



Jawanga Investments Limited v S. K Shah t/a Lewins; Adcom General Traders Limited (Interested Party) (Environment and Land Appeal E040 of 2024) [2025] KEELC 1155 (KLR) (11 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E040 OF 2024**

**JG KEMEL, J
MARCH 11, 2025**

BETWEEN

JAWANGA INVESTMENTS LIMITED APPELLANT

AND

S. K SHAH T/A LEWINS RESPONDENT

AND

ADCOM GENERAL TRADERS LIMITED INTERESTED PARTY

(In respect of the Appellant's Application dated 28/3/2024)

RULING

1. Before this Court for determination is the Appellant's motion dated 28/3/24 brought under the provisions of Section 1A,1B,3A,3B of the Civil Procedure Act, Cap. 21, Order 51, Order 40 Rule (1) (2) and Order 42 Rule 6 of the Civil Procedure Rules and Articles 40, 48 and 50 of the Constitution. The Appellant seeks substantively for orders that;
 - a. The Honourable Court be pleased to stay the proceedings of the Business Premises Rent Tribunal at Nairobi in the case of E906 of 2023 pending the hearing and determination of the appeal herein.
 - b. The Honourable Court be pleased to stay execution of the orders dated 01/03/2024 and/or any consequential orders from the business Premises and Rent Restriction Tribunal at Nairobi case E906 of 2023 pending the hearing and determination of this application.
 - c. In the alternative to (4) above, the Honourable Court be pleased to issue a temporary injunction restraining the Respondent by himself, his workers, servants, aids and or any other person from entering, accessing, dealing in any way or interfering with the business premises



known as Shop No. 3 Alishon House in LR 209/525/20 Latema Road pending hearing and determination of the appeal.

- d. The costs of this application be borne by the Respondents.
2. The application is based on the grounds on the face of it and further supported by the Affidavit of Charles Waweru, the Appellant's Director, deponed on even date. The Director avers that the Appellant was successfully issued with the orders dated 4/10/23 to have the Respondent vacate the business premises under the supervision of the Officer Commanding Police Station (OCS) Central Police Station, Nairobi which were lawfully enforced on the 10/11/23. That shortly after, the Appellant carried out a few renovations and issued the tenancy, possession and occupancy to a new tenant, the Interested Party herein. He avers that the Interested Party also carried out massive renovations after taking possession.
3. The deponent states that the Respondent despite having challenged the applicant's orders of eviction, the orders had already been executed as there were no stay orders hence issued a tenancy agreement to the Interested Party. He faults the court for determining the application before it without the Inspectors Report which the court had ordered for. That the Tribunal therefore lacked the jurisdiction to grant the orders sought as the tenant/respondent had been evicted from the premises.
4. He avers that it will be unfair, unjust and improper for the Appellant to return the Respondent's goods to the premises as directed in the Ruling of 29/2/24 as a new Tenant has possession and occupation of the said premises. That in the event the orders sought are not granted, the Appellant stands to suffer greatly and immensely. He prays that the orders sought be granted.

Respondent's Replying Affidavit

5. The Respondent opposed the application vide the Replying Affidavit of Mayur K. Shah sworn on 28/10/24. That on 10/11/23 the Appellant purported to evict the respondent. That the respondent was not served with the application and the said orders issued on 3/10/23 were set aside and the Tribunal directed the restoration of the respondent and its goods. The Respondent argues that the goods which were carted away by the Appellant were valued at Kshs. 10,000,000/= a fact confirmed by the Tribunal, the Appellant ought to have deposited or shown its willingness to deposit the sum of money as security as required in law.

Interested Party's Replying Affidavit

6. The Interested Party supported the application vide its Replying Affidavit sworn by Dennis Mugendi, its Director, sworn on 5/8/24. He avers that when he took occupation of the premises, it was vacant and that he has been paying the monthly rent without fail. He asserts that he has heavily invested on the suit premises. That he has never been issued with any order of eviction from the premises herein and believes that it is in legitimate occupation of the said premises after executing a Lease Agreement. He opines that the orders of restoration of the respondent and its goods to the premises will cause unnecessary confusion and likely breakdown of order. He therefore prays that the orders sought by the Appellant be granted.
7. The court, directed that the application be canvassed by way of written submissions. All parties complied and I have read and considered the submissions.

