Mambao v Sulum (Civil Appeal 13 of 2022)
[2022] KEELC 15464 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15464 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL 13 OF 2022

LL NAIKUNI, J

DECEMBER 9, 2022

BETWEEN

JOSHUA KALUNGE MAMBAO ..... APPLICANT

AND

SWALEH ABDUN SULUM ..... RESPONDENT

(Tribunal case number 160 of 2020 (Mombasa))

RULING

I. Introduction

1. The Appellant/Applicant herein, - Mr Joshua Kalunge Mambao moved the Honorable Court by filing a Notice of Motion application dated April 25, 2022 for its determination. The Application was brought under the provision of Order 51 Rules 1 and 2 and Order 46 Rule 6 (6) of the *Civil Procedure Rules, 2010* of the Laws of Kenya and all the enabling provisions of the law.

II. The Appellant/Applicant's case

2. The Appellant/Applicant sought for the following order:

    a. Spent;

    b. Thatthe Court be pleased to grant a stay of execution of the Chairman of the Business Premises Tribunal Ruling dated March 15, 2022 terminating the appellants tenancy on Plot Number Msa/block/XVII/116 and ordering vacant possession within 90 days.

    c. Thatthe Respondent be restrained by an order of injunction from evicting or in anyway interfering with the Appellant tenancy on plot number Msa/block/XVII/116 pending the hearing and determination of the appeal herein.

d. Thatprayers 2 & 3 be granted in the interim.

3. The application is premised on the grounds, the testimonial facts and averments made out under the fourteen (14) Paragraphed Supporting of Affidavit of Mr Joshua Kalunge Mambao,the Appellant and Tenant herein sworn and dated on April 25, 2022 together with seven (7) annexures marked as "JKM – 1 to 7" annexed hereto. Being in support of the application, the Deponent averred as follows:-

   a. On March 15, 2022 the Business Premises & Rent Tribunal (hereinafter referred to as "The Tribunal") gave a ruling terminating his tenancy on Plot No Msa/block/XVII/116 whereby he carried out a business of a hotel as evidenced by the annexure marked as "JKM - 1 & 2" herein being a copy of the said Ruling and the Court Order respectively.

   b. The tribunal gave him ninety (90) days to vacate and give up vacant possession of the business premises.

   c. Being aggrieved by the decision of the tribunal and that was the reason he preferred this appeal before this Honorable Court.

   d. The Notice of Termination was opposed inter- alia on the grounds that when it was issued there had been a pending reference being Tribunal Case No 8 of 2020.

   e. Under the provision of Section 9 of the *Landlord And Tenant (Shops, Hotels And Catering Establishments) Act* , cap 301 a Landlord was barred by law from issuing a Notice before the expiry of twelve (12) months after the tribunal had issued a determination of a previous notice. In the instant case, the tribunal had made a decision in the Tribunal case on 5th March, 2020 which was annexed and marked as "JKM – 3".

   f. The determination by the tribunal on March 5, 2020 was on two notices issued by the Landlord on 5th September, 2019 and September 12, 2019 which were annexed and marked as "JKM – 4" & "JKM – 5" respectively.

   g. The decision of the tribunal in Tribunal Case No 8 of 2020 rendered on March 5, 2020 granted leave to the Landlord to issue fresh notice. However, by this time the Landlord had already issued a Notice on March 2, 2020 clearly way before the leave of Court was granted.

4. He deposed that the preferred appeal herein has merit. He prayed for a stay of execution by way of restraining the Respondent from evicting him. He averred that if the stay of execution order was not granted he would suffer irreparably since the business premises herein was and had been the source of the livelihood of over twenty (20) workers and himself too.

5. He informed Court that the Landlord/Respondent had since the year 2019 used all unlawful means to try and evict him from the premises but in vain as they would later on be found to be unlawful and quashed by the Court. The eviction and order of reinstatement were annexed and marked as "JKM - 6 & "JKM – 7" respectively.

