njau* (1997) eKLR:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

13. Considering what would amount to an error apparent on the face of the record in *Muyodi –vs- Industrial and Commercial Development corporation & Another* (2006) 1 EA 243, the Court of Appeal observed as follows:

“...In *Nyamogo & Nyamogo –vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent



on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error for a wrong view is certainly no ground for a review although it may be for an appeal.”

14. In the matter herein, the basis of the Respondent’s submissions that there was an error apparent on the face of the record was the fact that the Learned Judge has noted at the tail end of Paragraph 30 of the Ruling as follows:

“However, I do take note the same prayer for stay has been overtaken by events as the Appellant no longer has tenancy in the suit property”.

15. In my considered view those words must be looked at within the context of the entire Ruling. A wholesome perusal of the Ruling starting with the said paragraph 30 would reveal that the court was very much alive to the fact that the Appellant was no longer in the suit property. Before making those remarks cited by the Respondent, the court states as follows at the said Paragraph 30 of the Ruling:

“30. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellant. The Court has already deliberated on this aspect and taken into consideration of it from the case of : Kenya Shell Limited (Supra).” From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed the Applicant has proved that it will suffer substantially if the orders for stay of execution are not granted as prayed. For that reason, the application should succeed...”

16. It was evident from the above that the court had determined that the Appellant stood to suffer substantial loss and was hence entitled to an order of stay. That must be the reason the court did not just issue an order of stay. To address the situation in which the Appellant found itself, the court proceeded to issue a further order as follows: -

“.....The Respondent and/or its representatives and/or its proxies be ordered (to) ensure that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune Paradise Holiday Resort and Neptune Village Holiday Resort and is allowed ingress and egress thereto without any hindrance.”

17. Thus, other than directing a stay of execution, the court proceeded to positively order that the Appellant be put back in possession of the premises until the rights of the parties under the tenancy agreement executed between them was determined upon the hearing of this Appeal. To balance the rights of the parties, the court directed the Appellant to deposit the 6 months rent as stated.

18. Dealing with a similar situation in *Samvir Trustees Limited –vs- Guardian Bank Limited (2007) eKLR*, Warsame J. (as he then was) observed as follows:

“.....At this stage we must as a court ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interest 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 party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court.



In my view justice and fairness requires this court to give an order of stay but with certain condition.”

19. In the matter herein the stay of execution order was made conditional on the Appellant depositing the six (6) months rent as security. The essence of the Appeal before this Court relates to the rights of the parties herein vis-a-vis the termination notice issued by the Respondent. If the relationship was to be deemed to have terminated because the Appellant left the suit premises in circumstances that both parties do not agree on, then the Appeal would be reduced to a mere academic exercise.
20. In the premises I was not persuaded that there was merit in the Motion dated December 30, 2024. The same is dismissed.
21. The costs shall abide the Appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 3RD DAY OF APRIL, 2025

.....

J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Ms. Ali holding brief for Hassan Advocate for the Appellant
- c. Mr. Mwakireti Advocate for the Respondent