Appellant/ Applicant's submissions

8. The Appellant filed its submissions dated 25/11/24. It was submitted that this Court should first stay the proceedings in the Tribunal and dispense with the question of jurisdiction which is pertinent to



this matter. Further, the court was urged not to restore the Respondent and its goods in the premises as it would be unjust and inappropriate given that there is a new tenant in occupation.

9. The second issue for determination is whether or not the Tribunal acted ultra vires? The Appellant cites the case of *Republic v Business Premises Rent Tribunal & Another Ex parte Davies Motor Corporation Limited* [2013] EKL.R where it was held that;

“at the time the order was made, there was no controlled tenancy between the ex parte applicant and the Interested Party hence the Respondent had no jurisdiction to issue any order to regulate the conduct of the ex parte Applicant.”

10. Counsel for the applicant submitted that the Tribunal acted ultra vires in entertaining, hearing and issuing orders yet it lacked the jurisdiction to entertain the matter

Respondent’s submissions

11. The Respondent’s submissions are dated 28/10/24. The Respondent restates the facts of the case as stated in the respective pleadings filed herein. On jurisdiction, Counsel cites the provisions of Section 2 (1) and Section 12 of the Act and submits that it paid rent for the month of November, 2023. The said rent was received by the Appellant meaning that the Landlord- Tenant relationship still existed. Further the Respondent submits that although the appeal is unmerited, the Appellant ought to deposit the security for the orders sought.

Interested Party’s submissions

12. The Interested Party in its submissions dated 4/2/25 reiterates its contents in the pleadings and submits that since the time when the interested party herein took the occupation of the premises herein, they have been paying the monthly rent to the appellant without fail and furthermore, they have made huge investment in terms of the capital, renovations and other structural changes. The Interested party argues that it has never been issued with any eviction order from the premises subject matter herein, a clear indication that they have been in occupation of the same legitimately.

Analysis and Determination

13. I have considered the application, the reply as well as rival submissions. In my considered view, two issues arise for determination namely;
- a. Whether this court ought to grant stay of proceedings in the Tribunal pending hearing of this appeal, and;
 - b. Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.
 - c. Costs of the application.

a. Whether this court ought to grant stay of proceedings in the Tribunal pending hearing of this appeal

14. The law on stay of proceedings pending appeal is provided for in Section 6 of the *Civil Procedure Act* to the effect that where an issue is directly and substantially in issue in the proceedings between the same parties, another court ought to stay its proceedings in respect of such suit. Stay of proceedings is further alluded to under Order 42 Rule 6(1) of the Civil Procedure Rules.



15. In the case of *William Odhiambo Ramogi & 2 Others v The Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory Application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:
- a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an Application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an Application for stay of proceedings to inordinately delay trial, there is a policy in favour of Applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the Application for stay was filed expeditiously and without delay.
16. It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the Court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50 (1) of *the Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit.
17. It is also important to note that stay of proceedings orders are issued at the discretion of the Court save to say that the unfettered powers should be exercised judicially and not capriciously at the whim of the Court. The grant of an order for stay of proceedings is a discretionary judicial power which must be exercised judiciously and sparingly. The Court has to consider if it will be in the interest of justice to grant the same.
18. In the instant case, the Appellant states that it is in the interest of justice to grant a stay proceeding in the tribunal pending the hearing and determination of its appeal. The justification of the order is that the Tribunal lacked the jurisdiction to entertain the Respondent's case for lack of a Tenancy relationship. Further that the orders issued on 29/2/24 which directed the restoring the Respondents goods and



restored in the suit premises yet the said premises already have another tenant is unfair, unjust and likely cause confusion.

