



REPUBLIC OF KENYA



**Amunabi & another v Demba (Environment and Land Appeal  
E028 of 2021) [2022] KEELC 15294 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15294 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E028 OF 2021  
FM NJOROGE, J  
DECEMBER 8, 2022**

**BETWEEN**

**GOODY RUHU AMUNABI ..... 1<sup>ST</sup> APPELLANT**

**GRACE VINCENT OPONDO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DOROTHY DEMBA ..... RESPONDENT**

*(BPRT in Nakuru BPRT case number 146 of 2020 delivered on December 2, 2021)*

**RULING**

**Application**

1. The appellant moved the court through notice of motion dated December 16, 2021 brought under rule 13 of the [Practice Directions on ELC Proceedings](#), Tenant (shops, hotels and catering establishments) and order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#), cap 21 seeking the following orders:
  1. ...spent
  2. ...spent\*
  3. That this honourable court be pleased to grant a stay of execution of the honourable vice chairman's ruling and all consequential orders given on December 2, 2021 pending the hearing and determination of the appeal already filed.
  4. That costs of this application be provided for.
2. The application is supported by the affidavit sworn on December 16, 2021 by Goody Ruhu Amunabi where she deposed that there exists a ruling by the vice chairman in Business Premises and Rent Tribunal; that the said ruling ordered that the appellants herein vacate the suit property within 60 days from the delivery of the said ruling; that further, the landlady filed an application for eviction of the



appellant with an alleged notice from the Public Health Department; that pursuant to that application, the vice chairman without hearing the applications by the appellants proceeded to issue an order of eviction; that the said order is prejudicial to the appellants as they have made various developments on the suit premises; that they have preferred an appeal against the said ruling and if the application is not allowed and the appellants evicted, the appeal will be rendered nugatory.

## Response

3. The respondent filed a replying affidavit on January 10, 2022 where she deposed that the current application and the intended appeal are a waste of time as they do not disclose any triable issue as the tribunal had disposed of both applications.
4. She further deposed that the actions by the appellants to file the reference is an act in bad faith as opposed to pursuit of justice; that the intention is to use the court to forestall any action by the respondent to realize the fruits of her investment in the property.
5. She further deposed that the court must stop the appellant from abusing and misusing the court process to frustrate the respondent; that the statutory notice must be complied with and thus the order of eviction must be allowed to stand; that the ruling by the vice chairman took into account all the prevailing circumstances and made a just and reasonable finding.
6. She deposed that the memorandum of appeal on record raises similar issues that were before the tribunal and to which the court made a finding hence the memorandum is fatally defective and ought to be dismissed.
7. The respondent finally deposed that the appellants' application lacks merit, amounts to an abuse of court process and ought to be dismissed with costs.

## Submissions

8. The applicants filed their submissions on September 15, 2022 where they identified three issues for determination. One, whether the applicants shall suffer substantial loss if the order is not granted. They relied on the case of *Mukuma v Abuoga (1988) KLR* and submit that they have been operating in the premises for more than 8 and 5 years respectively and that it serves as their place of business and source of income. They submit that the execution of the orders would force them to shut down their business which eventuality would result in substantial loss.
9. Second issue is whether the application has been made without unreasonable delay. They cited the case of *Joel Kazungu Yaa Mangi v Director of Land Adjudication & Settlement & 3 Others [2021]* and submit that the ruling was delivered on December 2, 2021 while the present application filed on December 16, 2021 hence without any delay.
10. On the final issue of security, the applicants relied on the case of *Butt v Rent Restriction Tribunal (1979)* and submit that they are ready to abide by any conditions the court orders; that the court should consider the losses already suffered due to the respondent's refusal to pay the electricity bill.
11. The respondent filed her submissions on October 13, 2022 and identified the three issues as raised by the applicants. On the first issue, she relies on the case of *Kenya Shell Ltd v Kibiru & Another [1986] KLR 410* and submits that the applicants have not proved what substantial loss they stand to suffer and adds that the present application deprives the respondent the fruits of her judgment.
12. On the second issue, the respondent cited the case of *Jaber Mohsen Ali & Another v Priscillah Boit & Another E&L No 200 of 2012 [2014] eKLR* and submits that the applicants approached the court



after unreasonable delay which they cannot account for, that the 13 days delay is unreasonable and this court should therefore exercise its discretion to dismiss the application.

13. On the final issue, she submits that the applicants should deposit costs in the matter without any conditions. She further submits that they have not furnished any security to the court. In conclusion, she submits that the court should dismiss the applicants' application as its main aim is to delay justice.

### **Analysis and Determination**

14. It is my considered opinion that what arises for determination is whether the appellant has met the threshold for grant of stay of execution of the vice chairman's ruling given on December 2, 2021.
15. The order of setting aside can only be available when an appeal is lodged, argued and if it is successful, then the court can set aside such order. In the present application, the applicants being aggrieved by the ruling by the vice chairman of the Business Premises Rent Tribunal (BPRT) in Nakuru filed the present application as well as an appeal. The decision on whether or not to grant stay of execution is discretionary and this court has powers to stay execution pending an appeal. This jurisdiction is derived from of order 42 rule 6 (1) of the [Civil Procedure Rules](#).
16. It is trite that stay of execution is issued to balance claims of the parties in the long run. This was the position in the case of *Consolidated Marine v Nampijja & Another, Civil Application No 93 of 1989*, where the court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
17. It is evident that the applicants did lodge an appeal against the ruling of the vice chairman of the BPRT in Nakuru BPRT case number 146 of 2020 delivered on December 2, 2021. It is also evident that the tribunal had issued an eviction order against the applicants herein which is the subject of the instant appeal. If the said application is allowed and the vice chairman's orders for eviction is executed, then the applicants would be evicted from the suit property before the appeal is heard and determined. The said eviction would render their appeal nugatory.
18. In the case of [The Director of Pension v Abdul Majid Cockar, Civil Appl No 66 of 1999](#), the Court of appeal observed as follows:

“In an application for stay of execution pending appeal, it must be shown that both the appeal is arguable and that if successful, the appeal will be rendered nugatory unless there is a stay of execution”.
19. In the present case, the appellants have filed an appeal which I find arguable and if the execution of the BPRT vice chairman's order is not stayed and the appellants are successful in the appeal, then the said appeal would be rendered nugatory as they would have been evicted from the suit property and the suit property would even have been alienated and/or disposed of by the respondent.
20. Consequently, this court finds that the application dated December 16, 2021 has merit. The said application is allowed and costs shall abide the outcome of the appeal.
21. Further, the court directs the parties to prepare the appeal for hearing within the next 45 days and set it down for hearing expeditiously.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8<sup>TH</sup> DAY  
OF DECEMBER, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

