



REPUBLIC OF KENYA



KENYA LAW
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**Chelule & another v Kuria & another (Appeal E001 of 2022)
[2022] KEELC 15445 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
APPEAL E001 OF 2022
CG MBOGO, J
DECEMBER 21, 2022**

BETWEEN

SAMUEL KIPLANGAT CHELULE 1ST APPELLANT

AGNES GACHAGO 2ND APPELLANT

AND

ALICE WANJIRU KURIA 1ST RESPONDENT

SAMUEL KURIA MUREU 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the Business
Premises Rent Tribunal at Nakuru (Hon. Gakubi chege, Vice Chair)
delivered on 11th March, 2022 in Nakuru BPRT Case No. 120 of 2019)*

RULING

1. Before me for determination is a notice of motion application dated June 2, 2022 expressed to be brought under order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. Spent.
 2. That for the reasons set out in the certificate of urgency, this honourable court do grant an urgent date when this application will be heard *inter-partes*.
 3. Spent.
 4. That pending the hearing and determination of this appellants' appeal, the honourable court be pleased to issue an order of stay of execution of the judgment delivered on March 11, 2022 in Nakuru BPRT Case No 120 of 2019.



5. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that the 1st respondent filed a reference before the Business Premises Rent Tribunal in Nakuru BPRT Case No 120 of 2019 against the applicants for a claim of rent amounting to the sum of Kshs 18,000,000/- for the 18-year occupation and use of the suit property known as Plot No 20 Block 8. Further, that judgment was delivered on March 11, 2022 in favour of the 1st respondent herein who has approached the county government of Narok seeking a reversal of the suit property in her name.
3. The application is supported by the affidavit of the 1st appellant/applicant sworn on even date. The applicants deposed that together with the 1st applicant and the 2nd respondent, they are partners of Harmony School in Narok. The applicants deposed that the 1st respondent filed a reference at the Business Premises Rent Tribunal in Nakuru BPRT Case No 10 of 2019 claiming rent amounting to Kshs 18,000,000/- for the 18 years they have been in occupation of the suit property known as plot No 20 block 8 and a judgment was delivered on March 11, 2022 in her favour and that she has approached the Narok county government, lands department seeking that the transfer of the suit property in favour of Harmony School be reversed and the same be re-registered in her name.
4. The applicants further deposed that they are dissatisfied with the decision of the vice chair of the tribunal and have now appealed against the said decision and if the application is not allowed, the appeal will be rendered nugatory, the 1st respondent will levy distress for rent against which the students will be deprived of their basic learning in the institution.
5. The application was opposed by the 2nd respondent *vide* a replying affidavit sworn on July 22, 2022. The 2nd respondent deposed that he opposed the reference filed at the tribunal *vide* a replying affidavit sworn on November 28, 2019 which reference proceeded for full hearing and judgment delivered on March 11, 2022. He further deposed that pursuant to section 14 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* any determination or order of the tribunal ought to be adopted as judgment of the court and that no determination or order of the tribunal is enforceable or capable of execution unless the same is adopted by a court of competent jurisdiction. He further deposed that the applicants proceeded to have the judgment of the tribunal adopted by the Chief Magistrates' court in Nairobi which court issued directions to the applicants to show cause why the application was filed in Nairobi whereas there is a court of competent jurisdiction in Narok and for this reason the applicants are aware that a determination of the tribunal can only be enforceable upon adoption as set out under section 14 of the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act*.
6. The 2nd respondent further deposed that as at the time of filing the instant application there was no judgment capable of execution as the decision of the tribunal has not been adopted by a court of competent jurisdiction. Further, that the prerequisites for granting stay of execution have not been satisfied as there is no enforceable judgment or decree capable of execution. As such, the application is misconceived, bad in law, otiose and flaws the set-out procedures of law.
7. The application was further opposed by the replying affidavit of the 1st respondent sworn on July 26, 2022. The 1st respondent deposed that she filed a reference at the Business Premises Rent Tribunal against the applicants for failure to pay rent for 18 years since the year 2001 accumulating to Kshs 18,000,000/- and obtained judgment in her favour. She further deposed that she was entitled to levy distress upon expiry of ninety days which period lapsed on June 11, 2022 and the applicants have not made any effort to settle the decretal amount and are therefore guilty of undue and inordinate delay which is mischievously calculated to frustrate her rights to enjoy the fruits of her judgment.