19. Jurisdiction is everything. It is a question of law; it either exists or not. It goes to the root of a matter before a Court of law and can be raised at any time by any party or a Court on its motion. In the event that it is established that the Court lacked jurisdiction then automatically the proceedings before it will be rendered null and void.
20. In my view, the facts and circumstances in this case justify the exercise of this Court's discretion in favour of the Appellant/ Applicant. The prayer for stay of proceedings pending appeal is well merited.
 - b. Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.
21. The power of the court to grant any order of temporary injunction is discretionary. Discretion must however be exercised judicially and not in a whimsical or arbitrary fashion. The exercise of that discretion should be guided by certain principles as follows: - a) The discretion will be exercised against an Applicant whose appeal is not frivolous. (b) The discretion should be refused where it would inflict greater hardship than it would avoid. c) The Applicant must show that to refuse the injunction would render his appeal nugatory. d) The court should be guided by the principles in *Giella v Cassman Brown & Company Ltd* [1973] EA 358.
22. It is important to note that this court is not expected to determine the matter in controversy in finality as that is the reserve of the trial court.
23. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] EKLK in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
24. In this case it is not in dispute that the appellant and the tenant enjoyed a landlord tenant relationship. On application by the appellant in the trial court, the court vide its orders of 4/10/23 ordered the respondent to vacate the premises. It is not in dispute that the said orders were executed on the 10/11/23. The applicant put the Interested Party into the occupation of the premises vide a tenancy agreement dated the 13/11/23.
25. The respondent avers that she was not served with the application and the orders of 4/10/23 and only alerted by the eviction on the 10/11/23. She also averred that she paid the rent for the month of November which rent was duly acknowledged and receipted by the appellant. Vide a motion dated the 14/11/23 filed by the respondent, the court set aside the orders of 4/10/23 and restored the respondent and its goods to the premises. The appellants Preliminary Objection dated the 28/11/23 was dismissed on the ground that the court found that there was a tenancy relationship between the appellant and the respondent.
26. Has the applicant demonstrated any prima facie case with a chance of success? The applicant has averred that he has already leased the premises to the Interested Party who is paying rent. That the orders issued on 29/2/24 were devoid of any legitimacy as the court was devoid of jurisdiction. I have perused the pending appeal and this issue takes centre stage in the controversy that the appellate court is expected to determine. It is argued that the Appellant has raised a prima facie case on the



basis that the tribunal lacked the jurisdiction to entertain the Respondents claim having vacated the premises. Jurisdiction is everything. A court without jurisdiction must down its tools. The Tribunal's jurisdiction is only exercised where there is a controlled tenancy. I am of the view that the Appellant/Applicant has made out a prima facie case. It has established that it has an arguable appeal.

27. As regards the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the court notes that the relationship of the parties herein was that of landlord and tenant relationship and if any harm is to be suffered it is such harm that can be quantified in monetary terms.
28. On the question as to which party in whose favour the balance of convenience tilts, I still find that the balance of convenience tilts in granting the granting the injunction rather than denying it but on terms.
29. The Respondent argued that in the event the court finds in favour of the Appellant, the Appellant should be compelled to pay security in the sum of Kshs. 10,000,000/= being the value of the goods carted away by the Appellant during the eviction. The Appellant did not make any suggestion as to the security for costs. The purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side and it is not to deter the Appellant from pursuing the Appeal.
30. Thus in the circumstances of this matter, I am satisfied that this would be a proper case for the court to exercise its discretion and order security for costs. Being cognizant that the Appellant has already leased out the premises to another party and is collecting a monthly rent of Kshs. 300,000/= as per the annexed Lease Agreement dated 13/11/2023, I in exercise of my discretion make an order for security of costs in the sum of Kshs. 1,500,000/-. (One Million Five Hundred Thousand only).
31. In view of the foregoing, I find that the Plaintiffs/ Applicants have met the criteria for grant of orders of temporary injunction.
32. The upshot is that:
 - a. There be a stay of proceedings of the Business Premises Rent Tribunal at Nairobi in the case of E906 of 2023 Road pending the hearing and determination of the appeal.
 - b. An order of temporary injunction is hereby issued restraining the Respondent by himself, his workers, servants, aids and or any other person from entering, accessing, dealing in any way or interfering with the business premises known as Shop No. 3 Alishon House in LR 209/525/20 Latema for the period of 180 days within which the appellant ought to have filed its Record of Appeal and prosecuted its appeal.
 - c. The Appellant do deposit the sum of Kshs. 1,500,000/- (One Million Five Hundred Thousand only)- into the court's account. The security deposit to be placed within a period of thirty (30) days from the date of this ruling.
 - d. Failure to adhere with orders (b) and (c) above, the Appellant's application dated 28/3/24 will automatically stand dismissed and execution of the orders granted on 29/2/24 by the Tribunal to be effected accordingly.
 - e. Costs of this application shall abide the appeal.
33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2025 VIA MICROSOFT TEAMS.



J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr. Mwaura for Appellant
2. No appearance for the Respondent
3. Mr. Njuguna for the Interested party
4. CA – Peggy Karago