III. The Replying Affidavit by the Respondent.

6. On June 21, 2022, while opposing the application, the Respondent filed an eleven (11) Paragraphed Replying Affidavit sworn and dated on May 31, 2022 by Swaleh Abdun Sulum where he deposed "inter alia" that:

   a. He was the Respondent in this Appeal and the Landlord hence well versed in the matter.

   b. The Tribunal rendered a ruling in his favour on the March 15, 2022.

c. The application for stay of execution of the said ruling to issue, the Applicant must satisfy the provisions of Order 42 Rule 6 (2) of the *Civil Procedure Rules, 2010* and which was lacking in the Instant Application.

d. The Applicant had not demonstrated to the Court that substantial loss would occur if no stay was granted as no evidence of substantial loss had been tendered in the application.

e. The Application as made and presented before Court was therefore defective in law and ought to be struck out.

f. The application as made did not satisfy the requirement for the prayers sought.

7. The Respondent herein deposed that should the Applicant be granted the prayers, there would be substantial injustice on his part as he would be kept from enjoying the fruits of a valid Judgment and invariably for a long period. He contended that the provision of Order 42 Rule 6(2) also provided that the Applicant should be ready to offer such security for Costs as the Court may order for the due performance of any decree or order that may ultimately become binding on him.

8. He opined that granting the stay of execution would mean denying him, the successful litigant, the fruits of the ruling. Therefore in the interest of justice, he urged Court to have the application dated April 25, 2022 be dismissed with costs.

IV. Submissions

9. On May 10, 2022 upon all the parties appearing before the Honorable Court, it directed that the said Notice of Motion application dated April 25, 2022 be disposed off by way of written submission. It provided proper and stringent timelines to that effect. Pursuant to that on June 21, 2022 all parties fully complied and a ruling date was set down on notice.

A. The Written Submissions by the Appellant/Applicant

10. On June 15, 2022 the advocate for the Appellant/Applicant the Law Firm of Messrs. B. W. Kenzi & Company Advocates filed their written submissions. He submitted that the background of the case on March 2, 2020 the Respondent gave notice to terminate the Appellants tenancy on Plot number Msa/block/XVII/116 whereby the Appellant runs the business of a hotel. He has been a tenant of the Respondent for over 30 years. The reasons for the termination was that the Landlord would wish to occupy the premises himself. The notice was opposed for the reasons that the Landlord could not issue a fresh notice before expiry of 12 months after determination on a previous notice. The landlord had alternative premises in the same building which he could occupy. The previous reference No 8 of 2020 had given the landlord the liberty to issue fresh notice on March 5, 2020 yet the landlord had already issued the Notice on March 2, 2020.

11. The Learned Counsel submitted that on March 15, 2020 the Chairman of the Tribunal issued the following order in Tribunal case number 160 of 2020 (Mombasa) that notice to terminate took effect on June 3, 2020, and the tenant is therefore ordered to handover vacant possession of the suit at the expiry of ninety days from the date thereof and the reference by the Landlord succeeds with costs. This is the ruling which has aggrieved the Appellant and has already filed the Appeal herein together with the Record of the proceeding and urge the court to grant orders of stay as prayed.

12. The Learned counsel submitted that the application had been made without unreasonable delay. The ruling of the tribunal was read on March 15, 2022. The Application herein was made on April 25,

2022. The Applicant took time because he was following up on the certified proceedings and ruling from Nairobi. The Appellant also had a stay for 90 days. The period in their submission not inordinate.

13. The Learned Counsel submitted that he has a good appeal in that the Appellant is laying the relevance of the law. The Respondent issued a termination notice while there was a pending reference before the Tribunal being Tribunal Case No 8 of 2020. Section 9 of the Cap 301 *Landlord & Tenant (Shops, Hotels and Catering Establishments) Act* is very express that a Landlord cannot issue a Notice before expiry of 12 months after the tribunal had issued a determination of a previous notice. In tribunal case number 8 of 2020 the Tribunal issued the following orders on March 5, 2020:-

    1. "That the Tenant application dated January 13, 2020 is allowed in terms of prayer 3 of the Notice of Motion that is to say.

        a. The Landlord is restrained from evicting the tenant from the business premises on Plot Number Msa/block/XVII/116.

