



REPUBLIC OF KENYA



KENYA LAW
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**Gam Holdings Limited v Anyango (Environment and Land Appeal
E037 of 2023) [2023] KEELC 20479 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E037 OF 2023**

J OMANGE, J

OCTOBER 2, 2023

**BEING AN APPEAL AGAINST ORDERS OF THE HONOURABLE ANDREW
MUMA VICE CHAIRPERSON OF THE BUSINESS PREMISES RENT TRIBUNAL
IN NAIRONI DELIVERED ON 13TH APRIL 2023 IN BPRT NO E669 OF 2022**

BETWEEN

GAM HOLDINGS LIMITED APPELLANT

AND

BENTA OLOO ANYANGO RESPONDENT

(Being an appeal against orders of the honourable Andrew Muma vice chairperson of the Business premises rent tribunal in NAIRONI delivered on 13th April 2023 in BPRT No E669 of 2022)

RULING

1. Vide Notice of Motion application dated November 17, 2022 the Applicant seeks the following orders:
 - a. That an order do issue staying the execution of the ruling and orders of Honourable Andrew Muma vice chairperson delivered in Nairobi BPRT No E669 of 2022 pending hearing and determination of this interparties.
 - b. That an order do issue staying the execution of the ruling and orders of Honourable Andrew Muma vice chairperson delivered in Nairobi BPRT No E669 of 2022 pending hearing and determination of this application.
 - c. That an order do issue staying the execution of the ruling and orders of Honourable Andrew Muma vice chairperson delivered in Nairobi BPRT No E669 of 2022 pending hearing and determination of this appeal.
 - d. Costs of the application.



2. The application was supported by an affidavit and a further affidavit both sworn by Peter Kihui who deponed that he is the director of the Appellant herein, owner of the suit property.
3. The Appellant avers that the Respondent is not a tenant and is not entitled to the amount awarded as damages. The Appellant thus faults the Tribunal for awarding the Respondent damages. The Appellant states that if the Respondent executes the orders of the Tribunal, its appeal will be rendered nugatory.
4. In addition, the Appellant states that no prejudice will be occasioned to the Respondent if the stay is granted as he is willing to abide to any conditions the courts issues for grant of the stay including but not limited to depositing the entire decretal amount in court as security.
5. The Respondent in her replying affidavit avers that her goods were unlawfully attached, without notice by the Appellant. This has caused her to suffer great loss. She insists that she is a tenant of the Appellant and had been dutifully paying rent until her goods were unlawfully attached. She states that even if she was paid the decretal amount as ordered by the Tribunal, she is in a position to refund if the Appeal were successful.
6. The Respondent argues that if the order for stay is to be given, it should be conditional on the Appellant depositing a sum of Ksh 1, 500,000 in court as security for the goods being withheld by the Appellant as their safety is not guaranteed pending determination of the appeal.
7. The Appellant in his submissions relies on order 42 rule 6 of the *Civil procedure rules*.
The Appellant also placed reliance in Nairobi Civil suit no 25 of 2012 -RWW v EKW (2019) in which Lady Justice Asenath Ongeru stated that the purpose for stay of execution pending appeal was to preserve the subject matter in dispute so the rights of the Appellant exercising the right of appeal are safeguarded and the appeal is not rendered nugatory in the event of success. Counsel for the Appellant submitted that the Respondent has not demonstrated that she would be in a position to reimburse the decretal amount if the appeal were to be successful. This he argued would result in substantial loss on the Appellants part.
8. In turn, the Respondent asked the court to disregard both affidavits sworn by the deponent as there was no authorization for the deponent to swear them on behalf of the Appellant.
9. On the issue of affidavits, I note that the affidavits have been sworn by one Peter Kihui who depones that he is the Appellants Director who is well versed with the matter. As a Director in the company I find that he can competently swear the affidavits hence the objection has no merit.
10. The issue before the court for determination is Whether the Appellant has satisfied the requirements as set forth in order 42 rule 6 for grant of stay.

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.
11. The applicant is required to establish that if the application is not allowed, substantial loss would result. Substantial loss has been defined in several judicial pronouncements. In the case of *Francis K. Chabari & another vs Mwarania Gaichura Kairubi* [2022] eKLR, Justice quoted *Geoffery Muriungi & another v John Rukunga M'imonyoso* as to define substantial loss as follows;
- “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”
13. In *Silverstein –vs- Chesoni* [2002]1 KLR 867 the Court held that:-
- “The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”
14. The above position was further reinstated in the case of *Shell Ltd –vs- Kibiru & Another*, Civil Appeal No. 97 of 1986, Nairobi where it was stated that:-
- “The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondent s would be unable to pay the money.”
15. The onus on the applicant to prove substantial loss was similarly addressed in *Antoine Ndiaye –vs- African Virtual University* [2015] EKLR; in which the court indicated as follows;-
- “The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”
16. In the present case, the Appellant aver that if they paid the Respondent the decretal amount, there is no guarantee that it would be able to recover this amount from the Respondent as her economic means are unknown. The Respondent disputes this and argues that her goods which are locked in the shop are worth more than the decretal amount. I have considered the affidavits filed by both parties in respect of this issue and I note that the Respondent does not dispute her economic means are not known. She insists that her goods in the premises are worth Kshs 1,500,000. However, there is no valuation confirming that the property that is locked in the shop is worth the said amount. In the circumstances



and in absence of any evidence on the earning of the Respondent I am of the view that the concern of the Appellant is valid.

17. This court holds the view that it has the duty to ensure that the Respondent is not unreasonably delayed from enjoying the fruits of her Judgement but at the same time ensuring that the Appellant does not pursue an Appeal which if decided in its favour will have no impact as the orders sought to be appealed against will have already been effected.
18. In balancing these two positions the court makes the following orders;
 - a. Stay of execution of the ruling and orders of Honourable Andrew Muma vice chairperson delivered in Nairobi BPRT No E669 of 2022 are hereby issued pending hearing and determination of this appeal.
 - b. The applicant is to deposit Kshs 1,000,000 in court within 30 days.
 - c. The Appellant is to filled the Record of Appeal within 90 days.
 - d. In default of (b) and (c) above the stay orders to lapse.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Irungu for the Appellant

Respondent in person

Steve - Court Assistant

