



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CIVIL APPEAL NO. E59 OF 2021

MOHAMED ALWY.....1ST APPELLANT

DAVID NGURE KIENJEKU.....2ND APPELLANT

- VERSUS -

EN GROUP (K) INTERNATIONAL LIMITED.....RESPONDENT

RULING

I. The Preliminaries.

1. The Notice of Motion application filed before the Honorable Court by the 1st and 2nd Appellants/Applicants respectively for determination is the one dated 23rd September 2021. It is brought under Sections 1A, 1B, and 3A of the Civil Procedure Act Cap. 21 and the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

II. The 1st & 2nd Appellant/Applicant's case

2. The 1st and 2nd Appellants/Applicants sought the following prayers are:-

a. Spent.

b. Spent.

b. That pending the hearing and determination of this Appeal, this Honourable court be pleased to issue an order for stay of execution of the orders issued and the Ruling of Business Premises Tribunal delivered on the 10th day of September 2021 in BPRT CASE NO. 308 OF 2020 MOHAMED ALWY -V- ENGROUP (K) INTERNATONAL LTD AND BPRT CASE NO. 309 OF 2020 DAVID NGURE KIENJUKU - Versus - ENGROUP (K) INTERNATONAL LTD.

d. That costs of this application to be provided for.

3. The application is grounded on the facts, testimony and averments on the face of the application as well as the 18 Paragraphed Supporting Affidavit of DAVID NGURE KIENJEKU, the 2nd Appellant/Applicant and the three (3) annexures marked "DN-1to 3". The 1st and 2nd Appellants/Applicants claim to occupy business premises situated on all that parcel of land known as land Reference Numbers Mombasa Block XXII/186 (hereinafter referred to as "The Suit land"). They paid a sum of Kenya Shillings Ten Thousand (Kshs 10,000) and Kenya Shillings Four Thousand, Five Hundred (Kshs. 4,500.00) per month respectively to the Respondent herein. On 20th November 2022, the Respondent as the Land Lord issued the Appellants/Applicants with notice of rental increment to a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000.00) and Kenya Shillings Ten Thousand (Kshs. 10,000.00) for the 1st and 2nd Appellant/Applicants respectively. Being aggrieved by this decision by the landlord, the Appellants decided to move the Business Premises and Rental Tribunal (hereinafter referred to as "THE BPRT") and made a reference challenging the increment in BPRT 308/2020 and 309/2020. The matter was heard and finally on 10th September, 2021 the BPRT delivered its ruling in favour of the Respondent, the land Lord and against the Appellants/Applicants herein confirming the increased rent effective from the date of increment being 1st March 2021.

4. Subsequently, the Appellants/Applicants preferred this appeal to challenge the said ruling. They also filed this current application to stay its execution pending the outcome of the appeal. The Appellants claim that the execution of the said ruling would cause the Appellants to suffer substantial loss as well as great hardship. The Applicants urged court to allow the appeal in order to evade, the appeal to be rendered

nugatory, which the appellants maintained has high chances of success.

III. The Respondent's case

5. On 5th October, 2021, while opposing the Appeal and the application by the Appellants, the Respondent filed a 35 Paragraphed Replying Affidavit in response to the application and fourteen (14) annexures marked as ("EIL -1 to 14). The affidavit was sworn by FAUD ABDALLAH a Director in the Respondent. He defended the rent increment, which he claimed was done in line with the relevant statutory provisions and based on the valuation conducted prior. He also stated that the Appellants were notified of the outcome of the valuation, which was culminated in the valuation report dated 13th October 2020.

6. He inter alia argued that the appeal was devoid of merit and the application ought to fail as they have not provided security as required by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. The Respondent contended that the Appellants/Applicants have not proved how they would suffer substantial loss not have they indicated how their appeal has a probability of success. Instead, the Respondent urged court to find that it is the one that stood to suffer loss of income, since the Appellants had been paying the same and merger rent for decades at such a prime location. The Respondent invited court to not only dismiss the application but to also vacate the stay orders and direct the Appellants/Applicants to pay the difference in rent as per the tribunal decision of 10th September 2021 or the same be deposited in court as a condition of appeal.

