



Khunaif Trading Co. Limited v Total Kenya Limited (Environment and Land Appeal 83 of 2021) [2022] KEELC 14947 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14947 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 83 OF 2021
NA MATHEKA, J
NOVEMBER 23, 2022**

BETWEEN

KHUNAIF TRADING CO. LIMITED APPLICANT

AND

TOTAL KENYA LIMITED RESPONDENT

RULING

1. The application is dated June 28, 2022 and is brought under articles 4,46 & 159 of the [Constitution](#) of Kenya, section 6 & 12 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishment\)](#) cap 301, order 42 rule 6, order 51 rule 1 of the [Civil Procedure Rules](#) and section 14 1B and 3A of the [Civil Procedure Act](#), cap 21 of the Laws of Kenya seeking the following orders;
 1. That this application be certified as urgent and service be dispensed with at the first instance.
 2. That there be stay of the judgment delivered on October 6, 2021 and an order of interim injunction do issue against the defendant/ respondent, their agents, servants and or employees from distressing for rent, evicting and or in any manner interfering with the applicant/ tenant's quiet possession pending the hearing and determination of this application inter-parties.
 3. That there be stay of the judgment delivered on October 6, 2021 and an order of interim injunction do issue against the defendant/ respondent, their agents, servants and or employees from distressing for rent, evicting and or in any manner interfering with the applicant/ tenant's quiet possession, pending the hearing and determination of the appeal filed herein.
 4. That the record of appeal filed hearing be deemed as properly filed and the appeal be admitted for hearing.
 5. That the costs of this application be provided for.



2. The application is based in the grounds that *vide* a Judgment delivered on October 6, 2021 the tribunal dismissed the plaintiff's reference dated December 14, 2020 and notice of motion application dated December 4, 2020. That the applicant being aggrieved of the said decision has filed an appeal before the High Court. That the applicant has sought for the certified copies of the proceedings to enable it ventilate the said issues in the appeal. That applicant urges this honorable court that the decision of this honourable tribunal be stayed and an order of interim injunction against the defendant/respondent, their agents, servants and or employees from, distressing for rent, evicting and or in any manner interfering with the plaintiff's quite possession pending the determination of this application and the appeal herein. That the applicant has now obtained all the requisite proceedings and has prepared the record of appeal which they pray that the same be deemed be properly filed. That the registry failed to supply the said proceedings in good time due to the court file being misplaced and upon frantic efforts the same was retrieved and the proceedings issued. to the applicant. That the tribunal has previously granted limited stay of execution to facilitate the preparation of the record of appeal and now we seek for the stay of execution pending appeal since the record of appeal is now ready for hearing of the appeal. That the applicant with the consent of the respondent constructed the premises it occupies and has undertaken extensive construction of the suit premises which has taken in a lot of capital which is yet to be recovered and therefore, if the application herein is rejected the applicant will suffer substantial loss. That the applicant has been and still is a tenant of the respondent since July 2013, and at all material times the applicant/ tenant has dutifully paid the rent when it falls due, the applicant only started experiencing cash flow problems in March 2020 due to Covid-19 pandemic however, the applicant sought for indulgence from the respondent. That the applicant / tenant runs a hotel on the said premises which is the only source of income of the applicant's director and thus if the orders herein are not granted and she will be deprived of her livelihood and rendered destitute. That the applicant is bound to suffer substantial and irreparable loss if the eviction is allowed to proceed and will be condemned unheard and prays that a stay order be granted, staying the said judgment. That the applicant will be demonstrating in the appeal that the trial tribunal failed to take into account very pertinent issues as set out in the memorandum of appeal which issues if the tribunal could have taken account of it could have arrived at a different decision. That the aforesaid arguable and meritorious issues are yet to be heard and determined by the court. That the respondent/ landlord stands to suffer no prejudice if the instant Application is allowed. That its right to be heard on appeal will be infringed if the respondent/ landlord is allowed to evict the applicant/ tenant. That in light of the above, it is therefore imperative and in the interest of fairness and justice that this honourable court be pleased to grant the orders sought in this instant application.
3. The respondent submitted that this dispute arose in 2015 when the landlord issued to the tenant a notice to vacate which issue ended up in court and annexed hereto the initial notices and replies from the tenant letters dated February 24, 2015, April 14, 2015, April 21, 2015 and April 24, 2015 marked "RW1". That the landlord has had a long standing dispute with this tenant concerning rent arrears. That the applicant/ tenant sought stay pending appeal at the Business Premises Tribunal which order was refused and they were granted sixty (60) days to vacate as per order annexed and marked "RW3". That the purported structure built by the tenant on the respondent's premises is a semi-permanent structure which could not have cost a lot of capital as deponed in the supporting affidavit and annexed hereto a copy of photos marked "RW4". That the tenant has run down the premises and sells "Shisha" at the premises which goes against the lapsed lease agreement.
4. The honourable court considered further the fact that the tenant does not pay rent on time or at all. The continued stay of the tenant on the premises continues causing the landlord hardship as she hardly fulfils her obligations towards the lease agreement.



