



**Kirinyaga Empty Bags v New Nyamakima Co Ltd (Environment and Land Appeal E039 of 2022) [2022] KEELC 15467 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15467 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E039 OF 2022**

**J OMANGE, J  
DECEMBER 20, 2022**

**BETWEEN**

**KIRINYAGA EMPTY BAGS ..... APPLICANT**

**AND**

**NEW NYAMAKIMA CO LTD ..... RESPONDENT**

**RULING**

1. The defendant vide a notice of motion application dated May 17, 2022 brought under order 42 rule 6 of the Civil Procedure Rules , order 51 rule 1 of the Civil Procedure Rules and section 3 A of the Civil Procedure Act sought for the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of the appeal herein a stay of execution of the judgement and orders of the Business Premises dated April 28, 2022 in BPR T E350 of 2021, Kirinyaga Empty Bags vs New Nyamakima Co Ltd and all consequential orders be issued and or granted.
  - d. That this honourable court do make any such further and or other orders and issue any other relief it may deem just to grant in the interests of justice.
  - e. That costs be in the cause.
2. The application is premised on the grounds that the appeal raises arguable issues of both fact and law and that the appellant who operates a cereals and empty bags shop on the premises is likely to suffer loss.
3. The appellant/ applicant has sworn an affidavit in support of the application in which he traces the history of how the applicant started renting the premises. He avers that the applicant will suffer



- substantial loss if the stay is not granted. In a further affidavit filed on August 29, 2022 he depones that the business has grown to a value of Kshs 10,000,000.
4. The respondent on his part depones that continued occupancy of the premises by the appellant is denying him the use of his premises and is likely to cause him to suffer loss.
  5. The court directed that the matter proceed by way of written submission. Both parties filed submissions and authorities which the court has considered.
  6. the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
    - "No order for stay of execution shall be made under subrule (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."
  7. In [Visbram Ravji Halai vs Thornton & Turpin](#) Civil Application No Nai 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under order 41 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
  8. In [Silverstein -vs- Chesoni](#) [2002] 1 KLR 867 the court held that:-

"The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory."
  9. The above position was further reinstated in the case of [Shell Ltd -vs- Kibiru & another](#), Civil Appeal No 97 of 1986, Nairobi where it was stated that:-

"The application for stay made before the High Court failed because the 1<sup>st</sup> of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money."
  10. The onus on the applicant to prove substantial loss was similarly addressed in [Antoine Ndiaye -vs- African Virtual University](#) [2015] eKLR; in which the court indicated as follows:-

"The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the respondent is not able to refund the decretal sum should the appeal succeed."
  11. As the court seeks to discharge its role of ensuring justice to both parties, the court is enjoined to consider the rights of the decree holder who is entitled to the fruits of his judgement and the rights of



the judgement debtor applicant who is entitled to have his day in court by being unfettered in pursuit for justice. This is the balancing act so aptly described in *Machira t/a Machira & Co Advocates vs East African Standard (No 2)* [2002] KLR 63 where it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

12. Under the provisions of order 42 rule 6 (1) (2) of the *Civil Procedure Rules*, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the court as to its sufficiency. In the case of *Equity Bank Ltd –vs- Taiga Adams Company Ltd* [2006] eKLR it was held that:-

“Of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 others.*”

13. In addition to these well settled principles the courts have now recognized that order 1 A and B of the *Civil Procedure Act* demands of the courts a responsibility to give effect to the overriding objectives. This calls upon the court to not only consider whether the well settled principles of grant of stay have been met, but to delve deeper to determine what the ends of justice would require in each circumstance.
14. Having reviewed the facts of this case, submission by counsel, the relevant law and principles that have been clearly set out by the courts, I now turn to the facts of this case. In the instant case the applicant on whom the onus lies to prove substantial loss has indicated that the business which is a going concern with an estimated value of Kshs 10,000,000 and immense goodwill stands to suffer loss if the application for stay is not granted.
15. The overriding objectives of the *Civil Procedure Act* especially as it relates to the just determination of proceedings require the court to ensure that the ends of justice are met for both parties. This was clearly spelt out in the case of *Transporters Ltd vs Absalom Dova Lumbasi* [2012] eKLR, thus:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”



16. I find that it is in the interests of justice and the right to be heard for the appellant to have an opportunity to canvas the appeal before any action is taken to evict it. Conversely the respondent is entitled to the fruits of its judgement. Taking into the account the foregoing and balancing the rights of both parties I make the following orders;
17. The application is allowed in the following terms;
- a. Stay of execution is granted of the judgement and orders dated April 28, 2022 issued by the Business Premises Tribunal in BPRT E350 pending the hearing and determination of the appeal of which the record of appeal should be filed within 120 days.
  - b. The applicant to deposit in court the rent for two years of Kshs 720,000 which shall provide security for as long as the appeal has not been determined.
  - c. That in default of prayer (a) and (b) the prayer for stay shall be deemed to have been dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

Aluoch for the Applicant

Mr. Okech for the Respondent

**Steve - Court Assistant**