7. The Court directed the Notice of Preliminary Objection be canvassed by way of written submissions.

IV. SUBMISSIONS

A. The 1st and 2nd Appellants/Applicants written Submissions.

8. On 11th November 2021, the Learned Counsel, the law firm of Messrs Michael Ngure & Company Advocates for the 1st and 2nd Appellants/Applicants filed submissions in support of the Notice of Motion. The Learned Counsel submitted that the Court of Appeal in **Civil Appeal (Application) No. E131 of 2021, The Public Service Commission & 72 Others – Versus - Okiya Omtata & 4 others** held that for an application of stay of execution to succeed an Appellant must demonstrate that the intended appeal is arguable and it will be rendered nugatory if the stay is not granted i.e the intended appeal must not be frivolous and must raise at least one bonafide issue that can be argued before the court. The Learned Counsel submitted that the tribunal assessed the rent based on two valuation reports that were tabled before it. On one hand, the Appellant's valuation report dated 29th July 2021 that valued at a sum of Kenya Shillings Twenty Four Thousand (Kshs 24,000.00) while the Respondent's report that valued the property at a sum of Kenya Shillings Fourty Thousand (Kshs 40,000.00). The Learned Counsel argued that the tribunal never exercised its judicial discretion judicially when it raised the rental income to a sum of Kenya Shillings Fifty Thousand (Kshs 50,000.00) despite both of the valuation assessment of the rent being at a lower price.

9. The learned Counsel reminded court that the main propose of stay is to preserve the subject matter in dispute. He relied on the case of **RWW - VERSUS - EKW (2019)eKLR** where it was held that **"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right to appeal are safeguarded and the appeal if successful is not rendered nugatory."** The Appellants/Applicants argued that they have fulfilled the three (3) conditions for stay of execution orders to be granted; sufficient cause, satisfaction of substantial loss and the furnishing of security for costs and the application has been made without undue or unreasonable delay.

10. On the first condition, the Appellants/Applicants claimed to have established a sufficient cause, that the tribunal failed to exercise its discretion judiciary, when it overlooked both valuation reports and failed to give reasons for its decision. The Appellants/Applicants have occupied the premises for decades operating small business and the huge rental increment would drive them out of business and that would result to substantial loss. The Learned Counsel argued that it would be unfair for the Respondent to demand security from the Appellants/Applicants who had been paying the rental sum so religiously since taking up possession of the business premises, yet the Respondent took ownership in the year 2014. The Learned Counsel urged court to allow the application which was made with no delay and issue costs to the Appellants/Applicants.

B. The Respondent's Written Submissions.

11. On 22nd November 2021, the Learned Counsel from the Law firm of Messrs. Abdulrahan saad & Associates for the Respondent filed his submissions in opposition of the application. They submitted that the Appellants/Applicants failed to meet the conditions melted out under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which were the establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security for costs. On the first condition, the Learned Counsel submitted that there was no subject matter to preserve and that the Appellants had refused to pay the rent as per the market rate or even pay the proposed rent on their valuation report. To support its case, the Learned Counsel relied on the case of **Hon. Attorney General – Versus - LSK & Anor, Civil Appeal (Application) No. 133 of 2011**, where sufficient case was said to be the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.

12. On the second limb, the Learned Counsel submitted that court needed to balance the interest of parties before reaching a decision on substantial loss, as observed in the case of **James Wangalwa & Anor – Versus - Agnes Naliaka Chesoto (2012)eKLR**, that:- **"...the process of execution by itself does not amount to substantial loss...this is so because execution is a lawful process. The applicant must establish other facts which show that the execution will create a state of affairs that will irreparably effect or negate the very essential core of the applicant as the successful party in the appeal...substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."** The Learned Counsel submitted while the Appellants/Applicants had failed to show how they would suffer loss. It was actually the Respondent who continued to suffer as the Appellants/Applicants were paying very low monthly rents of a sum of Kenya Shillings Ten Thousand (Kshs. 10, 000.00) and Kenya Shillings Four Thousand Five Hundred (Kshs. 4,500.00) since the year 2002. They stated that, this happened while the Respondent incurred expenses in maintaining the property.

