Kionga Investments Company & another v Kimani (Miscellaneous Civil Application E109 of 2023) [2024] KEELC 1143 (KLR) (4 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1143 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION E109 OF 2023

JA MOGENI, J

MARCH 4, 2024

BETWEEN

KIONGA INVESTMENTS COMPANY ..... 1ST APPELLANT

JANE NJOKI GICHURE ..... 2ND APPELLANT

AND

DERICK JAMES KIMANI ..... RESPONDENT

RULING

1. I have a Notice of Motion Application before me dated 3/11/2023 brought pursuant to the provisions of Section 1A, 1B, 3A & 79G of *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 42 & Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. The Applicants seek for the following orders:

    1. Spent.

    2. That the Honourable Court be pleased to grant the Applicant leave to file and serve a Memorandum of Appeal out of time against the Ruling in the Business Premises Rent Tribunal Case No. 986 of 2019 delivered on 12/11/2021 by Hon. Gakuhi Chege.

    3. That the Memorandum of Appeal filed and served by the Applicants against the Ruling of the Business Premises Rent Tribunal at Nairobi (Hon. Gakuhi Chege) delivered on 12/11/2021 be deemed to have been filed and served within time and this Honourable court be pleased to extend the duration for such filing and service accordingly.

    4. That there be a stay of execution of the Ruling and any consequential orders pending the hearing of this Application and the intended appeal

    5. Thatthe costs of this application be provided for.

2. The application is based on the grounds on the face of it and on the supporting affidavit of one Jane Njoki Gichure dated 3/11/2023, the 2nd Applicant/Appellant.

3. The Applicants case is that they sought to appeal a ruling from the Business Premises Rent Tribunal but filed the appeal in the High Court, resulting in its dismissal for lack of jurisdiction. They now seek to rectify this by applying to the Environment and Land Court for leave to appeal out of time. The 2nd Applicant/Appellant argues that the delay was due to their reliance on previous counsel, and they request the court's discretion to allow the appeal despite the statutory time limit having lapsed. They assert that the delay was not inordinate and that granting the application would serve justice without prejudicing the respondent. They believe the intended appeal raises significant legal and factual issues and express willingness to comply with any conditions set by the court.

4. Opposing the application, the Respondent through his Advocate Hiram Gachugi Nderitu, filed 8 grounds of opposition dated 16/02/2024 together with a Replying Affidavit sworn on 16/02/2024. The grounds were as follows:

    1. That the Appellants' Application dated 23/11/2023 is *res judicata* and offends Section 7 of the *Civil Procedure Act* which provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

    2. That the Applicants vide their Application dated 29/08/2022 filed in HCCA No. E056 of 2022 already sought and were granted leave to appeal and further were granted a Stay of Execution pending Appeal however they have not complied with the conditions for stay imposed by Justice Sergon in his Ruling dated 15/07/2022 and have further shown no good faith in their failure to deposit the Kshs. 500,000/- in a joint interest earning account as ordered by the Trial Judge in HCCA No. E056 of 2022 which renders the instant Application and Appeal *res judicata*.

    3. That the Applicants did not appeal or in any way challenge the Ruling by Justice Sergon dated 15/07/2022 and this Honourable Court cannot sit on appeal of the decision by Justice Sergon dated 15/07/2022.

    4. That this Application is thus a waste of judicial time and an abuse of the due process of law as this Honourable lacks the requisite jurisdiction to entertain the same and the successful Decree-Holder is now being vexed thrice and kept from the fruits of his judgement for no fault of his own while the Applicants despite being wealthy landlords and persons of means are only motivated by a need to frustrate and prejudice the Tenant/Respondent by holding onto his deposit and trading with it even after the Respondent vacated their premises way back in February of 2022.

    5. That this Honourable Court will not countenance any illegality and to the extent the Appellants/Applicants are merely seeking to re-litigate the same issues vide this present application, then this Honourable Court be obliged to strike out the Application with punitive costs against the vexatious litigants.

    6. That the judgment against the Appellants/Applicants is a money decree and it is trite law that that the security to be deposited should be in form of money as the purpose of security is to secure the interests of a Respondent pending the hearing of the Appeal but it is painfully

evident that the Appellants make no offer of security as a condition for stay pending Appeal and they are merely abusing the Court process for the second time.

