



**Talei v Kanini (Environment and Land Appeal 1 of 2023)
[2023] KEELC 15885 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 1 OF 2023
LC KOMINGOI, J
MARCH 2, 2023**

BETWEEN

ABRAHAM KIPKEINO TALEL ALIAS IBRAHIM TALEI APPLICANT

AND

JAMES MUTURI KANINI RESPONDENT

*(being an Appeal from a Ruling and order dated 10th January, 2023
delivered by Hon. Andrew Muma (Mr.) Vice Chairperson Business Premises
Rent Tribunal in Nairobi Business Rent Tribunal Case No. E663 of 2022)*

RULING

1. This is the Notice of Motion dated 13/1/2023 brought under Section 19(2) of the [Environment and Land Court Act](#), Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#) and all the other enabling provisions of the law.
2. It seeks orders;
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. Spent.
 - v. That this Honourable Court be pleased to grant an order of stay of execution of the ruling and order issued on January 10, 2023 in Nairobi Business Premises Rent Tribunal Case No E663 of 2022 as well as all consequential orders, proceedings and/or decrees pending the hearing and determination of the appeal herein.



- vi. That the Respondent does bear the costs of this application.
3. The grounds are in the face of the application and are set out in paragraphs (a) to (m).
4. The application is supported by the affidavit of Abraham Kipkeino Talel, the Appellant/Applicant herein sworn on the January 13, 2023.
5. The application is opposed. There is a Replying Affidavit sworn by James Muturi Kanini the Respondent therein sworn on the January 18, 2023.
6. On the February 8, 2023 the court with the consent of the parties directed that the Notice of Motion be canvassed orally.
7. The said application proceeded by way of oral submissions on the February 13, 2023.
8. It is the Appellant's case that the goods attached are unique tools of trade which will be difficult to replace if the Respondent is allowed to auction them.
9. It was further submitted that the Appellant is willing to be bound by any conditions granted by this court as regards furnishing to security for the due performance of the decree. He prays that the Notice of Motion be allowed.
10. The Respondent on the other hand submitted that the Appellant was given an opportunity to be heard at the Tribunal. That the Appellant ought to have sought to have the ruling of 10/1/2023, to be set aside but he did not do so. He prays that the application be dismissed with costs.
11. I have considered the Notice of Motion, the affidavits in support and the annexures. I have also considered the Response thereto; the annexures, the oral submissions and the authorities cited.

The issues for determination are;

- i. Whether the Appellants application had satisfied the conditions set out under Order 42, Rule 6 (2) of the *Civil Procedure Rules*.
 - ii. Who should bear costs of this application?
12. The gist of the Appellant's application and Appeal appears to be hinged in ground No (e) where it is stated;

“The said ruling and order were issued without regard to the Appellant's/Applicant's right to a fair hearing and in contravention of the principles of natural justice as the Appellant/Applicant was denied the opportunity to be heard in opposition to the application dated December 9, 2022 despite the Appellant's/Applicant's advocates requesting for leave to file a replying affidavit’.

13. On the January 10, 2023, Andrew Muma Vice Chairperson of the Tribunal granted the following orders;
- i. “That Landlord/Applicant is hereby allowed to dispose and/or sell the Tenant's properties under his custody as per the orders granted on 8th August, 2022 to recover rent arrears plus costs of the case.
- ii. Costs to the Landlord/Applicant.
- iii. Tenant can file and a formal application to review and set aside orders of August 8, 2022”



I am of the view that the Appellant by virtue of Order No 3 was accorded a fair hearing in that he was advised to file a review against the orders of August 8, 2022. He just did not seize the opportunity.

14. It is also not clear from his affidavits if he had participated in the proceedings culminating in the orders of August 8, 2022.
15. Section 12 (1) (h) of the *Landlord and Tenant(Shops, Hotels and catering Establishments Act)* Cap 301 Laws of Kenya provides that;
 - 1) A Tribunal shall... have power...
 - (h) To permit the levy of distress for rent...
 - (c) ...
 - (j) To vary or rescind any order made by the Tribunal under the provisions of this Act...”

In my view the Appellant who had the option of seeking review of the ruling of 10th January, 2023 neglected to do so. He cannot claim to have been denied a fair hearing.

16. In the case of *Bandali Sacco Limited –versus- Christopher I. Okwi and 5 others* (2015) eKLR Kasango Judge observed thus; “For the appellant to succeed it is required to meet the conditions set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules*. Those condition require appellant; to satisfy the court that it will suffer substantial loss if stay of execution is not issued, to show that the application for stay was filed without unreasonable delay; and, to meet such security as ordered by the court for due performance of the decree’.

I find that the ruling which is the subject of the appeal was delivered on January 10, 2023. This Application is dated January 13, 2023 and was filed on the same day. I find that this Application has been brought without undue delay.

17. The Appellant/Applicant stated that the value of the attached goods is Kshs 1.4 Million while the amount claimed by the Respondent is about Kshs 740,000/-.
18. It is his case that the attached goods are unique tools of trade which will be hard to replace if this orders are not granted.
19. It is not in doubt that the Appellant is in arrears of rent. He has admitted that he has vacated the Respondent’s premises.
20. I have gone through the list of the said goods and I find that they are the usual item used in hotel business. They are not unique in any way.
21. I find that the Appellant/Applicant has failed to demonstrate that he will suffer substantial loss if these orders are not granted.

In the case of *African Safari Club Limited v Safe Rentals Limited* Nairobi Civil Appeal (Application) No 53 of 2010 the Court of Appeal stated thus, “With the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put the hardship on the scales. On this point, the offer by the applicant of the security of the yacht and the immovable property, although not ideal, would in our view place the respondent in a much better position in that the two assets which have a combined value of Kshs 100 million will be placed in the hands of the respondent company with a possibility if the intended appeal



does not succeed realizing the assets should it make arrangements of registering appropriate charges against them after the necessary documents are deposited with the Deputy Registrar, of course, barring any winding up order being made during the intervening period. We think that the balancing act as described in the analysis of the positions of the parties before us, is in keeping with one of the principal aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing as far as it is practicable”

In the instant case, I find that the scales tilts in favour of the Respondent who is owed a substantial amount in terms of rent.

22. I find that the Appellant/Applicant has not furnished any security for the due performance of the decree. There is no longer any relationship of tenant and landlord between the parties herein.
23. I find that the value of the seized goods is ascertainable. It has not been shown that the Respondent would not be able to compensate the Appellant/Applicant in the event that the Appeal succeeds.

In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the Appeal.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF MARCH, 2023.

L. KOMINGOI

Judge

IN THE PRESENCE OF:

Miss. Ngatia for the Appellant/Applicant

Mr. Seneti for the Respondent

