



REPUBLIC OF KENYA



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Cause Impact Limited v Trustees & 2 others (Environment and Land Appeal E090 of 2021) [2022] KEELC 75 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 75 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E090 OF 2021
OA ANGOTE, J
JUNE 2, 2022

BETWEEN

CAUSE IMPACT LIMITED APPELLANT

AND

TRUSTEES 1ST RESPONDENT

TYSONS LIMITED 2ND RESPONDENT

SANNEX ENTERPRISES AUCTIONEERS 3RD RESPONDENT

RULING

1. Before this court for determination are two applications being the Appellant's Notice of Motion application dated 18th November, 2021 and the Respondent's Notice of Motion application dated 14th January, 2022.

The Appellant's application dated 18th November, 2021

2. This Application seeks the following orders;
 - a. Spent
 - b. This Honourable Court be pleased to grant the Applicant leave to Appeal out of time against the Ruling given on the 24th day of September, 2021 by Hon. Mugambi (Chairman, Business Premises Rent Tribunal) in Tribunal Case No. 435 of 2021.
 - c. The Memorandum of Appeal dated 16th November, 2021, and filed herein on 17th November, 2021, be deemed to be properly on record and directions be issued on the hearing and determination of the Appeal on merit.



- d. Spent-This Honourable Court be pleased to grant an order restraining the Respondents by themselves and/or agents from disposing and/or selling the Appellant's properties/ office equipment in their custody pending the hearing and determination of this Application.
 - e. This Honourable Court be pleased to grant an order restraining the Respondents by themselves and/or agents from disposing and/ or selling the Appellant's properties/office equipment in their custody pending the hearing and determination of this Appeal.
 - f. The costs of this Application be provided for.
3. The application is supported by the Affidavit of Kentice Tikolo, the Director of the Appellant who deponed that the Appellant has been a tenant in the subject premises from the year 2014, and has never been in rent arrears; that when its lease expired on 20th October, 2020, the same was not renewed and that the Appellant continued to occupy the premises as a protected tenant subject to the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
 4. According to the Appellant's Director, the premises changed ownership and the new owners appointed a managing agent who ignored the oral agreement that was in place between the Appellant and the new owner regarding the payable rent during the period that there was no lease causing a dispute to arise and that the dispute aforesaid prompted the Appellant to file Tribunal Case No. 435 of 2021 at the Business Premises Rent Tribunal.
 5. It was deponed by the Appellant's Director that before the matter could be heard on merit, the Respondents raised a preliminary objection, objecting to the Tribunals' jurisdiction, which objection was upheld and the case struck out and that the Appellant is aggrieved by the said Ruling and has appealed against the same.
 6. It is the Appellant's case that the Appeal has good chances of success as the impugned decision was clearly made in error to the extent that the Chairman purported to determine contested factual matters in the hearing of a Preliminary Objection.
 7. According to the deponent, the Appeal was lodged out of time due to the Appellants' inability to access a copy of the duly signed Ruling and further due to the fact that the Respondents had carted away all their computers and equipment effectively grounding them; that the Respondents have threatened to dispose of the aforesaid properties in an illegal distress for rent carried out on 27th September, 2021, and that the disposal of the Appellant's assets will render the intended Appeal nugatory.
 8. In response to the application, the Respondents, though a Director of the 2nd Respondent charged with the management of the suit property by the 1st Respondent deponed that upon delivery of the Ruling in BPRT No 435 of 2021, the Appellant filed MCCC/E1145 of 2021 together with a Motion seeking to restrain the Respondents from selling the Appellant's goods pending the hearing and determination of the suit which interim orders were granted.
 9. It was deponed that the suit was unilaterally withdrawn vide a notice dated 2nd February, 2022 which has not been adopted as an order of the court; that the Appellant lacks good faith and is guilty of material non-disclosure hence disentitling it to the discretionary orders and that the Appellant was and is still in rental arrears.
 10. It was the deposition of the 2nd Respondent's Director that indefeasible right to levy distress was lawfully exercised; that the statement of account shows rent arrears of Kshs 3,388,894.07 as at 30th



November, 2021 and Kshs 2,950,424.07 as at 31st January, 2022 and that the attached goods are yet to be sold due to the orders of the court in MCCC/E1145 of 2021.