7. That the Appellants' Application and indeed the entire Appeal is an afterthought, a device meant to frustrate, delay and derail the realization of the fruits of judgment by the Respondent noting that the Appellant's conduct in this matter has been deliberately indolent and dilatory as evidenced by: -

    a. The unexplained failure by the Appellants to file an Appeal within the prescribed time,

    b. The unexplained failure by the Appellants of their inordinate delay in filing the initial Application dated 11/02/2022 for Leave to File an Appeal out of time,

    c. The unexplained failure by the Appellants to deposit the decretal sum of Kshs. 500,000/- in a joint interest earning account as a condition for stay of execution ordered by the Trial Judge in HCCA No. E056 of 2022,

    d. The unexplained failure by the Appellants to file and serve a Record of Appeal to date, which is a delay of over Two (2) Years which is further exacerbated by the lack of a Certificate of Delay.

    e. The unexplained inordinate delay by the Appellants to apply for typed proceedings to date in Nairobi BPRT Case No. 986 of 2019 which is a delay of over Two (2) Years.

8. Thatthis Honourable Court being without the requisite jurisdiction to determine the present Application Notice of Motion Application dated 23/11/2023 be obliged to strike out the same with costs to the Respondent.

5. The Respondent's case is that had the personal conduct of this matter from its inception in the Business Premises Tribunal since its initiation in the Business Premises Tribunal, where the tenant filed a case against the landlords seeking the refund of a deposit. The Business Premises Tribunal ruled in favor of the tenant/Respondent, ordering the landlords/Appellants to refund the deposit. The landlords/Appellants sought leave to appeal and a stay of execution, but allegedly failed to comply with the conditions set by the court. The Respondent argues that the landlords' current application is an abuse of due process and a waste of judicial time, as the matter has already been decided by the court. Additionally, they claim that the landlords have not offered adequate security for the stay pending appeal and are merely attempting to delay the enforcement of the judgment.

6. The Court directed that the Application be canvassed by way of written submissions and by the time of writing this Ruling, it is only the Respondent who had duly submitted. The Respondent filed their submissions dated 16/02/2024 through the Law Firm of Hiram Christopher Advocates LLP.

Analysis And Determination

7. I have considered the Application, the rival affidavits, grounds of opposition and the Respondent's submissions supported by cited authorities. In my view, the issues for determination which arise from this application are whether this application is *res judicata*, whether leave can be granted to appeal out of time and whether the Applicants have made a case for the grant of an order for stay of execution.

Res judicata

8. On the first issue, the Respondent has pleaded that the Application is *res judicata* and offends Section 7 of the *Civil Procedure Act*. The Respondent argued that the Applicants vide their application dated 29/08/2022 filed in HCCA No. E056 of 2022 already sought and were granted leave to appeal and

further were granted a Stay of Execution pending Appeal however they have not complied with the conditions for stay imposed by Justice Sergon in his Ruling dated 15/07/2022 and have further shown no good faith in their failure to deposit the Kshs. 500,000/- in a joint interest earning account as ordered by the Trial Judge in HCCA No. E056 of 2022 which renders the instant Application and Appeal *res judicata*.

9. The issue of *res judicata* touches on the jurisdiction of this Court to try this application. Needless to say, jurisdiction is everything. Do we need to go through the entire motion of the Hearing of the Application and/or Appeal before determining whether this Court had jurisdiction in the first place? The Court does not have the luxury of that time.

10. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

11. The *Black's law Dictionary* 10th Edition defines "*res judicata*" as:

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

12. In the case of *Christopher Kenyariri vs Salama Beach* (2017) eKLR, the court clearly stated the ingredients to be satisfied when determining res judicata thus;

> " ...the following elements must be satisfied...in conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. Former suit between same parties or parties under whom they or any of them claim.
>
> c. Those parties are litigating under the same title
>
> d. The issue was heard and finally determined.
>
> e. The court was competent to try the subsequent suit in which the suit is raised."

