



**Mutura v Kagombe (Environment and Land Appeal E010 of 2023)
[2023] KEELC 20392 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E010 OF 2023
LN GACHERU, J
OCTOBER 5, 2023**

BETWEEN

JAMES KAMAU MUTURA APPELLANT

AND

DR MAINA DAVID KAGOMBE RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 11th September 2023, the Appellant/Applicant herein James Kamau Mutura sought for the following orders;
 1. That this Honourable Court be pleased to issue orders of stay of execution of orders entered on 31st July 2023, by the Business Premises Rent Tribunal, together with all consequential orders pending the hearing and determination of this Appeal.
 2. That the costs of this application be provided for.
2. The Application is premised on the following grounds; -
 1. That the Appellant/Applicant has appealed against the entire ruling and order delivered on 31st July 2023.
 2. That one of the orders given by the Business Premises Rent Tribunal is that the Applicant be evicted from the suit premises and failure to stay the said orders the Appellant/ Applicant's appeal will be rendered nugatory.
 3. That the Appellant has an arguable appeal with chances of success.
 4. That the grant of the stay shall not prejudice the Respondent in any way as he shall continue to receive rent from the Applicant/Appellant.



3. The Application is also supported by the Affidavit of James Kamau Mutura(Applicant), who averred that he filed a Defence at the Business Premises Rent Tribunal(BPRT), on 6th June 2023, seeking for orders that the Landlord/Respondent be restrained from unlawfully evicting him without having followed the due process of law, and he attached the said application as annexure JKM1. That the Respondent (Landlord)) filed a Replying Applying on 13th June 2023, and a Preliminary Objection even dated, and opposed the Jurisdiction of the tribunal as is evident from JKM3. Further, the Landlord/Respondent filed a Notice of Motion on 3rd July 2023, seeking for the Applicant's eviction.
4. After the parties had filed their written submissions, the tribunal issued its Ruling on 31st July 2023, and amongst the orders given was the eviction of the Applicant as is evident from JKM 7.
5. He also averred that the Hon. Vice Chairman of the tribunal erred in law and in fact on failing to appreciate that the Notice of termination issued by the Landlord to the Applicant on 12th March 2023, was defective and could therefore not be made effective.
6. Further that the said Vice-Chairman erred in law and in fact in failing to consider the relevant law relating to termination of tenancies under Section 4(2) of Cap 301 Laws of Kenya, and therefore arrived at a wrong determination. He also averred that he applied for review of the said determination, but his application was dismissed on 11th September 2023. He contended that he has an arguable appeal, with high chances of success and that there would be no prejudice occasioned to the Respondent, as he will continue to receive rent from the Applicant, but failure to grant the aforesaid orders will render the appeal nugatory.
7. The application is vehemently opposed by the Respondent, Dr Maina David Kagombe, who filed grounds of opposition dated 25th September 2023, and averred that the instant application is bad in law, unmeritorious and does not lie on the following grounds;
 - a. That the present Application and Appeal offends the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules as the Applicant had filed an Application for review before the Honourable Tribunal which was heard and determined.
 - b. That the Applicant applied for a review of the orders granted by the Honourable Tribunal on 31st July 2023, which was denied and he cannot come back to seek to appeal the same orders.
 - c. That the application is a fishing expedition only meant to deny the Respondent the fruits of his judgment.
 - d. That the Application has been overtaken by events as the Applicant has already been evicted from the suit premises.
 - e. That the Application and Appeal is bad in law, without merit and is an abuse of the Court process and should be dismissed forthwith.
8. The Respondent further filed a Replying Affidavit even dated, and averred that; - indeed the Applicant filed a complaint and an application at Business Premises Rent Tribunal, in Nairobi being case No. E571 of 2023, on 7th June 2023.
9. That the Respondent too filed an application seeking orders for vacant possession since the lease had expired on 30th June 2023, and he had issued the Applicant with a Notice to the effect that he would not renew the same. The said Notice was marked DMK2. Further that the Tribunal delivered its Ruling on 31st July 2023, and dismissed the Applicant's defence and allowed the Respondent's application. The said order was marked DMK3. That thereafter, the Applicant filed an application for review of



the Tribunal's Ruling which application was dismissed on 11th September 2023. Further that during the pendency of the Application for review, the Applicant filed the instant appeal on 30th August 2023. Therefore, as per the information and advice given by his advocate on record, the instant Appeal and application are incompetent and an abuse of the Court process as the appeal was filed during the pendency of application for review. Therefore, the Applicant is on a finishing expedition of seeking for favourable orders.

