



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Wanjiku & 3 others v Anthony Maina Mbugua t/a Spear Supermarket (Environment and Land Appeal E021 of 2022) [2022] KEELC 15352 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15352 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

**YM ANGIMA, J**

**DECEMBER 15, 2022**

**BETWEEN**

**TABITHA WANJIKU ..... 1<sup>ST</sup> APPELLANT**  
**ESTHER NJERI ..... 2<sup>ND</sup> APPELLANT**  
**CECILIA WANGARI ..... 3<sup>RD</sup> APPELLANT**  
**ANTHONY WAGURA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**ANTHONY MAINA MBUGUA T/A SPEAR SUPERMARKET .... RESPONDENT**

*(By a memorandum of appeal dated and filed on 25.10.2022 the Appellants appealed against the ruling and order of the Honourable Chairman of the Business Premises Rent Tribunal dated 21.10.2022 in BPRT in Case No. 123 of 2020 – Anthony Maina Mbugua t/a Spear Supermarket –vs- Tabitha Wanjiku and 3 others.)*

**RULING**

**A. Introduction and background**

1. By a memorandum of appeal dated and filed on October 25, 2022 the appellants appealed against the ruling and order of the honourable chairman of the Business Premises Rent Tribunal dated October 21, 2022 in BPRT in Case no 123 of 2020 – Anthony Maina Mbugua t/a Spear Supermarket –vs- Tabitha Wanjiku and 3 others. By the said ruling the tribunal dismissed the appellants’ application for setting aside its ex parte judgment dated April 12, 2022 with costs to the respondent. Being aggrieved by the said ruling the appellants filed the instant appeal.



## **B. The appellants' application**

2. During the pendency of the appeal, the appellants filed a notice of motion dated October 27, 2022 expressed to be based upon sections 1A, 1B, 3A & 63 of the *Civil Procedure Act* (Cap 21), order 40 rules 1, 2, 3 and order 51 rule 1 of the *Civil Procedure Rules, 2010*, and all enabling provisions of the law seeking the following relieves:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That pending the hearing and determination of the appeal herein a temporary order of injunction do issue restraining the respondent by himself, his servants, agents and/or servants from letting out, leasing out, occupying, gifting, parting with possession, and/or in any other way interfering with the rental premises previously occupied by the appellants/applicants on Plot No 6585/460 Nyahururu Township.
  - e. That pending the hearing and determination of the appeal herein, a mandatory injunction do issue restoring and reinstating the appellants into the rental premises they were evicted from on No 6585/460 Nyahururu Township.
  - f. That pending the hearing and determination of the appeal herein, there be a stay of execution of the orders issued on April 12, 2022 and any other consequential orders issued thereto in BPRT/Case No E123/2020 (Nakuru) Anthony Wagura Mbugua –vs- Tabitha Wanjiku & 3 Others.
  - g. That the OCS Nyahururu Police Station to ensure that the orders herein are complied with.
  - h. That costs if this application be borne by the respondent.
3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Anthony Wagura on November 27, 2022 and the exhibits thereto. He swore the said affidavit on his own behalf and on behalf of his co-appellants. The appellants contended that the references before the tribunal had proceeded ex parte and that they were irregularly evicted from the demised premises by the respondent on the basis of the ex parte judgment the subject of the instant appeal. It was contended that the judgment of the tribunal had not yet been adopted as a judgment by the magistrate's court of the first class by the time the appellants were evicted. It was further contended that the respondent intended to lease out the demised premises to other tenants for the purpose of defeating the pending appeal.

## **C. The respondent's response**

4. The respondent filed a replying affidavit sworn on November 9, 2022 in opposition to the application. The respondent stated that the leases of the appellants expired on January 1, 2020. He further stated that upon expiry of the leases he issued them with notices to vacate the demised premises for purposes of undertaking renovations after which they were to be considered for new leases on new terms. It was contended that when the appellants refused to vacate, he filed BPRT Case No 123 of 2020 before the tribunal seeking their eviction whereas the appellants also filed separate reference seeking to stop their eviction.



5. The respondent pending further stated that on December 3, 2021 the tribunal directed that all the pending references be heard together. The respondent contended that when the references were fixed for hearing the appellants did not turn up despite service in consequence whereof the matter proceeded ex-parte and judgment was delivered on April 12, 2022 granting his prayers.
6. The respondent further stated that vide an application dated May 5, 2022 the appellants sought a review and setting aside of the tribunal's judgment on the basis that they were not informed of the hearing date by their previous advocates on record. It was his case that upon a hearing of the application on the merits the tribunal was satisfied that the appellants were duly served and consequently their application was dismissed with costs paving way for their eviction.
7. The respondent further stated that the appellants were duly evicted and that the demised premises were leased out to new tenants. As evidence of leasing the respondent exhibited copies of various lease agreements for the demised premises which was described as Nyahururu Municipality Block 6/405/460. It was therefore contended that the application had been overtaken by events since the premises were no longer available. The court was consequently urged to dismiss the application with costs.