13. The Learned Counsel maintained that the Appellants ought to furnish to court the differences in monthly rents which accrued from 1st March 2021 up to 1st November 2021 as per the tribunals' decision dated 10th September 2021. The Counsel urged court to dismiss the application since the Appellants/Applicants had failed to propose any security in their application, which was only meant to deny them the fruits of their judgement. The Counsel contended that though a party may fulfill the requirement, only court had the discretion to grant or deny the stay orders, after it had balanced the rights of the Applicant to appeal against that of the successful litigant to enjoy the fruits of their judgement as held in the case of "**Machira T/A Machira & Co Advocates – Versus - East African Standard No. 2 (2002)**" eKLR 63.

V. ANALYSIS AND DETERMINATION

14. Having carefully considered the pleadings and the submissions made, in my view the substantial issue to be determined are:-

a. Whether the Appellants/Applicants have met the threshold for the issuance of orders of stay of execution of the decision of the tribunal pending the hearing and determination of the appeal as founded under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

b. Whether the parties herein are entitled to the orders sought.

c. Who will meet the costs of the application.

ISSUE No. a). Whether the Appellants/Applicants have met the threshold for the issuance of orders of stay of execution of the decision of the tribunal pending the hearing and determination of the appeal as founded under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

15. The Honorable Court has decided to refer to the authority cited by the Appellants/Applicants In "**RWW – Versus - EKW (2019)**eKLR, the Court held that "**The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.**"

16. Stay of execution is provided under the provision of Order 42 Rule 6, of the Civil Procedure Rules, 2010 which provides as follows:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

17. The Appellants/Applicants need to satisfy the court they have fulfilled the following conditions before they can be granted the stay orders they are seeking. These are:-

a. Sufficient cause of action;

b. Substantial loss may result to the applicant unless the order is made,

c. The application has been made without unreasonable delay, and

d. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

18. These four (4) conditions must all be present. In the case of **Tabro Transporters Ltd – Versus - Absalom Dova Lumbasi (2012)**eKLR it was held that "**These conditions are the essence of Order 42 Rule 6 of the CPR. They however share an inextricable bond such that, it one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.**"

19. Undisputedly, execution is a process of law and itself being in motion is not a ground for granting stay, instead the appellants have to demonstrate substantial loss will occur if the execution is not stayed. The Appellants/Applicant' claim that execution would led to great hardship since they operate small scale shops and a huge increase in monthly rent from a sum of Kenya Shillings Ten Thousand (Kshs 10 ,000) and Kenya Shillings Four Thousand, Five Hundred (Kshs. 4,500.00) per month respectively to a sum of Kenya Shillings Fifty

Thousand (Kshs. 50,000.00) and Kenya Shillings Ten Thousand (Kshs. 10,000.00) would kick them out of business. A huge increase on the monthly rent payable would definitely strain the Appellants/Applicants small scale business, and until their appeal is heard, its in the interest of justice to stay the execution of the tribunal's decision.

20. Be that as it may, its unfortunate that the Appellants/Applicants have not demonstrated that if the decretal sum was paid to the Respondent, it may not be able to repay them. Execution proceedings will definitely be at the disadvantage of the Appellants/Applicants, however that is not a reason to stop the process. The Respondent too has a right to enjoy the fruits of its judgement and unless the Appellants/Applicants prove that their appeal would be rendered nugatory because the Respondent would be unable to pay the decretal sum if execution is allowed, substantial loss in my view has not been established. It is trite law that substantial loss lies in the inability of the respondent to refund the decretal sum. The Appellants' argument that the tribunal failed to exercise its discretion judicially, is a question to be answered in the appeal and cannot be argued to be prove that they stand to suffer substantial loss.