10. Further that he has been informed by the same Advocate who is on record for him, that the filing of the appeal during the pendency of the application for review is an abuse of the Court process, and he urged the court to dismiss the instant application. That the appeal could only lie on the outcome of the application for review, but not on the matter where review had been sought and denied.
11. It was his contention that the instant Appeal has no legs to stand on and therefore the instant application should be dismissed. Further, that the Appeal and the instant Application are spent as the Applicant has already been evicted from the suit premises on the strength of the tribunal's orders of 31st July 2023, and which were affirmed on 11th September 2023. He urged the Court to dismiss the said application.
12. The Application was canvassed orally in Court online on 28th September 2023, and thereafter, the parties filed authorities to support their respective positions.
13. The Applicant submitted that he filed his appeal as provided by Section 15 of Cap 301, and therefore this appeal is properly filed before this Court. It was also submitted that the Applicant seeks the protection of the Court so that the Appeal shall not be rendered nugatory if the Applicant will be evicted from the suit premises. It was also submitted that the Appellant/Applicant has a right of Appeal and the same cannot be defeated by an application for review. Further, that there was no evidence of eviction and that the Applicant has not been evicted as alleged by the Respondent. It was submitted that the Respondent closed the premises but did not evict the Applicant. That though the Applicant had a filed a review under Section 12(1) (e) of the Cap 301, which is a statutory right available to the aggrieved party and thus the Civil Procedure Rules do not apply to the tribunal, which has its own regulations which governs its operations. The Applicant submitted that he has an arguable appeal with high chances of success as the Vice-Chairman of the tribunal terminated the tenants tenancy without complying with Section 4(2) of Cap 301.
14. It was also his submissions that if the orders sought are not granted, the appeal will be rendered nugatory, and the Applicant will suffer irreparable loss and thus the application should be allowed.
15. In support of his case, the Applicant relied on a number of decided cases among them; - Narok ELC Appeal No. E001 of 2022, wherein the Court allowed an application for stay of execution pending appeal, Civil Application No. 50 of 2002 (UR 29/2002: African Airlines International Ltd Vs Eastern & Southern African Trade & Development Bank (PTA Bank), where the Court of Appeal held; -

“Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, Court has Jurisdiction to hear it, although is pending. Jurisdiction of a Court to hear review is not taken away if after the review Petition, an Appeal is filed by any party. An Appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with”.
16. The Respondent on his part submitted that the tenant herein was evicted on 21st September 2023, and therefore the application has been overtaken by event. Further, that the Applicant's application for review having been heard and dismissed on 11th September 2023, the Applicant is barred from filing an appeal. He relied on Order 45 and Section 80 of the Civil Procedure Rules and Act. It was his further



- submissions that this application is a fishing expedition and should not be allowed since litigation should come to an end. Further, that since the Applicant has been evicted, then the Appeal is bad in law, lacks merit and so is the application. He urged the Court to dismiss the said application.
17. The Respondent relied on various decided cases among them the case of Isaac Kimani Kamau vs Eunice Wangui Mungungu (2011) eKRL, where the Court held;
- “A stay order, like an order of injunction can only be issued against an event that has not yet occurred. Issuance of a stay order after the event intended to be barred has occurred is futile.....”
18. He also relied on the case of Serephen Nyasani Menge vs Rispah Onsase(2018) eKLR, where the Court held;
- “In my view, a proper reading of Section 80 of the Act and Order 45 Rule 1 & 2, makes it abundantly clear that a party cannot apply for review and Appeal from the same Decree or Order. In the present case, the Applicant exhausted the process of review upto appeal and now wishes to go back to the same orders she sought review and failed and to try her luck with an Appeal.....she cannot be allowed to do so. Her instant Application constitutes an abuse of the process of the Court and the same must surely fail.....”
19. The above are the pleadings, the rival written submissions as filed by the parties, and the cited authorities which the Court has carefully considered. From gleaning the pleadings herein and the Court records, it is evident that the Applicant and the Respondent had entered into a Lease agreement on 7th June 2018, which Lease was to terminate on 30th June 2023. That was therefore a tenancy of 5 years and 23 days. The said Lease agreement was reviewed on 19th August 2021, and the said tenancy was to terminate on 30th June 2023. The review basically was on the amount of money or the rent payable per month.
20. There is also no doubt that on 1st March 2023, the Respondent as a Landlord gave the Applicant a Notice of Intention Not to renew the tenancy or extend the Lease agreement. A dispute arose, and the parties filed their dispute at the Business Premises Rent Tribunal. The said dispute culminated in a ruling of Business Premises Rent Tribunal of 31st July 2023, wherein the Applicant’s Tenant’s Reference and Application dated 6th June 2023, were dismissed. The Tenant (Applicant) was ordered to give a vacant possession to the Landlord (Respondent) immediately. Aggrieved by the said Ruling, the Applicant filed a Memorandum of Appeal on 30th August 2023.
21. It is also evident that the Applicant also filed an application for review of the said orders dated 31st July 2023. The said application was dismissed on 11th September 2023, the same date that the Applicant filed this application for stay of execution.
22. The Respondent has objected that the Applicant cannot be allowed to proceed with the Instant Application and Appeal since it offends the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. That the Applicant could not file the Application for review and Appeal at the same time. It was submitted that the instant appeal and application are an abuse of the Court process and should be dismissed entirely with costs.
23. Considering the above objection by the Respondent, the Court finds the issues for determination are;
- i. Whether the Applicant could file an appeal after having filed an application for review.
 - ii. Whether the Applicant is entitled for orders of stay of execution.