    2. That the Tenant shall deposit rent in this Tribunal if the Landlord does not accept the same within Thirty(30) days from the date of this ruling.

    3. That the Landlord shall pay costs assessed at Kshs 50,000/-.

    4. That the tenant shall deduct the costs from the rent due to the landlord.

    5. That the Landlord is at liberty to serve the Tenant with a Notice in the prescribed forms if he wishes to terminate the tenancy.

14. The Learned Counsel submitted that notice cannot take retrospective effect in that it is clear the order of March 5, 2020 the tribunal gave the Landlord liberty to issue a fresh notice. However, the landlord had already done so 2 days earlier in March 2, 2020. The Order of the tribunal could not take retrospective effect. It is in view of the above points inter alia he submitted that the Appellant has a good appeal on merit. He also invited the court to look at their memorandum of appeal which he have already filed.

15. The Learned Counsel submitted that the Appellant is to suffer substantial loss because he runs a hotel. It is at the busy Mwembe Tayari area of Mombasa. It is his source of livelihood and that of over 20 workers working in the hotel. If evicted he will suffer substantially. Even if he is evicted and the Appeal succeeds he would have lost goodwill, clients and shall be difficult to restart his business again. The Appellant has come to Court with clean hands since he is not in rent arrears or in breach of any tenancy agreement and the Respondent just wants him out so as to occupy the space himself.

16. The Learned Counsel submitted that that he wished to be granted prayers numbers 2 and 3. He referred to the provision of Order 42 Rule 6(6) which gives the Court discretion to grant, a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal for a subordinate court or Tribunal has been complied with. The Applicant is ready to abide by any order of the court as to security. The principles guiding grant of 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: -

    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 biding on him has been given by the Applicant.

17. The Learned Counsel submitted that the court have held that in light of the overriding objective stipulated by Sections 1A & 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. He relied on the case of:- '*Vishram Ravji Halai v Thornton & Turpin* Civil Application No NAI 15 of 1990 (1990) KLR the Court held: -

> " To the foregoing I would add that the stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in section 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

It further stated

> "it is therefore important that the court takes into consideration the likely effect of granting the stay on the proceeding in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome."

18. The Learned Counsel also relied on the case of "*Samvir Trustee Limited v Guardian Bank Limited* (Nairobi) Milimani HCCC No 795 of 1997 Warsame J as he then was stated as follows:-

> " The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner, but the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgment."

19. The Learned Counsel also cited the ratio from the case of:- "*Kenya Shell Limited v Kibiru* (1986) KLR 410 expressed himself thus:-

> " Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay"

20. The Learned Counsel concluded their submissions by stating that the Applicant had shown that he would suffer substantial loss and justice in the circumstances would be done by granting him stay. He was a sitting tenant in a Business Premise running a hotel. It was his source of livelihood and that of his workers. He had built a goodwill overtime. If evicted he would lose all the foregoing. If he was evicted and succeeded in the appeal he could not recoup his goodwill, clients and his life shall be already in shatters.

B. The Written Submissions by the Respondent

21. On June 29, 2022, the Advocates for the Respondent herein, the Law Firm of Messrs. Mwenda Kaumbuthu & Company Advocates filed their written submissions dated May 25, 2022. M/s. Mwikali holding brief for Mr Mwenda Advocate submitted that the Applicant herein filed an appeal against the decision if the Business Premises Rent Tribunal tendered on the March 15, 2022 terminating the Appellant's tenancy on Plot Number Msa/block/XVII/116. On April 26, 2022, the Applicant obtained "ex – parte" orders to maintain status quo pending the hearing and determination of

the instant application. The Application has been opposed vide a Replying Affidavit sworn by the Respondent dated 31st May, 2022.

22. The Learned Counsel submitted that the Applicant's position was that the Applicant posited that the Respondent could move to evict the Applicant from the suit property at any time owing to the ruling and should therefore obtain a stay of execution/injunction pending hearing of the application and the appeal while the Respondent's position in his replying affidavit contends that the Applicant has not met the requirements for granting of stay of execution as provided by the Civil Procedure Rules, and therefore the Application is fatally defective.