13. In *E.T v Attorney General & Another* [2012] eKLR where it was held that:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because

he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

14. From the record, it is true that the Applicants herein filed an Application dated 29/08/2022 before the High Court in Nairobi HCCA No. E056 of 2022 wherein they sought for the inter alia orders seeking to deposit the original Title Deed Number Kieseges/Subukia West Block 3/804 (Simboyon) in court as security pending the hearing of the intended Appeal and for a stay of execution of the Ruling and any consequential orders delivered in BPRT Case No. 986 of 2019 on 12/11/2021 pending the hearing of this Application and intended appeal.

15. In that Application, the Appellants confirm that the High Court delivered a Ruling on 15/07/2022 granting an order of stay of the Ruling of the lower court for 45 days on condition that they deposit a security of Kshs. 500,000/- in a joint Advocate's account. They admitted that the 45 days had since lapsed and that they were unable to raise the said amount and instead sought to deposit a Title Deed instead as security. I also note that they contended to have filed a Memorandum of Appeal as ordered. It is my assumption that this had been ordered in the Ruling of 15/07/2022. The said ruling has however not been produced before this Court.

16. The Respondent argued that the Appellants were granted leave to appeal and further were granted a Stay of Execution pending Appeal and they have not complied with the conditions for stay imposed by Justice Sergon in his Ruling dated 15/07/2022 which renders the instant Application and Appeal res judicata.

17. The record shows that the Appeal filed in the High Court was struck out for lack of jurisdiction on 9/11/2023.

18. The concept of res judicata simply means that a court of competent jurisdiction has made findings in merit on issues between the same parties litigating under the same title. To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. See *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR.

19. Having considered the pleadings and the submissions by the Respondent's counsel, it is my finding that the appeal being struck out for lack of jurisdiction is not synonymous with a suit that has been heard and determined on merits. The issues between the parties had not been heard and finally determined. My view is that a party is at liberty to file a fresh appeal/seek leave to file a fresh appeal after the earlier appeal is struck out for lack of jurisdiction.

20. In *Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62, the Court of Appeal for Ontario, Canada, stated that the purpose of res judicata is to balance the public interest in finality of litigation with the public interest of ensuring a just result on the merits. The court found that the doctrine is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create an injustice.

21. The High Court of Kenya in *Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party)* after reviewing decided cases held that exceptional circumstances such as fraud, mistake or lack of jurisdiction may constitute special circumstances to remove the operation of the doctrine of *res judicata*.

22. A suit that has been dismissed or struck out for non-attendance of a party or for want of jurisdiction or on account of limitation can hardly be said to have been "heard and finally decided" which is a requirement of Section 7 of the *Civil Procedure Act*. It would also not be in tandem with Article 50(1)

of *the Constitution* which provides for fair hearing. The Court must also be alive to the requirements of both Article 159(2)(d) of *the Constitution* and Section 19(1) of the *Environment and Land Court Act* which eschew the determination of disputes on procedural technicalities.

23. To this end, this Court is of the view that the application and/or appeal are not *res judicata* as the previous appeal was not determined conclusively and a final judgment rendered on the merits. On this ground alone, the Respondent's argument that the application and appeal is *res judicata* collapses as it is not well founded.

Whether leave can be granted to appeal out of time.

24. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that;

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

25. Section 95 of the *Civil Procedure Act* provides thus: -

> " Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

26. The principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court outlined the principles as follows: -

> " We derive the following as the under-lying principles that a Court should consider in exercise of such discretion: Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;4. Whether there is a reasonable reason for the delay. 5. The delay should be explained to the satisfaction of the Court;6. Whether there will be any prejudice suffered by the respondents if the extension is granted;7. Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

27. Have the appellants met the principles outlined in the *Nicholas Kiptoo Arap Korir Salat case* (ibid)? Though the provisions of law do not set out the maximum or minimum period of delay, an applicant has to demonstrate that he has good and sufficient cause for the delay.