11. It was submitted that the Appellant did not request for the proceedings, ruling and order of the Tribunal and cannot therefore claim that it could not lodge the Appeal on time due to inability to access a copy of the signed ruling and that the Appellant lacks good faith as illustrated by the fact that despite its letter of 17th January, 2022 giving notice to vacate the premises on 31st January, 2022, it removed its files and other tools of trade from the premises on 24th January, 2022 in total ignorance of the fact that the tenancy agreement is not terminable other than for breach as provided at Clause 4.
12. According to the Respondents, the Ruling on the Appellant's application in MCCC/E1145 of 2021 was delivered on 28th January, 2021 dismissing the application with costs and because no landlord tenant relationship exists, there is no reason why the attached goods should not be sold to offset the rent arrears.
13. Vide its Further Affidavit dated 5th March, 2022, the Appellants Director further deponed that it had signaled the fact that it would be withdrawing the suit at the Magistrate's Court for the reason that the magistrate's court lacked the requisite jurisdiction to entertain the dispute; that the fact that the Notice of Withdrawal is yet to be adopted as an order of the court does not in any way detract from the fact that the suit has been withdrawn and that it had difficulty securing the signed copy of the Ruling of the Tribunal.

The Respondents' application dated 14th January, 2022

14. This Application seeks the following orders.
 - a. Spent
 - b. Spent-That the Interim Orders granted Ex-parte on the 29th November, 2021 and extended on 7th December, 2021 be set aside pending the hearing and determination of the Appellants' Notice of Motion dated 18th November, 2021.
 - c. That costs of the Application be paid by the Appellant in any event.
15. The application is supported by the Affidavit of the 2nd Respondent's Affidavit in which he deponed that on 6th December, 2021, orders dated 29th November, 2021 were served upon them via e-mail and that the ex-parte orders therein were similar to the orders granted in MCCC/E1145 of 2021 on 28th September, 2021 and were on 29th November, 2021 extended to 21st January, 2022.
16. It was deponed that the Appellant did not disclose the aforesaid material facts to the court when obtaining the ex-parte orders; that having obtained the orders on 29th November, 2021, the Appellant did not serve the same until 6th December, 2021 after the 3 days' time period for service of interim orders and that as the court was extending the orders on 7th December, 2021, the Respondent was filing submissions in respect of the suit at the Magistrates' Court.
17. It was deponed by the 2nd Respondent's Director that MCCC/E1145 of 2021 has not been withdrawn; that the Appellants' actions of obtaining similar orders from different courts constitutes an abuse of court; that whereas the Appellant asserts that it has paid all the due rent, there has been no demonstration of the payment and that the Appellant is not paying any rent and is hiding under the interim orders that only restrain the sale of the attached goods.



18. In response to the application, the Appellant through its Director filed a Replying Affidavit in which he averred that contrary to the Respondents' assertions, all material facts relating to the subject matter were disclosed in the application of 18th November, 2011 including the pleadings in MCCC/E11425 and that MCCC/E11425 has since been withdrawn.
19. It was deponed that at the time of the dispute, the Appellant was a protected tenant there being no lease agreement and as such this court has the requisite jurisdiction to entertain the Appeal; that the Appellant has since vacated the suit property and settled all the due rent but the Applicant insists on unfairly detaining its tools of trade and intends to sell them and that in any event, the question of whether or not the Appellant is in arrears is a contentious issue that is yet to be determined on its merits.

Submissions

20. The Appellant's counsel submitted that the application of 14th February, 2022 has been overtaken by events and is spent as the subject orders were extended pending the determination of the application scheduled for 2nd June 2022 and that in any event, it is undisputed that MCCC/E1145 of 2021 was long withdrawn and there being no other suit pending between the parties herein, the Respondents are not entitled to the orders sought therein.
21. It was submitted that the superior courts have established a jurisprudence of not denying an Appellant leave to appeal for a delay of 30 - 90 days like the present case. Reliance in this regard was placed on the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* [2020] eKLR.
22. Counsel submitted that the Appeal is arguable as it seeks to challenge the Tribunal's decision to deny the Appellant a hearing on merit by striking out its case based on a Preliminary Objection and that as expressed in *Abmed Musa Ismael v Kumba ole Ntamurua & 4 others* [2014] eKLR, an arguable Appeal need not be one that will necessarily succeed on full consideration of the Appeal, but one that raises a bonafide question to be explored and answered.
23. Counsel for the Appellant submitted that no prejudice will be suffered by the Respondent if the application is allowed as the Appellant has long vacated the demised premises and handed over vacant possession of the same and that if the Respondents are allowed to sell the Appellant's goods currently in their unlawful possession, the Appeal will be rendered nugatory and a mere academic exercise.
24. The Respondents' counsel submitted that pursuant to Section 79 G of the *Civil Procedure Act*, the Appellant was obligated to file an Appeal within 30 days of the date of the decree or order appealed from; that the Appeal may be admitted out of time if sufficient cause has been demonstrated and that as expressed by the Supreme Court in *Agatha v Azad & others*, Application 11(E020) of 2021(2022) KESC 1(KLR), an Applicant in such an application has to explain the delay to enable the court exercise its discretion in his favour.
25. It was submitted that in the present circumstances, the Appellant's explanation that the delay was due to its inability to access a copy of the Tribunals' Ruling is untenable and has not been demonstrated and that the reason that all their equipments were carted away is equally untenable as the attachment was carried out on 27th September, 2021 while the Ruling was delivered on 25th September, 2021.
26. It was submitted that the attached goods are yet to be released and the Appellant has been able to file its application and the Appeal albeit late and that the documents attached to the Affidavit in support of the Motion of 18th November, 2011 are inadmissible as they defy Rule 9(a) of the *Oaths and Statutory Declarations Act*. Reliance in this regard was placed on the case of *Francis A Mbalanya v Cecilia N. Waema* [2017]eKLR.



27. It was submitted that the Appellant has not demonstrated an arguable Appeal; that the Tribunal made a determination that it had no jurisdiction to entertain the matter; that having signed a letter of offer on 7th July, 2021 for a term of six years commencing on 1st August, 2021, it is apparent that at the time the matter was filed at the Tribunal, the relationship between the parties was neither controlled nor protected and that the Tribunal rightfully found that it had no jurisdiction.
28. Counsel submitted that the Appellant will not suffer any loss as the landlord tenant relationship terminated when it vacated the premises; that while averring that it is not in any rental arrears, the Appellant has not demonstrated evidence of rent payment and that distress for rent is governed by the *Distress for Rent Act* pursuant to which the sale of lawfully attached goods cannot be stopped.
29. It was submitted by the Respondents' counsel that having demonstrated lack of good faith by the Appellant, it follows that they are not entitled to the court's discretion and that in light of the fact that it has been demonstrated that the Appellant obtained ex-parte orders through non-disclosure of material facts particularly the existence of MCCC/E1145, the Motion of 14th January, 2022 is merited and should be allowed with costs.
30. Vide their supplementary submissions filed on the 23rd May, 2022, it was submitted by counsel for the Respondents that as expressed by the Court in *Master Fabricators Limited vs Patrick Omondi Ndonga* [2014] eKLR, a corporate entity/legal person cannot seek protection from the provisions of Section 44(I) of the *Civil Procedure Act*; that in any event, the attached goods do not fall within the definition of tools and implements of a person necessary for the performance by him of his trade or profession and that the Court in *Bora Capital Limited vs Jane Njeri Munyi* [2018] eKLR stated that not every item qualifies as a tool of trade.

Analysis and Determination

31. Having considered the applications, the Affidavits and submissions, the issues that arise for determination are;
 - i. Whether the Applicant has met the legal threshold for granting leave to appeal out of time? and if so,
 - ii. Whether the Court should restrain the Respondents from disposing off the Appellants properties pending the determination of the Appeal?
32. It is noted that vide the application dated 14th January, 2022, the Respondents sought to have the interim orders granted on 29th November, 2021 and extended on 7th December, 2021 be set aside pending the hearing and determination of the Appellants Notice of Motion dated 18th November, 2021.
33. The Motion aforesaid has already been heard and this Ruling constitutes its determination. Consequently, the prayer has been spent. As the application was only seeking the setting aside of the interim orders aforesaid, it follows that the entire application is moot. The same is subsequently dismissed with no orders as to costs.
34. The law governing the institution of an Appeal from a subordinate court to the High Court (ELC) is found in Section 79G of the *Civil Procedure Act* that provides as follows:

“ Every appeal from the Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period



any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

35. However, there is a proviso to Section 79(G) aforesaid which provides that;

“an Appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the Appeal on time.”

36. Section 15 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) provides as follows:

“Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court; Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.”

37. Apart from the foregoing, Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#) grant this court discretion to enlarge time where a limited time has been fixed for doing any act or taking any proceedings.

38. It is now accepted that the discretionary powers granted to a court are not to be used whimsically or capriciously but must be based on sound legal principles. The courts have had occasion to set out the principles guiding the extension of time within which to Appeal. The Court of Appeal in the case of [Paul Musili Wambua vs Attorney General & 2 Others](#) [2015]eKLR, held as follows;

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

39. The Supreme Court of Kenya in the case of County Executive of [Kisumu v County Government of Kisumu & others](#) [2017] eKLR while relying on its earlier decision in the case of [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#) Application No. 16 of 2014 [2014] eKLR equally relied on by the Court of Appeal in [Vishva Stone Suppliers Company Limited v RSR Stone \[2006\] Limited](#) cited by the Appellant reiterated the considerations to be made in such a case to be as follows:

“the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

40. The Court will be guided by the foregoing authorities. In the present circumstances, the Ruling that the Appellant is seeking to appeal against was delivered on 24th September, 2021. The Appeal against the Ruling should therefore have been filed on or before 24th October, 2021.

41. The Memorandum of Appeal which the Appellant seeks to have admitted was filed on 17th November, 2021. According to the Appellant, its’ failure to file the Appeal in time was occasioned by two main factors, firstly, that it only managed to receive a copy of the duly signed Ruling in November, 2021 and secondly that all their computers and equipment were carted away by the Respondents hence grounding them.

42. This assertion was rebutted by the Respondents who contend that the applicant did not request for proceedings, ruling and order of the Tribunal and cannot therefore claim that it could not lodge the Appeal on time due to inability to access a copy of the signed Ruling and that the Appellants goods and equipment were carted away one month after the Ruling.

43. In determining whether the explanation advanced by the Appellant to file the appeal out of time is sufficient in the circumstances of this case, the court will be guided by the holding of the court in *Daphne Parry v Murray Alexander Carson* [1963] EA 546 where it was stated as follows:

“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.”

44. At the onset, the court notes that the Respondent has raised an objection to the admissibility of the documents in support of the present Motion. This objection has been raised by way of submissions and subsequently cannot be maintained. It is common ground that new issues cannot be raised in submissions. As aptly stated by the court in *Republic vs Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another* [2014];

“....New issues raised by way of submissions are best ignored.”

45. Having keenly perused the documents in support of the Motion by the Appellant, there appears to be no demonstration of any steps that have been taken towards securing a signed copy of the Ruling nor indeed any difficulty in obtaining the same. Such steps would be evidenced by letters written to the Tribunal and where indeed a delay was occasioned by the Tribunal, a letter to that effect.

46. It is trite that he who alleges must prove and in light of the Respondents’ rebuttal of the assertion that the delay in filing the appeal was occasioned by the lack of a certified Ruling, it behooved the Appellant to prove that the set of circumstances it alleges actually existed.



47. As expressed by the Supreme Court in *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR, a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. In considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.
48. In addition to the fact that there is no evidence that the Appellant applied for the copy of the Ruling, it is not clear when exactly the signed copy of the Ruling became available to the Appellant. In the circumstances, the court is inclined to agree with the Respondents that the alleged delay in securing a signed copy of the Ruling having not been demonstrated cannot constitute a good reason for extension of time.
49. The other reason that has been proffered by the Appellant for not filing the Appeal within the requisite time is that the Respondent had carted away its goods hence its inability to file the Appeal. The court finds it difficult to relate the carting away of the goods with the failure to file the Appeal timeously especially in light of the fact that the suit in the magistrate's court was filed after the impugned proclamation and attachment of its goods.
50. The Appellant asserts that a period of one month does not constitute inordinate delay. While that may be so, it is trite that any delay must be satisfactorily explained. This was the holding by the Court of Appeal in *Vishva Stone Suppliers Company Limited vs RSR Stone* (supra) which set the guiding principles in applications for extension of time to Appeal as follows:
- “...The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
51. It has been brought to the attention of the court, and it appears to be undisputed, that between the filing of the present application and the filing of the Notice of withdrawal of CMCC/E1145 on 2nd February, 2022, parallel proceedings were ongoing in this court and in the Magistrates Court with the Appellant seeking to restrain the Respondents from disposing off the distressed goods.
52. While the Appellant states that it had all along intended to withdraw the application, no cogent reason has been given as to why the suit was only withdrawn 3 months after the filing of this application and more notably after the dismissal of their application for injunction.
53. Even though the intent to withdraw the suit at the Magistrate's Court was stated in the grounds in support of the Motion, nowhere was it disclosed that the Magistrate's court had issued interim injunctive orders. The fact that the Appellant was at some point enjoying interim orders from both this court and the Magistrate's court inevitably lends itself to the conclusion that the Appellant has been acting in bad faith. The Court cannot be seen to countenance such conduct.
54. The orders being sought herein are discretionary and equitable in nature. Equity demands that those seeking its aid should come before it with clean hands. As observed by the Court of Appeal in *John Njue Nyaga vs Nicholas Njiru Nyaga & another* (2013) eKLR;
- “It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings. The applicant has not done so and is underserving of the orders he seeks.”



55. In view of the foregoing, and having determined that the Appellant did not approach this Court with clean hands, the court finds the Appellant undeserving of the court's discretion. In any event, the court has also found that no plausible reason has been given as to why the appeal was not filed within the requisite period of 30 days from the date of the Ruling of the Tribunal
56. The Appellant seeks to have the Respondent restrained from disposing off its properties that were distressed for rent. It contends that if the Respondent is not restrained from disposing off the property, the Appeal will be rendered nugatory. What the Appellant is seeking, though not expressly stated, is an injunction pending Appeal.
57. Order 42 Rule 6 (6) of the *Civil Procedure Rules* provides:-
- “Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
58. Considering that the court has declined to grant to the Appellant leave to file the Appeal out of time, the issue of granting an injunction to restrain the Respondents from selling the distrained goods cannot arise. I say so because an injunction, or a stay of execution cannot be granted in a vacuum.
59. Consequently, the Appellant's application dated 18th November, 2022 is dismissed but with no order as to costs. Considering that the Appeal herein was filed out of time and without the leave of the court, the same is struck out with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF JUNE, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Agwara for the Appellant

Ms Mbabu for the Respondent

Court Assistant: Nechesah