23. The Learned Counsel submitted that the Applicant had not met the conditions for stay of execution pending appeal as contained in Order 42 Rule 6 which provides as follows:-

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 biding on him has been given by the Applicant.

24. The Counsel submitted that the application had been made with unreasonable delay as the ruling of the Tribunal was delivered on March 15, 2022. The Applicant filed the Application on the April 25, 2022, well over a month from the decision, the delay was most unreasonable. The Applicant had not even attempted to explain the delay in the present application.

25. The Counsel on substantial loss submitted that the Applicant in his affidavit had not sought to demonstrate how not being in occupation of the Respondent's property would subject him to any hardship and or substantial loss. The tenant had not tendered any evidence to support the baseless allegations that the livelihoods of his employees would be affected. The tenant had also not tendered any evidence of the existence of any employees in said suit premises. The tenants in the case of:- "*Mary Muthoni v Kenya Nut Company Limited* (2016) eKLR", the court expressed itself as follows:

> " What constitutes substantial loss has been explained in several decisions by the High Court, Odunga J. held in Republic vs The Commissioner for investigations and Enforcement ex parte Wananchi Group Limited [2014] eKLR, and which I endorse, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit...it is therefore not sufficient to merely state that the decretal sum is a lot of money and the Applicant would suffer loss if the money is paid. In an application of this nature, the Applicant should show damages it would suffer if the order for stay is not granted....
>
> The Court has keenly perused the Respondent's supporting affidavit sworn by Jacqueline Chele and nowhere has the Deponent attempted to demonstrate the substantial loss it would be occasioned to were the application for stay of execution pending appeal be denied."

26. The Counsel submitted that the suit property belonged to the Respondent. The Respondent intended to improve the premises by his own use and thus moved to terminate the tenancy as provided by law and in conformity with the Landlord and Tenant Act by issuing a proper notice, a fact which was upheld by a court of competent jurisdiction that was Tribunal. It was actually the Respondent who stood to suffer substantial loss as he was being denied the use of his property. There had been no attempt by the Applicant to demonstrate substantial loss at all. This was glaringly evident in both the application and the supporting affidavit.

27. The Counsel on the issue of security for costs, submitted that the law enjoined an Applicant to offer security for appeal. None had been offered in this instant application by the Applicant. The Counsel referred to the case of "*Vision Housing Co - operative Limited v Wairimu Kinyanjui & another* [2015] eKLR Onyancha J. observed thus:-

> " On the security to be given, the Applicant has not stated what security they will furnish. The Applicant has only stated in their submissions that they are willing to abide by the terms and conditions that will be set by the court. Order 42 Rule 6 (2b) requires the Applicant to provide such security as may ultimately be binding upon him."

28. The Counsel submitted that the Applicant, therefore failed to meet this statutory requirement for the provision of a security as required by law. In the present application not only had the Applicant not offered any security, he had not even considered and or addressed the issue of security. The balance that needed to be struck by this Court was on the rights of the parties was to be premised on the material before the Court. The Counsel submitted that it had come out fairly well that the Applicant had fallen foul of the law. The statutory and equitable requirements for stay of execution had not been satisfied. The Court was enjoined to consider the proprietary interest and rights of the Respondent in a decree he now could not enjoy. It was their pleas that the application be dismissed and at the very least the Respondent ought to be allowed to reap the fruits of a successful litigation as it was clear that the Applicant was out to deny the Respondent the fruits of the ruling delivered in his favour.

V. Analysis and Determination

29. I have keenly considered all the pleadings , the issues raised and the written submissions, the case law and authorities cited by both parties, the relevant provisions of the *Constitution of Kenya, 2010* and the statute. In my view, in order to arrive at an informed, just, fair and reasonable decision, the Court has framed the following two (3) issues for its determination. These are: -

    a. Whether the Notice of Motion application dated 25th April, 2022 by the Appellant/Applicant herein has any merit.

    b. Who will bear the costs of this application.

Issue No a). Whether the Notice of Motion application dated 25th April, 2022 by the Appellant/ Applicant herein has any merit.