28. The Respondent's case is that the application and intended appeal is an afterthought, a device meant to frustrate, delay and derail the realization of the fruits of judgment by the Respondent noting that the Appellant's conduct in this matter has been deliberately indolent and dilatory as evidenced by: The unexplained failure by the Appellants to file an Appeal within the prescribed time, the unexplained

failure by the Appellants of their inordinate delay in filing the initial Application dated 11/02/2022 for Leave to File an Appeal out of time, the unexplained failure by the Appellants to deposit the decretal sum of Kshs. 500,000/- in a joint interest earning account as a condition for stay of execution ordered by the Trial Judge in HCCA No. E056 of 2022, the unexplained failure by the Appellants to file and serve a Record of Appeal to date, which is a delay of over Two (2) Years which is further exacerbated by the lack of a Certificate of Delay, the unexplained inordinate delay by the Appellants to apply for typed proceedings to date in Nairobi BPRT Case No. 986 of 2019 which is a delay of over Two (2) Years.

29. On the issue of merit of the application to extend time within which to file an Appeal, the Respondent submitted that the Application is unmerited and is an abuse of Court process. He relied on the case of *Nicholas Kiptoo Arap Korir Salat* (*supra*).

30. The present Application was filed on the 9/11/2023 after the trial court delivered its ruling on the Tenant/Respondent's Application dated 4/10/2019 on 12/11/2021. The Applicants has also given an explanation of the delay since the delivery of the Ruling on the 12/11/2021.

31. The Applicants contends that the delay was caused by the court for delivering the Ruling in the absence of the parties. That the Appellants/Applicants only came to know about it when the Respondent threatened to terminate the tenancy Agreement sometimes in February 2022. Being aggrieved by the aforementioned Ruling and consequential orders, the Appellant/Applicants instructed the firm of Otieno Oyucho & Co. Advocates to apply for stay of execution of the Ruling and any consequential orders as well as prefer an appeal on their behalf.

32. On or about 11/02/2022, the said firm applied to the High Court at Nairobi in High Court Civil Appeal No. E56 of 2022 for leave to appeal the tribunal ruling and for stay orders. On 23/10/2023 the High Court dismissed the appeal for want of jurisdiction. She further explained that the delay in filing the appeal in this Court is not inordinate and was occasioned by the misapprehension of the substantive and/or procedural law by previous counsel on record who filed this Appeal in the wrong court. That unfortunately, the statutory time limit for filing and serving the Memorandum of Appeal has since lapsed.

33. The Appellants averred that the High Court had conduct of the appeal from the time of its filing on 11/02/2022 until 23/10/2023 when the appeal was dismissed for want of jurisdiction which Court had discretion to transfer the matter to appropriate court. That still being aggrieved by the aforementioned Tribunal Ruling of 12/11/2021 and the consequential orders therein, she has now instructed the firm of Kihima & Koech Advocates to take conduct of the matter. They aver that the delay in filing the appeal in this Honourable Court is not inordinate and was occasioned by the misapprehension of the substantive and/or procedural law by previous counsel on record who filed this Appeal in the wrong court. That unfortunately, the statutory time limit for filing and serving the Memorandum of Appeal has since lapsed.

34. The Applicants also contend that mistakes of counsel should not be visited upon the Clients and therefore humbly pray that this application be allowed in its entirety. That the intended appeal will be rendered nugatory unless the instant application is granted. the intended appeal raises pertinent issues both of law and facts in which the learned Magistrate erred in his judgment.

35. In the cases of *Kenya Power and Lighting Company Limited v IO suing through GIO* [2020] eKLR and *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR the court held that the mistakes of advocates should not be visited upon their clients. I find the reasons given for the delay are reasonable, plausible and sufficient.

36. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.

37. From the delivery of the ruling to the filing of the instant Application is about almost 2 years' delay. This in my view amounts to inordinate delay however, the explanation given by the Applicants is sufficient. The Appeal filed in the High Court was struck out on 9/10/2023 and this Application was thereafter filed on 9/11/2023, this is a period of about 31 days. I therefore find that the Application was filed without undue delay.

38. In executing its mandate, the court needs to balance the interests of the respondent who has a decision in their favour against the interest of the appellants who has a constitutionally underpinned right of appeal. It would be in the interest of justice if the appellant was given an opportunity to vent their issues on appeal.

