



Kiogi & another v Diocese of Meru Trustees Registered (Environment and Land Appeal E034 of 2022) [2022] KEELC 15309 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E034 OF 2022**

CK NZILI, J

DECEMBER 7, 2022

BETWEEN

DENNIS KIMATHI KIOGI 1ST APPLICANT

SIMON MAINA MUNENE 2ND APPLICANT

AND

DIOCESE OF MERU TRUSTEES REGISTERED RESPONDENT

RULING

1. The court is asked to grant the applicants leave to appeal out of time and also issue a temporary injunction barring and restraining the defendants from interfering whether by eviction or threats with the applicants quiet and uninterrupted possession of the suit premises. Thirdly, the court is urged to stay the lower court suit pending the hearing and determination of the intended appeal.
2. The reasons given are contained on the face of the application and in the supporting affidavit of Dennis Kimathi Kiogi sworn on 29.9.2022. The applicants have averred that the trial court dismissed their application for temporary injunction. That the respondents have filed a notice for inter-alia an order for eviction of the applicants together with their tenants and demolition of any structures or establishments on the suit land, estimated at Kshs.18,200,000/= which will render the tenants run out of business. That the tenants and subtenants have obtained orders from the Business Premises Rent Tribunal.
3. The application was opposed through a replying affidavit sworn by Patrick Micheni Kaaria, the curator or moderator and in-charge legal office of the respondent sworn on 11.10.2022.
4. It was averred that the applicants have no legal, equitable, beneficial and or any proprietary interest over the suit property since the lease expired on 30.11.2021. That the application is brought too late in the day even after the applicants were ordered to make a formal application in the lower court on 20.7.2022 and later on 15.8.2022, 7.9.2022 and 22.9.2022, when the matter came up in court. That the applicants



failed to make the said application before the trial court and have not satisfied the requirements so as to merit the two prayers in view of their past conduct and indolence. That if the orders sought are granted, the respondent would be prejudiced for the applicants will continue to unjustly enrich themselves without any justifiable reason and in total violation of the respondent's rights to property. That the delay has not been satisfactorily addressed and that the applicants have no arguable appeal given the facts in this matter especially the lease agreement which expired with no request for renewal; its terms were that upon expiry the applicants to clear their developments and grant vacant possession; that the subtenants were taken through misrepresentation as if the applicants were the true owners and despite the limited and already extinguished interest in the property; that since November 2021 no rent has been paid; that a formal notice in line with *Land Act* 2012 was issued as per the notice attached as (PMK "3"); the applicants had during the pendency of the lease filed at Meru ELC No. E045 of 2022 as per annexure PMK "4" for breach of contract. That the trial court was right in dismissing the application since the applicants had failed to satisfy the requirements for the grant of a temporary injunction. That the applicants have resorted to using the judicial process to frustrate any efforts by the respondent to regain its property through endless and frivolous litigation. That no documents have been served from the Business Premises Rent Tribunal as alleged and if any were filed, the same were dismissed on 1.9.2022 and are now subjudice. That the application for stay is a veiled attempt to thwart the hearing and determination of the application for eviction which has been pending for long.