i. Whether the Applicant could file an appeal after having filed an application for review?

24. The Respondent submitted that Section 80 of the [Civil Procedure Act](#) is clear that an Order of Review may be filed where an Order or Decree are issued, and the party is aggrieved, but though the Appeal is allowed, the said aggrieved party has not appealed or preferred an appeal.
25. Further Order 45 Rule 1(a) & (b) gives guidelines or principles to be considered in determining an Application for review. The said order also provides that review can be filed“when a party is aggrieved by a Decree or Order, which an appeal is allowed but no appeal has been preferred”.
26. The Respondent submitted that the above provisions of law estopped the Applicant from filing an appeal when there was a pending application for review before the Business Premises Rent Tribunal. Indeed, the said application for review was filed on 31st July 2023, and decided on 11th September 2023. The Appeal herein was filed on 30th August 2023. The Appeal was filed during the pendency of the Application for review.
27. The Applicant has submitted that the said application for review was filed under the Regulations of Cap 301, specifically Sections 6 and 12 of the said Act. That proceedings before the Business Premises Rent Tribunal, are not bound by the provisions of the [Civil Procedure Act](#) and Rules and therefore the Applicant was within his right to file the said application for review. The Court has indeed seen the referred Notice of Motion for review, and which is expressed to be filed under Section 6 of 12 of Cap 301 Laws of Kenya. The Court has considered the above provisions of law and Section 12 is on the Powers of the Tribunals and specifically Section 12(i), provides that the tribunal in exercise of its Jurisdiction has powers to “vary or rescind any order made by the Tribunal under the provisions of this Act”.
28. As correctly submitted by the Applicant, the Application for review dated 31st July 2023, was brought under the provisions of Cap 301 Laws of Kenya, and not the [Civil Procedure Act](#) and Rules. Therefore, the provisions of Section 80 and order 45 of the [Civil Procedure Act](#) and Rules do not apply in regard to the Application for review filed on 31st July 2023, to review the orders of the tribunal even dated.
29. Even if the provisions of the [Civil Procedure Act](#) and Rules, were applicable, the Court finds that the Applicant would not be barred from filing an appeal while there was an application for review pending. In the case of *Kisya Investment Ltd vs AG & Another*, Civil Appeal No. 31 of 1995 ,the Court of Appeal held;
30. A Party who has filed a Notice of Appeal cannot apply for review, but if application for review is filed first, the party is not prevented from filing an appeal subsequently even if a review is pending”.
31. The Application for review herein was filed on 31st July 2023, and the Memo of Appeal on 30th August 2023. Therefore, the Applicant was not prevented for filing the appeal.
32. Further in the case of *Stephen Ndungu Kimani Vs Devkesh General Stores Ltd*, Civil Application No. 211 of 2000 (Lakha JA as he then was) held that; -

There is no authority that merely that Application for review has been dismissed, an Appeal cannot be preferred. If the Appeal had been decided, a review may not lie, but the contrary is not the case”



33. This was the same finding in the case of Kenya Oil Company Ltd vs Mohammed and Another (2003) 2EA 525 where the Court held;

The mere fact that an Application for review has been dealt with does not preclude the Applicant from pursuing the Appeal (See Mulla on code of Civil Procedure (9th Ed) P 1055”

34. Therefore, the Applicant herein is not precluded from filing an appeal on the basis that he had already filed an application for review.

ii. Whether the Applicant is entitled for orders of stay of execution?

35. The Applicant’s Notice of Motion dated 11th September 2023, expressed to be brought under Order XX1 Rule 22(1,) Order 45 Rule 1 & ,5 Section 3A & 34 of the Civil Procedure Rules and Act.

36. However, the Court has perused Order 21 of the Civil Procedure Rules and has noted that the said order deals with Judgement and Decree and not stay of execution. Further there is no Order 21 Rule 22(1) in the Civil Procedure Rules.