8. The 1st respondent further deposed that she remains at a great loss as her judgment was stayed and delayed *ex-parte* and despite the inconvenience caused, the applicants have not provided any security or guarantee for the due compliance as is required by law. Further, that the appeal does not raise any serious triable issues for the consideration by this court since the decision of the tribunal was well reasoned. As such the application is frivolous, vexatious and an abuse of the court process.
9. The application was disposed off by way of written submissions. The applicants filed written submissions dated October 21, 2022. On whether the applicants have an arguable appeal, the applicants submitted that to say that an appeal is arguable is to say that it is not frivolous and that it raises a *bona fide* issue deserving full consideration by the court and even one *bona fide* issue will satisfy the requirement for the law does not look for a multiplicity of arguable issues. The applicants relied on the case of *Abmed Musa Ismael v Kumba Ole Ntamorua & 4 Others*, Civil Application No 256 of 2013 [2014] and submitted that they have demonstrated that the appeal is arguable by setting out the grounds in their memorandum of appeal.
10. On substantial loss, the applicants submitted that they will suffer loss as the 1st respondent has shown indication towards regaining back ownership of the suit property which is registered in the name of Harmony School and if the 1st respondent were to regain possession, nothing would stop her from evicting the school which would cause substantial harm to the students who depend on the school for their basic education. The applicants relied on the cases of *Sewankambo Dickson v Ziwa Abby* HCT-00-CCMa 0178 of 2005 and *Tropical Commodities Suppliers Limited & others v International Credit Bank Limited (in liquidation)* (2004) 2 EA 331.
11. The applicants further submitted that all the prerequisite in order 42 rule 6 of the *Civil Procedure Rules* are as important and must be considered in an inextricable manner. The applicants relied on the cases of *Jason Ngumba Kagu & 2 Others v Infra Africa Assurance Co Limited* [2014] eKLR, *Absalom Dova v Tarbo Transporters* [2013] eKLR and *Butt v Rent Restriction Tribunal* [1982] KLR 417.
12. On security for costs, the applicants submitted that the court must weigh the claims by both sides and render a decision that would not impose hardship on the applicants who are rightfully pursuing their right of appeal where the judgment creditor would not suffer harm if the application is allowed and considering the colossal sums involved, it is impossible not to see that a conditional stay that demands that appellants provide security is too onerous and present extreme hardship to them. They relied on the case of *Oraro & Rachier v Co-operative Bank of Kenya Limited* [2000] eKLR and *Job Kilach v Nation Media Group & 2 Others* [2006] eKLR.
13. The 2nd respondent filed written submissions dated November 10, 2022. The 2nd respondent raised three issues for determination as follows: -
 - i. Whether the prerequisites for granting stay of execution as provided for under order 42 rule 6 of the *Civil Procedure Rules* have been met.
 - ii. Whether the applicants ought to prove an arguable appeal.
 - iii. Who should bear the costs of the appeal.
14. On the first issue, the 2nd respondent submitted that the prerequisites for grant of stay of execution ought to be satisfied before the court can grant stay of execution. The 2nd respondent relied on the case of *Jamii Bora Bank Limited & Another v Samuel Wambugu Ndirangu* [2022] eKLR. On substantial loss, the 2nd respondent submitted that the allegation that the 1st respondent has approached the county government of Narok for reversal and re-registration of the suit property in her name is baseless and has not been supported by any evidence and that it is laughable to have the legally recognized beneficial