5. The issues for my determination are whether the applicants have made a case for the grant of the prayers sought. On the jurisdiction and the guiding principles to grant injunction pending appeal, the court in *Patricia Njeri & 3 others vs National Museum of Kenya (2004)* eKLR, said a party must demonstrate an arguable appeal raising serious issues requiring the courts determination.
6. In *Madhupaper International Ltd vs Kerr (1985)* eKLR the court said an applicant has not only to show that he has an arguable appeal but must also show that if the injunctive orders are not granted, the appeal will be rendered nugatory.
7. Order 42 Rule 6 (6) *Civil Procedure Rules* provides that a High Court has powers to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal has been complied with.
8. On the aspect of stay of proceedings, the court in *David Morton Silverstein vs Atsango Chesoni (2002)* eKLR, cited with approval *KCB Ltd vs Benjob Amalgamated Ltd & another (1998)* eKLR where it was held that it is not the law that a stay of proceedings cannot be granted but each case depends on its own facts.
9. In *Niazsons (K) Ltd vs China Road & Bridge Corp. (K) Ltd (2001)* eKLR, the court held that where an appeal has serious effects on the entire case so that if stay of proceedings is not granted, the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted.
10. A prayer for stay is an equitable relief. An applicant seeking for it must show that he filed for the same timeously ,in good faith and must disclose all facts. A party must also come to court with clean hands as held in *Port Florence Community Health care vs Crown Health Care Ltd (2022)* eKLR.
11. The respondent has stated the lower court file came up for mention thrice and the applicants took too long to apply for a formal stay even after they were directed to file a formal application until the application dated 1.9.2022 was eventually filed. The applicants have not given an explanation why they took over two months to file a request of the typed proceedings.
12. The application dated 1.9.2022 is yet to be heard and determined. The suit is also yet to be heard.



13. The ruling sought to be appealed against was delivered on 20.7.2022 whereas this application was filed on 30.9.2022. The delay of over two months is said to have been occasioned by the registry who took more time to supply the typed ruling despite letters seeking for the same. The applicants averred that they needed the ruling so as to frame the draft memorandum of appeal.
14. The request for proceedings and ruling was made on 27.7.2022. Courts have held that a delay of even one day can be inordinate depending on the circumstances of each case. See [*Vincent Amolo Ambani t/ a Fast Track Investments vs National Bank of Kenya Ltd \(2021\)*](#) eKLR.
15. In this matter, the delay is of over two months and 7 days. There is no indication of any follow up letters for the proceedings and the ruling. The date when the same were ready and collected has not been indicated. Therefore, I find the explanation for the delay not convincing at all.
16. As regards the issue of temporary injunction and the appeal being arguable, the applicants have failed to attach a copy of the ruling which they wish to challenge at the hearing. Visram J as he then was in Patricia Njeri (*supra*) held that the discretion has to be exercised judicially and not in a whimsical or arbitrary fashion guided by certain principles such as if the appeal is not frivolous, it has a reasonable argument in support of it and that the discretion should be refused where it would inflict greater hardship than it would avoid and that the court should be guided by *Giella vs Cassman Brown & Co. Ltd (1973)* E.A 358.
17. There is no pending appeal as required under Order 42 (6) (6) [*Civil Procedures Rules*](#).
18. The respondent has said that the lease expired in November 2021 and to date no rent has been paid by the applicants. The applicants also admit that they have sublet the premises without the consent of the head lessor and even when they knew the lease had expired.
19. The applicants have not denied or demonstrated that notwithstanding the expiry of the lease, they have continued to pay rent which is a right to the owners of the suit properties. The respondents have pleaded that the applicants are engaged in a delaying tactic and continue to enjoy the premises without payment of the rent. Furthermore, the respondent stated that the applicants failed to seek for an extension of the lease.
20. Additionally, the applicants have not denied that they have received a statutory notice of eviction dated 24.5.2022 following whose expiry the respondent filed a notice of motion dated 1.9.2022.
21. To my mind, the said application is yet to be heard and determined. The applicant will have an opportunity to respond to it. To allow or deny an application for temporary injunction was within the discretion of the trial court.
22. This court has looked at the plaint dated 24.5.2022. It does not seek for any prayers for permanent injunction. The principle prayer is a declaration that the lease agreement dated 12.2.2015 is invalid and for general damages for the breach.

Summary

23. Consequently, my finding is that there is no pending appeal, the draft grounds of appeal do not disclose an arguable appeal; that to grant a temporary injunction or not was within the discretion of the trial court; that the suit and the application for the eviction is yet to be heard on merits.
24. Therefore, I find this application lacking merits and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT



THIS 7TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

Yegon for applicant

Mutua for respondents

HON. C.K. NZILI

ELC JUDGE