#### **D. The appellants' rejoinder**

8. The appellants filed a supplementary affidavit sworn by Anthony Wagura on November 18, 2022 in response to the replying affidavit. It was contended that although most of the leases were due to expire in 2019, the lease for the 3<sup>rd</sup> appellant was due to expire on October 1, 2020 hence the notice of termination was issued prematurely in relation to her. The appellant further contended that upon expiry of their initial leases a periodic tenancy was created in their favour by operation of the law.
9. The appellants further contended that the respondent's reference was heard on a date the matter was fixed only for mention hence the hearing was irregular. The appellants further contended that there was no evidence of payment of rent deposits by the new tenants and that the shop numbers were not indicated in their respective leases. They also contended that the respondent was debarred from leasing out the shops since he had not refunded their security deposits as per the terms of the expired leases. It was further contended that since the lease agreements for the new tenants had not yet been registered then the demised premises were still available to them.

#### **E. Directions on submissions**

10. When the said application was listed for inter partes hearing on November 27, 2022 it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellants' submissions were filed on November 28, 2022 whereas the respondent's submissions were not on record by the time of preparation of the ruling.

#### **F. The issues for determination**

11. The court has considered the appellants' notice of motion dated October 27, 2022, the respondent's replying affidavit sworn on November 9, 2022, the appellants' supplementary affidavits sworn on November 18, 2022 and November 26, 2022 as well as the material on record. The court is of the opinion that the main questions for determination in the application are the following:
  - a. Whether the respondent should be restrained by an order of injunction from letting out, leasing or parting with possession of the demised premises.



- b. Whether a mandatory injunction should be issued to restore and reinstate the appellants into the demised premises.
- c. Whether an order for stay of execution of the tribunal's orders made on April 12, 2022 and all consequential orders should be granted.

## **G. Analysis and determination**

**a.**

### **Whether the respondent should be restrained by an order of injunction from letting out, leasing or parting with possession of the demised premises**

12. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the appellants were previously in occupation of various shops in the demised premises from which they were carrying out business activities. It is also evident from the material on record that they were evicted on October 26, 2022 pursuant to the judgment of the tribunal dated April 12, 2022.
13. The respondent's replying affidavit sworn on November 9, 2022 indicates that the demised premises were let out to new tenants and lease agreements were signed on or about November 27, 2022. The court agrees with the respondent's contention that an interim order of injunction cannot issue since what was sought to be prevented has already taken place. It is trite law that a restraining injunction is forward looking and it cannot undo what has already taken place. It is also trite law that an order of injunction ought not to be granted in vain where it would not serve any useful purpose. See *Erick Makokha & 4 Others -vs- Lawrence Sagini & Others [1994] eKLR*. Accordingly, the court is not inclined to grant the interim injunction as it has been overtaken by events.

**b.**

### **Whether a mandatory injunction should be issued to restore and reinstate the appellants into the demised premises**

14. The court has considered the material and submissions on record on this issue. The appellants are essentially seeking reinstatement into the demised premises pending the hearing and determination of the pending appeal. The court is alive to the fact that the demised premises were let out to new tenants by the respondent on November 27, 2022. The court cannot ignore their presence since the lease agreements they signed with the respondent have been brought to the attention of the court. It is also pertinent to note that the appellants have not taken any steps to join the new tenants as parties to the appeal. In the premises, the court is not inclined to order reinstatement of the appellants into the premises they formerly occupied since the premises are no longer available. The court is also not inclined to order their reinstatement since such order would affect the rights of the new tenants who are not parties to the instant appeal. Any order made adversely affecting the new tenants would be a violation of the rules of natural justice.

**c.**

### **Whether an order for stay of execution of the tribunal's orders made on April 12, 2022 and all consequential orders should be granted**

15. It is common ground that by the ex parte judgment dated April 12, 2022 the tribunal ordered the appellants to vacate the demised premises within 30 days in default of which they were to be evicted upon expiry of the period. It is common ground that the appellants did not vacate the demised premises



within 30 days or at all in consequence whereof they were forcibly evicted on October 26, 2022. The court is of the opinion that orders of the tribunal having been fully executed to the point of eviction there is really nothing to be stayed. Perhaps, the only reprieve the appellant could have obtained was an order for reinstatement on interim basis. However, that order is not available to the appellants for reasons already stated hereinbefore.

#### **H. Conclusion and disposal order**

16. The upshot of the foregoing is that the court is not satisfied that the appellants have made out a case for the grant of any of the interim orders sought. Accordingly, the appellants' notice of motion dated October 27, 2022 is hereby dismissed in its entirety with costs to the respondent.

Orders accordingly.

**Ruling dated and signed at Nyahururu this 15<sup>th</sup> day of December, 2022** and delivered via Microsoft Teams platform.

In the presence of:

Mr Waichungo for the Appellants

Ms Kimani holding brief for Mr Mathea for the Respondent

C/A - Carol

.....

**YM ANGIMA**

**JUDGE**