- owner of land seek o have land retransferred to them. He further submitted that as per the evidence before this court, none has shown any attempt by the 1st respondent to evict the applicants' school from the suit premises. The 2nd respondent relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.
15. On security for costs, the 2nd respondent submitted that the applicants have demonstrated their inability or unwillingness to satisfy the prerequisites of security for costs which would result to denying the 1st respondent the right to enjoy the fruits of the judgment entered in her favour. The 2nd respondent relied on the cases of *Gianfraco Manenthi & Another v Africa Merchant Assurance Co Limited* [2019] eKLR and *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others* [2014] eKLR.
 16. While relying on the case of *Tanui Robert & Another v Jessica Adikinyi Afwande* [2021] eKLR, the 2nd respondent submitted that whether the intended appeal is arguable or not is irrelevant and this court should not waste its judicial time trying to ascertain the same.
 17. The 1st respondent filed written submissions dated November 4, 2022. The 1st respondent raised two issues for determination as below: -
 - a) Whether the applicants have met the prerequisites for grant of stay of execution pending appeal.
 - b) Who should bear the costs of the application.
 18. On the first issue, the 1st respondent submitted that whereas the applicants have the right to prefer an appeal, there exists no sufficient cause in the proceedings herein as the same is meant to delay and frustrate the 1st respondent from enjoying the fruits of her judgment. The 1st respondent further submitted that the applicants have not demonstrated how and why the payment of the said amount would occasion them substantial loss and as such there is no substantial loss likely to be occasioned. The 1st respondent relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.
 19. The 1st respondent further submitted that according to section 16A of the *Environment & Land Court Act*, the applicants had 30 days within which to file their appeal which days expired on April 11, 2022 which is a clear indication that the applicants had made up their minds not to comply with the judgment entered therein and instead sought to challenge the same via appeal.
 20. The 1st respondent further submitted that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment and that the applicants have not expressed their intention to comply with the requirement for costs which makes the application frivolous, vexatious, incompetent, unmerited and an abuse of the court process. The 1st respondent relied on the case of *Mohammed Salim t/a Choice Butchery versus Nasserpuria Memon Jamat* [2013] eKLR.
 21. I have carefully analysed and considered the application, the replying affidavits thereof and the written submissions and authorities relied upon by all the parties and the issue for the determination is whether the applicants are entitled to the grant of orders of stay of execution pending appeal.
 22. The principles that guide the courts while considering an application for stay pending appeal are now well settled. The substantive provision for grant of stay pending appeal is to be found under order 42 rule 6 of the *Civil Procedure Rules*.



23. Order 42 rule 6 provides in part as follows: -

“6.

- (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 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.
- (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”

24. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and



unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
25. The question is whether the applicants have demonstrated substantial loss. The applicants deposed that they stand to suffer substantial loss owing to the fact that if they are evicted from the suit property, then they risk losing business as the school will be evicted and students will lose their basic education. I have perused the judgment delivered by the vice chair of the business premises rent tribunal dated March 11, 2022 and I note that there is a dispute over ownership and rent arrears of the suit property known as plot no. 20 block 8 and which suit property is a school known as Harmony School. In the case of *Lucy Nyamu Kimani v Lawrence Mburu Muthiga* [2006] eKLR, it was held:-

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant.”
26. I am of the view that substantial loss would be occasioned and in this case particularly on the students who acquire their basic education from the suit property.
27. On whether there is inordinate delay, the judgment of the tribunal was delivered on March 11, 2022. The memorandum of appeal was filed on April 11, 2022 and therefore there is no delay whatsoever.
28. On security, the applicants have not provided or offered any security save to say that the demands to provide security is too onerous and present extreme hardship to the applicants. Pursuant to order 42 rule 6 of the *Civil Procedure Rules*, the applicants are required to offer security for the due performance of the decree and the court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I place reliance in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
29. Having read the judgment of the tribunal, I am aware that the 1st respondent was awarded judgment in her favour to the tune of Kshs 18,000,000/- amongst other orders. On the other hand the applicants having deposed they are proprietors of Harmony School, I believe they are in a financial position to deposit security for the due performance of the judgment. I am alive to the fact that the law is that where the applicants intend to exercise their undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the 1st respondent who has a judgment in her favour should not, if the applicants



were eventually to be unsuccessful in their intended appeal, find it difficult or impossible to realize the decree.

30. Arising from the above and while taking into consideration all the issues raised in the application and the replies, there is need to balance the interests of both parties and as such I allow the application as follows: -

- i. An order of stay of execution is hereby issued pending the hearing and determination of the appeal on condition that the applicants deposit a sum of Kshs 500,000/- in a joint interest earning account in the names of counsel for the applicants and the 1st respondent within 45 days from the date of this ruling.
- ii. Failure to comply with order i. above would mean that the order of stay of execution lapses and the 1st respondent will be at liberty to execute.
- iii. Costs shall abide the outcome of the appeal.
- iv. The Deputy Registrar to call for the record from the Business Premises Rent Tribunal. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 21ST DAY OF DECEMBER, 2022.

HON. MBOGO C.G.

JUDGE

21/12/2022.

In the presence of:-

CA:Chuma