21. The second consideration is security for costs, the Appellants/Applicants must offer such security for the due performance of the orders as may ultimately be binding on the Appellants/Applicants. This position was well founded In the case of **Focin Motorcycle Co. Limited – Versus - Ann Wambui Wangui & Anor (2018)eKLR** it was held that, **“When an applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security.”** In this case, the Appellants have not proposed any security at all. On the contrary to the provisions of law, and strangely so, the Learned Counsel has submitted that it would be unjust for the Respondent to seek security for costs from the Appellants/Applicants who had been in occupation for decades and paid their old rent on time. I totally disagree with that rather unreasonable contention by the Appellants/Applicants' Counsel as ideally it is not the Respondent who demands for the security for costs. The correct legal position is that it's the Honorable Court which determines the security upon ordering stay to ensure that due performance of the obligations by the Applicant as to costs and to satisfy the decree.

22. The other consideration is whether there was undue and/or unreasonable delay in making this application. The Court has noted the following timelines whereby the Tribunal made its decision on 10th September 2021 and the Memorandum of Appeal and the application were filed on 24th September 2021. They were both filed timeously during the same month. Clearly, there was no undue delay. On this limb the Appellants/Applicants succeed.

23. In granting orders of stay of execution, the court is called to strike a balance between the right of the Appellant to appeal and the Respondent right to enjoy the fruits of this judgement. In **Tabro Transporters (supra) it was held:-**

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. Then the court is faced with a novel task of balancing the two competing rights to an almost constitutional symmetrical bound.

In carrying out the exercise, the focus is on the reconciliation of the two rights, which is not a question of discrimination as espoused by the Court of Appeal in SWANYA LTD V DAIMA BANK LTD CIVIL APPLICATION NO 45 OF 2001 that;

Whilst it is true that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, if successful, is not rendered nugatory but is however in the discretion of the court to grant or refuse a stay.”

I need say no more on this.

VI. DETERMINATION

24. In exercising my discretion under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, I am inclined to stay the execution pending the determination of the appeal. In my view, the Appellants/Applicants cannot be shut from the seat of justice, which is exercised discretionally by the court and they should be given an opportunity to prosecute the appeal. On the same breath, the Respondent should be assured of his judgement debt being secured as security for costs.

25. Consequently, based on the detailed analysis above stated, I do proceed to allow the Notice of Motion application dated 23rd September, 2021 by the 1st and 2nd Appellant/Applicant herein and order that there be a stay of execution pending the hearing and determination of the appeal under the following terms and conditions. These are:-

a. THAT until the filed appeal is heard and determined the 1st and 2nd Appellant/Appellants to continue paying the old and/or current tenancy rent to the Respondent as stated in the duly executed tenancy agreement terms and conditions stipulated thereof.

b. THAT the 1st and 2nd Appellants/Applicants to provide security for costs by depositing the decretal sum, which is the rental sum as ordered by the Business Premises Rent Tribunal on 10th September 2021, from 1st March 2021 to 24th September 2021 when the application was filed in court.

c. THAT the decretal sum hereby be and shall be deposited in an interest earning escrow joint holding bank account in the

names of Messrs. Michael Ngure & Company Advocates And Abdulrahman Saad & Associates the Counsel on record for both the 1st and 2nd Appellants/Applicants herein and Respondent, WITHIN THE NEXT 60 DAYS from the date of this ruling, failure to adhere these orders stay vacated.

d. THAT the Costs shall be in the cause.

26. IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2022

JUSTICE HON. L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of.

M/s. Yumna Court Assistant.

Mr. Gitahi holding brief for Mr. Ngure Advocate for the 1st & 2nd Appellant/Applicants

M/s. Lusweti holding brief for Mr. Saad Advocate for the Respondent.