5. That the tenant has failed to annex any evidence of the cost of the construction of the premises which in any event was not a factor adduced before the Business Premises Tribunal Court during the hearing and is not a factor this honourable court can consider under section 7(b) of the Landlord and Tenant (Shop, Hotel, and Catering Establishment) (cap 301) Laws of Kenya. That it is not true that the tenant started experiencing cash flow problems during the covid period. The covid period was in 2020 and the tenant has a longstanding dispute with the landlord on rent prior to that date. That the tenant has a history of writing "dud" cheques to the landlord and having their advocate call to request that the cheques remain unbanked as per their annexure letter dated October 6, 2020 and October 20, 2020. No 0xxxx0 not banked as per their telephone instructions annexed and marked "RW6" and previous payments that the tenant advised us not to bank vide letters dated December 24, 2018 and February 19, 2019 annexed and marked "RW7". That it is only after the landlord issued a notice to the tenant to terminate the tenancy did the tenant issue a cash payment sum of Kshs 100,000/- on the October 23, 2020 to replace cheque No 0xxxx0 which was received on a "without prejudice basis" by their Advocates Messrs V N Okata & Co Advocates annexed hereto and marked "RW8". That the tenant has admitted that there is no business on the premises but seeks Goodwill from the landlord of Kshs 3,500,000. The tenant has built a semi-permanent structure on the premises which the landlord has no intention to use upon the tenant vacating the premises. That the construction done by the tenant has not been done to the required safety standards required by the landlord and the landlord has no intention to maintain the structures as built hence the tenant's requirement to be reimbursed for improvements is not a proposition the landlord is willing to discuss.

6. This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

7. Order 42, rule 6 states:

“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.”

8. The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and



3. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
9. The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl No Nai 93/02 (UR), thus:

Hitherto, this court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
10. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the learned judges stated the principles to be applied in considering an application for stay of execution as thus;

..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

11. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right

12. We are further guided by this court's decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

.. the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. .. 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, and the application must, of course, be made without unreasonable delay.”

13. That the applicant/tenant submitted that *vide* a judgment delivered on October 6, 2021 this tribunal dismissed the plaintiff's reference dated December 14, 2020 and notice of motion application dated December 4, 2020. That the applicant being aggrieved of the said decision has filed an appeal before the High Court. That the applicant has been and still is a tenant of the respondent since July 2013, and at all material times the applicant/ tenant has dutifully paid the rent when it falls due, the applicant



only started experiencing cash flow problems in March 2020 due to Covid-19 pandemic however, the applicant sought for indulgence from the respondent. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. The respondent stated that the landlord has had a long standing dispute with this tenant concerning rent arrears. That the applicant/ tenant sought stay pending appeal at the Business Premises Tribunal which order was refused and they were granted sixty (60) days to vacate. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. From the facts before me it is clear that the parties have had long standing disputes on payment of rent. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application dated June 28, 2022 has no merit I dismiss it with costs.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF NOVEMBER 2022.

N.A. MATHEKA

JUDGE