39. The court has had a chance to look at the memorandum of appeal annexed to the appellants' motion and the grounds set out an arguable case with possibility of success and it is the considered view of this court that the appellants should not be denied access to the seat of justice.

40. The Respondent was paid costs when the Appellants' appeal was struck out in HCCA No. E056 of 2022. Further, on the issue of whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant, the answer is in the affirmative, I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed. It is the considered view of this court that the respondents will not be prejudiced if an order for extension of time is granted.

41. In the end, the upshot of the foregoing is that the orders sought by the Applicants; for leave to file the Appeal out of time is merited and for that reason Prayer no. (2) and (3) in the Notice of Motion dated 3/11/2023 is allowed.

Whether the Applicants have made a case for the grant of an order for stay of execution

42. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the *Civil Procedure Rules* that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states 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 binding on him has been given by the applicant."

43. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that: -

> 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, a 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."

44. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. In the case of *Machira T/A Machira & Co. Advocates v East Africa Standard* [2002] eKLR Kuloba J. as he then was held that an applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful, it will be rendered nugatory. The Applicants have only stated that they are exposed to execution of the order unless a stay is granted pending the hearing and determination of this application as well as the intended appeal. I am not satisfied that execution of the decree will cause the applicant substantial loss. The applicants have not demonstrated the substantial loss they will suffer should the court disallow their prayer for stay.

45. Order 42 rule 6 requires the provision of security as a pre-condition for allowing a request to stay execution. The trial court ordered for the refund of Kshs. 500,000.00 to the Tenant/Respondent upon termination of the tenancy subject to restoration of the demised premises back into its initial state in terms of clause 3 of the tenancy agreement dated 20/10/2015 failing which the landlord shall use the same to do repairs and any balance arising therefrom shall be paid to the tenant. It is evident that the amount of Kshs. 500,000.00 was not paid. The applicants cannot have a blanket stay of execution without providing reasonable security. The Applicants averred that they are willing to abide with any conditions as maybe set by this court in granting the prayers sought. The Applicants have not stated that they are willing to provide security and have conveniently evaded that issue yet the application is also brought under Order 42 Rule 6 of the *Civil Procedure Rules*.

46. The Respondent deponed that the judgment against the Appellants/Applicants is a money decree and it is trite law that that the security to be deposited should be in form of money as the purpose of security is to secure the interests of a Respondent pending the hearing of the Appeal but it is evident that the Appellants make no offer of security as a condition for stay pending Appeal and they are merely seeking to abuse the Court process for the second time.

47. I find that Order 42 Rule 6 (2) (b) of the *Civil Procedure Rule*s stipulates in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. In the case of *Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* the court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment

is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

48. Under the provisions of Order 42 rule 6 (1) (2) of the *Civil Procedure Rules*, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR it was held that: -

> " of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay..." which principle was also emphasized in Carter & Sons Ltd v Deposit Protection Fund Board & 3 Others".

49. In the instant matter, the applicants have not offered any security or an undertaking that they are ready and willing to pay the same if ordered by this Honourable Court.

50. In the case of *Mukuma v Abuoga* [1988] K.L.R 645, the Court held:

> " The granting of a stay of execution in the High Court is governed by Order XLI Rule 4(2). The question to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the applicant has given security".

51. All in all, the Applicants have failed to satisfy this Court on the conditions precedent set out under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*. I therefore cannot grant prayer 4 of the Application dated 3/11/2023.

Disposal Orders

52. Consequently, this Court makes the following disposal orders:

    a. The Appellants are granted leave to appeal out of time in terms of prayer 2 of the motion dated 3/11/2023.

    b. The Memorandum of Appeal filed and served by the Applicants against the Ruling of the Business Premises Rent Tribunal at Nairobi (Hon. Gakuhi Chege) delivered on 12/11/2021 be and is hereby deemed as duly filed and served within time upon payment of the requisite fees.

    c. Case to be mentioned for directions on 10/04/2024.

    d. Costs be in the cause.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MARCH 2024

.....

MOGENI J

JUDGE

In the virtual presence of: -

Mr. Gachungi for the Respondents

Mr. Gakaria for the Applicants

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE