



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCA E29 OF 2021

NEW SOLTA LTD.....APPELLANT/APPLICANT

VERSUS

NAIVASHA SOUTHLAKE SACCO LTD.....RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect to the Appellant/Applicant's Notice of Motion application dated 20th December, 2021. The said application is expressed to be brought under Order 42, 43 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya.

2. The application is filed under certificate of urgency and seeks the following orders:

i. Spent

ii. Spent.

iii. THAT there be an order of stay of execution of the ruling together with all consequential orders emanating from the ruling delivered on 1st December, 2021 pending the hearing and determination of the Appeal herein.

iv. THAT this Honourable Court grants such further or other reliefs as it deems appropriate.

v. THAT the costs of this application be provided for.

3. The application is based on the grounds on its face and supported by the affidavit sworn by one George Mwangi Kabuti with authority of the Appellant/Applicant. The Supporting affidavit is sworn on the 20th of December, 2021.

FACTUAL BACKGROUND

4. The Appellant/Applicant filed a reference dated 17th June, 2021 and an application dated 15th June, 2021 before the Business Premises Rent Tribunal at Naivasha. The Appellant/Applicant sought a restraining order against the Respondent, its servants and or agents from interfering with its right to quiet enjoyment of the premise.

5. The Tribunal delivered its ruling on 1st December, 2021 and dismissed the application on the basis that it lacked of jurisdiction and the Appellant/Applicant ordered to vacate the suit premises within 60 days of the ruling.

6. The Appellant/Applicant being aggrieved by the said ruling approached this court by way of appeal and the instant application and seeks relief of stay of execution from the orders emanating from the ruling by the tribunal.

APPELLANT/APPLICANT'S CONTENTION

7. The Appellant/Applicant contends that this application was filed to stay execution from the ruling of the Business Premises Rent Tribunal in Naivasha, Tribunal Case No. E001 of 2021.

8. It is its contention that they have since preferred an Appeal against the said ruling and that if stay of execution is not granted, the Appellant/Applicant may be evicted from the suit premises and the Appeal preferred could be rendered nugatory. The memorandum of appeal is annexed.

9. It is also its contention that his application has been made expeditiously, the appeal is arguable and has prima facie prospects of success.

10. It ends its deposition by stating that it is only just and fair that the application is allowed.

RESPONDENT'S RESPONSE

11. In response to the application, the Respondent filed a relying affidavit sworn by one Joseph Ngunjiri Gicheha, chairperson of the Board of Directors of the Respondent.

12. He deposes that the application is a delaying tactic employed by the Appellant/Applicant to delay justice for the Respondent.

13. He further deposes that there exists no tenant relationship between the Appellant/Applicant and the Respondent and therefore the dispute could not be determined by the Tribunal due to lack of jurisdiction.

14. The Respondent deposes that the Tribunal used its discretionary powers to issue the sixty (60) days' notice of eviction to the Appellant/Applicant well within its powers.

15. The Chairperson of the Respondent's Board of Directors deposes that the Respondent continues to be prejudiced by the Appellant/Applicant's occupation of the suit premises as it is unable to conduct its daily business therefore suffering irreparable losses.

16. According to him, the orders issued by the Tribunal are valid and the Respondent has every right to enforce it and that the grounds on the Memorandum of Appeal are not arguable and have no chances of success.

17. He finally deposes that no prejudice will be occasioned on the Appellant/Applicant and therefore in the circumstance and in the interest of justice and fairness urges this court to dismiss the instant application with costs.

ISSUES FOR DETERMINATION

18. The Appellant/Applicant and Respondent both filed their submissions on 7th January, 2022.

19. The Appellant/Applicant identified the following issues for determination:

a. Whether the Appeal is arguable.

b. Whether the Appeal will be rendered nugatory

20. The Respondent on the other hand identified the following issues for determination;

a. Whether the Appellant/Applicant has satisfied the conditions necessary for the grant of orders of stay of execution pending Appeal.

21. My considered view is that the issues for determination are:

a) Whether the Appellant/Applicant has met the conditions for grant of order of stay pending Appeal.

b) Which party bears the cost of the application.

ANALYSIS AND DETERMINATION

22. I have considered the application, the affidavits in support of the application and in opposition to the application, the annexures to the affidavits and the submissions by both parties.

23. The law relating to stay pending appeal is Order 42 Rule 6 (2). It is also important to state that it is a discretionary power. It is dependent on certain conditions being met and if the court is satisfied, it shall grant orders of stay pending Appeal.

24. **Order 42 Rule 6(2)** of the Civil Procedure Rules, 2010 provides as follows:-

(2) No order for stay of execution shall be made under sub rule (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.

25. In **Victory Construction Vs BM (a minor suing through next friend one PMM) [2019] eKLR**, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions.

26. Section 1A of the **Civil Procedure Act** provides that

1) The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act

2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section 1.

27. Section 1B of the Civil Procedure Act explains some of the aims of the overriding objectives as:

a) *the just determination of the proceedings;*

b) *the efficient disposal of the business of the Court;*

c) *the efficient use of the available judicial and administrative resources;*

d) *the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and*

e) *the use of suitable technology.*

28. In **Vishram Ravji Halai Vs Thornton & Turpin Civil Application No. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending Appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

29. In **Butt vs. Rent Restriction Tribunal [1979]**, the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The court stated thus:

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

ii. 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 the Appeal court reverse the judge's discretion.

iii. Thirdly, 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.

iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

30. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicant/Appellant has brought this application without unreasonable delay, I am satisfied that there was no delay. The Ruling was delivered on 1st December, 2021 and this application and Memorandum of Appeal were filed on 21st December, 2021.

31. The second criterion is whether the Applicant/ Appellant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In **Silverstein Vs Chesoni (2002)1 KLR 867** it was 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 loss would render the Appeal nugatory”

32. **Shell Ltd Vs Kibiru & Another [1986] KLR 410** sets out the principles for grant of orders of stay pending Appeal. Holding number 4 of the **Shell** case is particularly instructive on the question of substantial loss. The principles are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse

it would render the Appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed Appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the Appeal nugatory, as the case involved a money decree capable of being repaid.” (Emphasis is mine)

33. My deduction from principal No. 4 above is that when a decree is for payment of money, refusal to stay execution would not render an Appeal nugatory.

34. The order arising from the ruling of the Tribunal is for eviction. If orders of stay are not granted, then the Appellant/Applicant faces eviction. I therefore find that the Appellant/Applicant has sufficiently demonstrated that substantial loss would be occasioned to him if orders of stay pending Appeal are not granted.

35. The third criterion is that the Applicant must furnish security for the due performance of the decree. I am reminded that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks to preserve the status quo pending the hearing of the appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement.

36. The Court of Appeal in *Nduhiu Gitahi and Another Vs Anna Wambui Warugongo* [1988] 2 KAR 621, while citing the decision of Sir John Donaldson M. R. in *Rosengrens Vs Safe Deposit Centers Limited* [1984] 3 ALLER 198 stated:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending Appeal the court is faced with a situation where judgment has been given. It is subject to Appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that Appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the Appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the Appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the Appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

37. In *Absalom Dova Vs Tarbo Transporters* [2013] eKLR, it was stated:

“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. The court in balancing the two competing rights focuses on their reconciliation...”

38. In *Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was stated:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the Appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

39. In *Gianfranco Manenthi & another Vs Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed:

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of Appeal from money decree of the lower court for an order of stay must satisfy this condition on security.

40. The decision in *RWW Vs EKW* [2019] eKLR reminds me of the purpose of a stay of execution order pending Appeal, in the following words:

“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.

41. In *Cotton L J in Wilson Vs Church (No 2) (1879) 12ChD 454 at page 458*, Hancox JA stated,

“I will state my opinion that when a party is Appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed Appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

42. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287*.

43. It is not lost on me, therefore, that the power to grant or refuse an application for stay of execution pending Appeal is discretionary and that while at it, I should balance the competing interests of both the Appellant and the Respondent; focusing on their reconciliation. Further, under Order 42 Rule 6 (2) this court is not required to inquire into the merits of the intended Appeal.

DISPOSITION.

44. Keeping this in mind and taking into consideration the submissions of parties, the provisions of section 1A and 1B of the Civil procedure Act, Order 42 Rule 6 (2) of the Civil Procedure Rules and judicial decisions cited in preceding paragraphs. I now make the following orders:

a. There shall be an order a stay of execution of the Ruling and order of the Business Premises Tribunal, delivered on 1st December, 2021 in Naivasha BPRT Case No. E001/2021 pending the hearing and determination of the Applicant’s Appeal.

b. The Applicant/Appellant shall continue to meet its contractual obligations, in respect of continued use of the suit premises, pending the hearing and determination of this Appeal.

c. That in the event of failure to comply with the order in (b) above, the order in (a) shall stand vacated.

d. The cost of this application shall be in the Appeal.

45. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 3RD DAY OF MARCH 2021

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Wairegi the Appellant/Applicant.

Mbugua Macharia for the Respondent.

Court Assistant; Jeniffer.