



REPUBLIC OF KENYA



**KENYA LAW**  
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**Hassan v Hussein (Environment and Land Appeal E114 of 2022)  
[2022] KEELC 15288 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15288 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E114 OF 2022  
MD MWANGI, J  
DECEMBER 7, 2022**

**BETWEEN**

**AL-SAWAE MOHAMMED ABDULQADER A HASSAN ..... APPELLANT**

**AND**

**SALEH AIDHA HUSSEIN ..... RESPONDENT**

*(Being an appeal against the Orders of the Honourable Vice Chairperson of  
the Business Premises Rent Tribunal in Nairobi BPRT Case No. 859 of 2020)*

**RULING**

**Background**

1. The application before me for determination is the notice of motion application dated November 17, 2022. The applicant in the application brought it *inter alia* under the provisions of sections 1A, 1B, 3A and 79G of the [Civil Procedure Act](#) and order 42 rule 1 and 6 of the [Civil Procedure Rules](#). He prays for orders, that: -
  - i. Spent
  - ii. The honourable court be pleased to issue an order staying the execution of the orders of the tribunal pending the hearing and determination of this application and the appeal herein. For avoidance of doubt, the stay to deter the 1<sup>st</sup> respondent whether by himself or any other person acting in his name from entering into or otherwise interfering with the appellant's quiet possession of Sawa Towers formerly known as Al-Haqq plaza on LR No 36/VII/451, Eastleigh Nairobi.
  - iii. The OCS Eastleigh Police Station to assist in the enforcement of the orders of the court.
  - iv. The honourable court be pleased to grant leave to the appellant to file its appeal out of time and the memorandum of appeal be deemed as properly on record.



- v. Costs of this application be provided for.
- vi. Any further order the honourable court may deem fit and just to issue in the circumstances.
2. The grounds upon which the application is premised are on the face of the application. The applicant is the registered owner of the suit property after purchasing it from its previous owners, Bora Developers Ltd. The appellant avers that the respondent herein filed a reference in the Business Premises Rent Tribunal (BPRT) challenging a notice to vacate the applicant's premises on the allegation that he was a tenant of Bora Developers Ltd, the previous owner of the suit premises.
3. The applicant avers that while the BPRT case was going on, this court in another case, ELC E211 of 2020 – *Abdifatab Mohammed Abdi v Al-Sawae Abdulqader A Hassan*, made a finding that there was no existing tenancy relationship between the tenants of the former landlord with the applicant herein. He urged this court to adopt the finding in the ELCC E211 of 2020, arguing that the facts are similar to the facts of this case.
4. The application was further supported by the affidavit of the applicant sworn on November 17, 2022. The deponent essentially reiterates the grounds on the face of the application.
5. The application was set down for hearing inter partes on December 6, 2022. The respondent did not appear despite having been served with the application. The advocate for the applicant urged the court to grant the prayers sought as the application was unopposed.

#### **Analysis and Determination.**

6. Although this matter is referenced to as ELC Civil Appeal No E114/2022, there is actually no appeal filed by the applicant. Indeed, one of the prayers by the applicant herein is for leave to file an appeal out of time and that the memorandum of appeal be deemed as properly on record. No draft memorandum of appeal has been attached to the application though.
7. It was misleading for the court registry to reference this matter as an appeal. It should have been opened as a miscellaneous application.
8. An appeal to this court is by way of a memorandum of appeal. Before a memorandum is filed, there is no competent appeal before the court. There would therefore be no basis whatsoever to grant an order for stay of execution pending appeal as sought by the applicant in this matter.
9. The applicant should have first and foremost sought leave of the court to file his intended appeal by way of a miscellaneous application before seeking the other orders. The applicant, metaphorically speaking, literally put the 'cart before the horse'.
10. Consequently, I find the application incompetent and hereby strike it out with no orders as to costs.  
It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2022.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms Arunga holding brief for Madowo for the appellant/applicant.

No appearance for the respondent.



Court Assistant – Hilda/Yvette.

**M.D. MWANGI**

**JUDGE**