30. From the filed application, the Appellant/Applicant is basically seeking to be granted stay of execution against the Judgement of the BPRT delivered on March 15, 2022 terminating the tenancy agreement between the Appellant/Applicant and the Respondent over the suit premises. Being aggrieved by that decision, the Appellant/Applicant filed a Notice of appeal and a Memorandum of Appeal.

31. The laws that govern the granting of stay of execution pending appeal is provided for under the provision of Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. The Appellant/Applicant is required to satisfy the court that the intended appeal is arguable and that if the court does not grant the stay, the intended appeal will be rendered nugatory.

32. The application is brought pursuant to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules, 2010* which states 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, 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with."

33. It is trite that the provision of Order 42 Rule 6 of the *Civil Procedure Rules, 2010* specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. 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.

Further, it is also trite law and as evidenced by precedents that an application for stay of execution pending appeal requires that there be a positive requirement/or order that is capable of being stayed.

The Court of Appeal in the case of "*Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how discretion should be exercised as follows:

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, 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."

34. Further, in the case of:- "*Co - operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal (Kantai J.A) held as follows: -

> " ...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No13 of 1984) where it was stated:
>
> '..... an order for stay of execution must be intended to serve a purpose .....'

35. In the case of "*Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* eKLR, the learned judges stated the principles to consider whether to grant a stay of execution or not 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..."

36. Additionally, in the case of '*Stephen Wanjohi v Central Glass Industries Limited*, Nairobi HCC No6726 of 1991, the Court held that: -

> " For the court to order a stay of execution there must be: -
>
> i. Sufficient cause;

ii. Substantial loss;

iii. No unreasonable delay;

iv. Security and the grant of stay is discretionary".

37. The Appellant/Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application has been filed without unreasonable delay. The applicant must also show that he is willing to offer such security as may be ordered by the Court.

38. In the instant application, the Appellant/Applicant is apprehensive that the Respondent will commence execution of the order to their detriment, and should this happen the intended appeal will be rendered nugatory. In the case of "*JMM v PM* [2018] eKLR it was stated:

> " As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

39. On substantial loss the Appellant/Applicant argues that the Respondent being the Landlord had already issued a Notice on March 2, 2020 even before the leave of the court was granted. The Landlord has threatened to evict them. If that is allowed to happen it will defeat the very purpose of the intended appeal and render it nugatory as the Applicant will not be able to get his business, his clients and his income back if the Respondent evicts them and the appeal succeeds. In the case of "*National Industrial Credit Bank Limited v Aquinas Francis Wasike and another* (UR) CA 238/2005 stated: -

> "This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."

40. The cornerstone of the Court's jurisdiction under this Rule is substantial loss and the court must determine whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of:- "*Kenya Shell Kenya Limited v Kibiru & another* [1986] KLR 410 cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell* case are especially pertinent. These are that:

1. ". .....

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

41. The decision of Platt Ag JA, in the *Shell* case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules 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 repay the decretal sum plus costs in the two courts... (emphasis added)"

42. The Learned Judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money." (Emphasis added).

43. In his affidavit in support of the motion the Appellant/Applicant demonstrated that it stands to suffer substantial loss if his hotel business is closed down due to the eviction by the Respondent. He would loose his goodwill, his clients and his 20 workers will be out of employment. He will also loose his source of income will be lost.

44. On security for costs, the Respondent submitted that the Appellant/Applicant had not indicated to the court that amount they intend to give as security for their prayers to be granted. The Appellant/Applicant on the other hand submitted that he is willing to provide security for Cost being any amount to be prescribed or ordered by the Court only that he never stated the exact amount he was ready to surrender as security. The offer of Security for Costs by the Applicant is bona fides that the stay application is not a mere exercise to deny the Respondent the fruits of its Judgments. Therefore, the offer for Security for Costs fully satisfies a ground for stay of execution pending the hearing of appeal. This is as was held in the case of:- '*Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR.

