



Kamau & another v KMK kuria Investments Limited (Environment and Land Appeal E046 of 2024) [2024] KEELC 5167 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E046 OF 2024**

**J OMANGE, J
JULY 3, 2024**

BETWEEN

NJAI KAMAU 1ST APPELLANT

JOHN MUEMA 2ND APPELLANT

AND

KMK UKURIA INVESTMENTS LIMITED RESPONDENT

RULING

1. This suit relates to shop No. 4 on in L. R No. 209/136/186 along Kirinyaga Road extending to Lower Kirinyaga Road (herein after referred to as suit property) situate in Nairobi. Vide Notice of Motion application dated 20th December 2023 the Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to issue an order staying execution of the orders of the ruling of the Nairobi Business Premises Rent Tribunal case number E280 of 2024 delivered on 25th March 2024 pending the hearing and determination of this application.
 - d. That the honourable court be pleased to issue an order staying execution of the orders of the ruling of the Nairobi Business Premises Rent Tribunal case number E280 of 2024 delivered/ordered on 25th March 2024 pending the hearing and determination of this appeal.
 - e. The costs of this Application be awarded to the appellant/ applicants.
2. The application was supported by an affidavit sworn by the 2nd Appellant/Applicant in which he deponed that the Applicants have been tenants in the suit property since the year 2011. That the Respondent had filed an Application E280 of 2024 in the Business Premises and Rent Tribunal seeking



an eviction on grounds that the Applicants did not pay rent. The Respondent had also alleged that he wished to renovate the premises.

3. The Applicants insist that they have been paying rent and take issue with the learned Tribunal for failing to consider their argument before the Tribunal that the proceedings before the Tribunal were Res Judicata. The Applicants aver that the 15 days' notice would cause them irreparable harm as their customers would not know where to find them.
4. The Respondent opposed the application vide a replying affidavit sworn by its director dated 24th April 2024 in which he deponed that the Applicants had been served with a notice to vacate dated 29th November 2023. That the Applicants failed to file a reference to the Tribunal prompting the Respondent to file an application for eviction at the Business Premises Tribunal.
5. The Respondent averred that on the 10th February 2024 they visited the property and took possession of the same. It is their evidence that they have commenced repairs. The Respondent insist they were only served with pleadings and the order for stay of execution on the 15th April 2024.
6. The Applicants in response to the Replying affidavit filed a supplementary affidavit dated 6th May 2024 in which they assert they were not served with the notice to vacate as alleged by the Respondent, hence their failure to file a reference. They allege that the Respondent broke into the suit premises on the 9th April 2024 while they were still in occupation.
7. The Applicants further contend that no other tenant has been issued with eviction notices as alleged and that the actions are meant to frustrate them. The applicants state that they have not been able to raise security as they have not been able to access the premises.
8. The Respondent in a supplementary affidavit reiterate that the Applicants were served with the notice to vacate. As such the Respondents were right to take possession of the premises. They further argue that given that the Applicants did not comply with the court order to deposit security, the stay orders had lapsed.
9. The applicant filed submissions dated 7th May 2024 in which they urged the court to consider not only the provisions of Order 42 Rule 6 but to also consider Section 1 A and 1B of the Civil Procedure Act on the overriding objective to do justice to both parties.
They referred the court to the case of Victory Construction Vs BM (a minor suing through next friend one PMM) [2019] eKLR, and the court of appeal case of Butt vs. Rent Restriction Tribunal [1979].
10. Further, they submitted that they had brought the appeal without unreasonable delay, and had demonstrated that substantial loss would be occasioned to them by the eviction order as they would be out of a business which has been has been their source of livelihood for many years.
11. On the issue of security of costs for due performance of decree, the applicants submit that they have been out of business and have not been able to raise the security for costs. They request to be allowed to pay rent as the security. The Respondent did not file any submissions.
12. Having considered the application, the various affidavits filed and the submissions by the Applicants the only issue for determination is;
13. Whether the appellant has satisfied the requirements as set forth in Order 42 Rule 6 for the grant of stay.
14. Order 42 Rule 6 provides;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court



appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (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.
15. Proof of substantial loss is the first hurdle for an applicant seeking stay of execution. In the case of *Francis K. Chabari & another vs Mwarania Gaichura Kairubi [2022]* eKLR, the learned judge cited with approval *Geoffery Muriungi & another v John Rukunga M'imonyoso* which explained substantial loss thus;

“The undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal.”

16. While considering the issue of substantial loss, the court ought to consider the two competing interests of the parties, that is, Respondent’s right to enjoy the fruits of the judgment and the Applicant’s right of appeal which must be safeguarded so as not to render the appeal nugatory. In the case of *Butt Vs Rent Restriction Tribunal [1979]* eKLR it was held that:

“... It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory”

17. In the instant case, it is clear from the accounts given by both the Applicant and the Respondent that the Respondents have already taken possession of the premises. Although the time frame differs, there is consensus that the Applicants are no longer in possession. This the Applicants argue, is the reason they were not able to comply with courts directions on deposit for security of costs issued way back on 15th April, 2024. The order of the Tribunal having already been executed an order for stay of execution would be akin to locking the door after the horse has already bolted. Court orders should not be made in vain. For this reason, I find that the application has no merit and is dismissed with costs to abide the outcome of the appeal.

RULING, DATED, SIGNED AND DELIVERED ON 3RD DAY OF JULY, 2024 VIA MICROSOFT TEAMS.

JUDY OMANGE

JUDGE



In the Presence of: -

-Mr. Munge for the Appellant

-Ms. Wanjohi for Mr. Macharia the Defendant

-Court Assistant: Steve Musyoki

