



Lamettal Kenya Limited v Yako Supermarket Limited (Environment and Land Appeal E012 of 2022) [2022] KEELC 13351 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E012 OF 2022
SM KIBUNJA, J
SEPTEMBER 23, 2022**

BETWEEN

LAMETTAL KENYA LIMITED APPELLANT

AND

YAKO SUPERMARKET LIMITED RESPONDENT

RULING

1. Vide an application dated April 6, 2022 that was brought under the provisions of section 15 (1), (2), (4) of the [Landlord and Tenant \(Shop Hotels and Catering Establishments\) Chapter 301 of the Laws of Kenya](#), and order 42 rule 1 of the [Civil Procedure Rules](#), the appellant, being dissatisfied with the orders issued by the Business Premises Rent Tribunal dated the March 9, 2022 approached this court seeking for the following reliefs among others;

- a. Stay of further proceedings in Eldoret BPRT Cause No E038 of 2021.
- b. Stay of execution of the court's, BPRT, orders issued on March 9, 2022.
- c. Stay of execution of notice of termination of tenancy dated December 6, 2021.

The application is based on the twelve (12) grounds on the notice of motion and supported by the affidavits sworn by Pinakin Ramanbhai Patel, a director of the appellant, on the April 6, 2022 and May 10, 2022. The dispute herein is about a license agreement dated December 30, 2019 with the rent payable being Kshs 200,000/- per month in the first year, and Kshs 220,000/- monthly in the following year, which the appellant contends was later orally reviewed downwards by the respondent to Kshs 150,000/-, pursuant to their email of the May 28, 2020. It is the appellant's position that the rent payable should remain as reviewed.

2. The application is opposed by the respondent through the replying affidavit sworn by Snetu Karna, an officer with the respondent, on the April 21, 2022. It is the position of the respondent that it only



indulged the appellant for the review of rent payable to Kshs 150,000/- for eight (8) months from the May 1, 2020 to December 30, 2020, to mitigate the severe implications the covid 19 pandemic had on the business, and that measure was not to be enjoyed by the appellant in perpetuity. That aggrieved by the conduct of the appellant to remain adamant in paying the Kshs 150,000/- as opposed to the amount in their agreement, the respondent issued an agreement termination notice dated the November 26, 2021.

3. The appellant filed a reference at the tribunal to forestall the notice and injunctive orders were issued temporarily stalling the termination notice. The injunctive reliefs did not last for long as the tribunal subsequently issued orders that among others required the appellant to pay Kshs 220,000/- per month, and the outstanding sum of Kshs 660,000/- within 30 days. That is the order that precipitated this appeal.
4. That pursuant to the directions issued on the April 25, 2022 the learned counsel for the appellant and respondent filed their submissions dated the May 10, 2022 and May 26, 2022 respectively, for and against the application.
5. The following are the issues for the court's determinations;
 - a. Whether the appellant has established the threshold for the relief of stay sought to be issued.
 - b. Who pays the costs in the application.
6. The court has carefully considered the grounds on the application, the affidavit evidence, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions:
 - a. That the provisions guiding the court in stay applications are those provided for under order 42 rule 6 of the *Civil Procedure Rules*, 2010 which provide as follows;
 - “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 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 of stay 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 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.”



The above provisions were discussed in the case *Peter Ondande T/A Spreawett Chemis v Josephine Wangari Karanja (2006)Eklr* as follows;

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters, where the character of the suit property may be changed while the appeal is pending. The applicant must establish that he/she will suffer substantial loss if the order of stay is not granted.

- b. The order for stay is a discretionary one that should be issued judiciously, as was the holding in the case of *Halai & Another v Thornton & Turpin [1963] Ltd [1990] eKLR* where the Court of Appeal held that:

“... thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, 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 the case of *Hassan Guyo Wakalo v Straman EA Ltd (2013)* as follows:

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

The matter before the court is an interlocutory application and therefore, the court should be wary of making any definitive finding at this stage that may render the pending appeal proceedings nugatory.

- c. It is not disputed that the appellant has been on the said premises for a number of years before the relationship between the two parties turned tumultuous. It is equally noted from the appellant’s depositions, and acknowledged by the respondent, that the dispute herein is in relation of how much rent ought to be paid by the appellant, and not the failure to pay rent. The appellant position is that monthly rent payable should be Kshs 150,000/- while the respondent insists it is Kshs 220,000/-.
- d. That though prayers 3, 5, 7 and 8 of the appellant’s notice of motion, paragraphs 3 and 12 of the supporting affidavit referred to the tribunal orders of March 9, 2022, there is no copy of any order bearing that date that has been availed to the court. The order of the tribunal that has been attached to the appellant’s supporting affidavit shows that it was given on the March 10, 2022 and issued on the March 24, 2022. The order *inter alia* directed that the appellant “pay the outstanding rent of Kshs 660,000/- within the next thirty (30) days in default execution to issue”. That as the appellant did not amend the notice of motion to make reference to the



tribunal order of March 10, 2022, then the court is unable to consider issuing stay orders in respect of non-existent orders of March 9, 2022.

- e. It has not been rebutted that if the eviction of the appellant was to be effected, the same will take considerable time to complete, due to the time it would apparently take to uninstall all the machines currently in the premises. The time to be taken to uninstall the machine on its own is however not evidence of substantial loss to be suffered. The appellant had the duty to indeed tender proof that it would be exposed to substantial loss unless the stay orders are issued, but has failed to discharge that duty. That in any case, eviction would only occur if the appellant was to fail to comply with the tribunal's orders, allegedly of March 9, 2022, subject matter of the appeal. That the loss the appellant is apprehensive of, would also only be imminent if it failed to comply with the said orders, and the respondent moved to execute the decree. That as found in (d) above, there is no order availed that was issued on March 9, 2022 and the issue of loss, substantial or otherwise does not therefore arise.
- f. The instant application was filed on the April 6, 2022. That though the appellant has not attempted to explain why it waited for almost a month to pass before filing the application, the court is of the view that there was no unreasonable delay. In any case, the respondent has not raised the issue of there being such a delay in filing of the notice of motion.
- g. An applicant in an application for stay pending appeal must tender security for the due performance of the decree, but the appellant herein has neither offered any such security nor expressed its readiness to abide by any such conditions as the court may direct.
- h. That the record confirms that on the April 11, 2022, the duty court issued an *ex parte* order of limited stay of execution and proceedings in "Eldoret BPRT Cause No EO38" pending further directions. That interim order was on the April 25, 2022 extended with an added condition that "the appellant/applicant deposits the outstanding rent at the rate determined by the tribunal in an interest earning account in a bank in the joint names of parties' counsel on record in thirty (30) days, and in default, the interim order to lapse automatically." That during the proceedings of the May 31, 2022, the court was informed that the account was opened on the April 24, 2022 and the rent for the months of April and May 2022 had been deposited.
- i. That as there were no directions or orders given by the tribunal in Eldoret BPRT Cause No E038 of 2021 on the March 9, 2022 as alleged, the prayers of stay of execution and proceedings sought by the appellant through its notice of motion dated the April 6, 2022 cannot be issued in respect of none existing orders.
- j. That the orders issued by the tribunal as per the copy attached to the application and marked "PRP11" did not have anything about monthly rent being Kshs 220,000/-. It had required *inter alia* that the appellant pays the outstanding rent of Kshs 660,000/- in thirty (30) days, which the appellant has deposed at paragraph 11 of their further affidavit to have paid on the April 9, 2022. That as the other directions on the order of March 10, 2022 dealt with service of the appellant's [tenant's] response, filing of the respondent's [landlord's] replying affidavit and date of hearing of the application, the court finds those matters are not among the issues for determination in the pending appeal and instant application. It follows therefore, that the appellant's application dated the April 6, 2022 is without merit.
- k. That on the issue of costs of the application, the court is of the view that the appellant having failed in their notice of motion, and as costs follow the event under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, the same be awarded to the respondent.



7. That flowing from the foregoing the court orders as follows:
- a. That the appellant's application dated the April 6, 2022, is without merit and the same is hereby dismissed.
 - b. The appellant to pay the respondent's costs.
 - c. The interim order issued on the April 11, 2022 as extended on the April 25, 2022 is hereby vacated.
 - d. That the rent monies deposited in the parties' counsel joint names pursuant to the court order of the April 25, 2022 be and is hereby released to the respondent, upon a copy of this order being served upon the bank where the account is.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23rd DAY OF SEPTEMBER, 2022

S M KIBUNJA, J

ENVIRONMENT & LAND COURT - ELDORET

In the Virtual Presence of;

Counsel:

Mr Aloo for Appellant

Mr. Cheruiyot for Respondent

Court Assistant: Oniala

S. M. KIBUNJA, J.

ENVIRONMENT & LAND COURT - ELDORET