37. Further Order 45 Rule 1 & 2 of the said Rules gives guidelines on an application for Review, but not stay of execution. Section 3A of the *Civil Procedure Act*, donates inherent power to Court to issue orders that are necessary for the end of justice. And Section 34 of the same Act deals with questions to be determined by the Court in executing the Decree.

38. Therefore, the above provisions of law as quoted by the Applicant do not support the instant application for stay of execution.

39. Further, the Applicant has indicated that the Application is anchored under Section 159(2) d of *the Constitution* and that is on non-existent section, although the Applicant might have meant Article 159(2) (d) of the Constitution, wherein Courts are called upon to administer justice without undue regard to procedural technicalities. A look at the provisions of law that the Applicant alludes to have anchored his application upon, do not support the prayers sought.

40. However, this Court will be guided by Order 51 Rule 10 (2) which provides that;

“No application shall be defeated on technicality or for want of form that does not affect the substance of the application”.

41. The Applicant herein quoted the wrong provisions of law, but the court finds such transgression or commission does not affect the substance of the Application. The Court will revert to the Overriding Objective of the Act as provided for in Section 1A & 1B of the *Civil Procedure Act*. Again, the Applicant anchored his Application under Section 3A of the said Act, which donates power to this Court to issue necessary orders that would ensure end of justice is met and/or to prevent abuse of the process of Court.

42. Having observed as above, the Court finds that the principles that guides the Court in an application for stay of execution, pending appeal are laid out in Order 42 Rule 6, of the Civil Procedure Rules. The said order provides as follows;

“6. (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”.

43. These principles have been elaborated by various Courts and which Courts have also variously held that grant of stay of execution is discretionary, and which discretion must be exercised judiciously. Further it has been held that Courts do not make a practice of depriving the successful litigant of the fruits of his litigation and / or judgement. However, courts should also ensure that that the intended appeal is not rendered nugatory.

44. The Court of Appeal in the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417, elaborated on what to be considered in an application for stay. The Court held;

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.”

6. In the case of *Stephen Wanjohi vs Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991*, the Court held as follows;

45. For the Court to order a stay of execution, there must be;



- i. Sufficient cause
 - ii. Substantial loss
 - iii. No unreasonable delay
 - iv. Security
46. Even as the court considers the above conditions, the said stay of execution is granted at the discretion of Court, and which discretion must be judicially exercised.
47. On whether the Applicant herein has demonstrated substantial loss. It was the Applicant's averments that the Respondent has threatened to evict him from the suit property. That if evicted, he will suffer loss as he has carried out elaborate development on the suit property and that he was not given the necessary notice as provided by Section 4(2) of Cap 301. He further submitted that the Respondent will not suffer any prejudice as the Applicant will continue to pay rent to him, during the pendency of this appeal.
48. However, the Respondent has submitted that there is nothing to stay because the Applicant was evicted on 21st September 2023, in conformity with BPRT Decree of 31st July 2023. The Respondent attached a letter dated 26th September 2023, from Fantasy Auctioneers which letter confirmed that the said Auctioneers carried the eviction of the Applicant herein, with the assistance from Kirogo Police Station.
49. Though the Applicant denied through his Advocate that no eviction was carried out on the alleged date, but only closure of the building was effected, there was no averment filed in Court to controvert the allegations by the Respondent that the Applicant has already been evicted. Stay of execution is issued to prevent an intended action in fulfilment of a Decree. If eviction has already taken place, then there is nothing to stay and therefore the Applicant needed not to establish that he will suffer substantial loss. See the case of Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 the Court rightly held:
50. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss."
51. On whether there was inordinate delay, the Court finds that the Appeal herein was filed on 30th August 2023. The Applicant did not file the instant application then or even immediately after the Ruling being appealed against was delivered, but filed this application, immediately after the Application for Review was dismissed. Indeed, the Applicant herein was involved in fishing expedition, and there were no sufficient reasons given as to why the Application for stay was not filed immediately after the impugned Ruling was delivered on 31st July 2023. Though there is no definition of what amount to inordinate delay, the conduct of the Applicant herein of engaging in fishing expedition shows that he has not come to Court with clean hands. The Court finds and holds that the Applicant herein does not deserve the stay of execution orders as sought.
52. Taking into account that it is not the practice of the Court to deprive a successful litigant the fruits of his litigation, and also considering the conduct exhibited herein by the Applicant of involving in fishing expedition, the Court finds and holds that the Applicant is not deserving of the Orders of stay of execution.



53. For the above reasons, the Court dismisses entirely the Applicant's Instant Notice of Motion Application dated 11th September 2023, with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

M/s Mburukwa H/B Mr Kinyua for the Appellant/Applicant

M/s Aura H/B for M/s Njari Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

5/10/2023