45. It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this Court has the power to grant injunction only when exercising its appellate jurisdiction. In this instant case, the Court has not rendered its decision so I do not agree with the Respondent that this provision does not apply in this case. On that basis alone, I find that the court does have the jurisdiction to entertain the present application and grant the order of injunction and stay of execution sought by the Appellant/Applicant. This Court is exercising its appellate jurisdiction. The Appellant/Applicant has already filed a Notice of Appeal in this court which has not been decided upon.

46. Consequently, the prayer for stay of execution is hereby allowed but on condition that the Appellant/Applicant deposits a sum of Kenya Shillings Two Hundred Thousand (Kshs 200,000/-) in a joint interest earning account in the names of both advocates pending the hearing and determination of the appeal. Further, it is just fair and reasonable that the Appellant/Applicant settles all the outstanding rent arears and continues making the usual monthly rent as stipulated in the terms and conditions of the duly executed Tenancy Lease agreement. For good order, this Court should be furnished with properly and professionally prepared statements of accounts for the suit premises.

47. The time to file appeal is extended and the appeal to be heard within 180 days from today's date. The Appellant/Applicant to deposit the security for Costs in a joint escrow interest earning bank account in the names of both advocates within sixty (60) days from the date of the delivery of this ruling hereof. For these reasons the application succeeds.

Issue No b). Who will bear the costs of this application.

48. It is now well established that issues of Costs are at the discretion of the Honorable Court. Costs mean the award that is granted by Court at the conclusion of a legal action, proceedings or process of any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow the events. By events, it means the result or outcome of the legal action, process and/or proceedings of any litigation.

49. In this instant case, as Honorable Court finds that the Appellant/Applicant has succeeded in prosecuting his Notice of Motion application dated April 25, 2022, and thereby consequently is awarded the costs of the said application.

VI. Conclusion And Disposition

50. Conclusively, having conducted such an elaborate deliberation on the issues stated herein, the Honorable Court on the preponderance of probability wishes to proceed to make the following orders. Specifically, upon fulfilment of the pre – conditions stated herein, the Court directs as follows:-

    a. That the Notice of Motion application dated April 25, 2022 by the Appellant/Applicant has merit and thus be and is hereby allowed with costs.

    b. That an order be and is hereby made directing the Appellant/Applicant within the next sixty (60) days from the date of the delivery of this Ruling to deposit a sum of Kenya Shillings Two Hundred Thousand (Kshs 200,000.00) as security for Costs into the joint escrow bank account of both the Law firms of Messrs BW Kenzi & Company Advocates and Messrs Mwenda Kaumbuthu & Company Advocates to be held pending the hearing and final determination of the appeal.

    c. That an order made that in the meantime, the Appellant/Applicant to fully settle any outstanding rental dues in reasonable monthly instalments payable directly to the Respondent and continue remitting the monthly rent in accordance with the terms and conditions stipulated in the Tenancy Lease Agreement duly executed by parties herein. For the sake of good order, this Court to be furnished with proper and professionally prepared statement of accounts for the business premises covering all these tenancy period to form part of the empirical evidence to be adduced during the hearing of the appeal.

    d. That the Appellant/Applicant herein be and is hereby granted fourty five (45) days leave from this date hereof to have prepared, compiled, filed and served the Records of appeal accordingly.

e. That for expediency sake this Appeal to be heard and disposed off within the next One Hundred and Eighty (180) days from the date of this ruling. There shall be a mention on March 2, 2023 for purposes of taking directions under the provision of Section 79B and G of the *Civil Procedure Act*, 2010 and Order 42 Rules 11, 16 and 18 of the *Civil Procedure Rules, 2010*.

f. That in the meantime, the Executive Officer of the Business Premises and Rent Tribunal, Mombasa be and is hereby directed to ensure the Lower BPRT Court file is placed before this Court on or before the February 15, 2023 for its further and ease of reference without fail.

g. That the costs of the application to be borne by the Respondent herein.

51. **IT IS SO ORDERED ACORDINGLY.**

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF DECEMBER,2022.

HON. Mr JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:

a. M/s. Yumna, the Court Assistant.

b. M/s. Omboga Advocate holding brief for Mr B. W Kenzi Advocate for the Appellant/Applicant.

c. M/s. Thiaka Advocate holding brief for Mr Kambuthu for the Respondents.