



**Ram Hospital Ltd v Ramji Meghji Gudka Ltd (Environment and Land Appeal E005 of 2022) [2022] KEELC 2678 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2678 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E005 OF 2022**

**JM ONYANGO, J**

**JULY 6, 2022**

**BETWEEN**

**RAM HOSPITAL LTD ..... APPLICANT**

**AND**

**RAMJI MEGHJI GUDKA LTD ..... RESPONDENT**

***(Kisii BPRT No. 78 of 2021)***

**RULING**

**Introduction**

1. This Ruling is in respect of a Notice of Motion application dated 11<sup>th</sup> March 2022 filed by Appellant/Applicant pursuant to order 40 rules 1 and 2 of the *Civil Procedure Rules* 2010, section 1A, 1B and 3A of the Civil Procedure Rules-Cap 21 of the Laws of Kenya and Articles (59 2(d) of *the Constitution*. In the said application the Applicant seeks the following orders;
  - a) spent
  - b) Spent
  - c) Pending the inter partes hearing and determination of this appeal an order of injunction do issue to restrain the Respondent, its agents, servants, employees and/or anyone working under authority and/or directions of the Respondent from evicting the Appellant/Applicant herein, that is to say RAM Hospital Limited, its workers, agents, servants and/or employees at RAM Hospital, a medical facility situated upon that piece of land known as L.R No. Kisii Municipality/BlockIII/270.
  - d) The OCS Kisii Central Police station to oversee the implementation of the order.
  - e) Cost of the application be borne by the Respondent.



2. The application is supported by grounds on the face of it and by the Supporting Affidavit sworn by one Dr. Anil Ratilal Tailor, the Managing Director of the Applicant on 11<sup>th</sup> March, 2022. Dr. Tailor averred that sometimes in 2000, the Respondent granted him lease of the suit property. At the time he was trading as RAM Hospital. He averred that in the year 2011 he incorporated a company known as RAM Hospital Limited, the Applicant herein which immediately assumed the position of tenant in his place through an oral lease.
3. He further contended that no formal notice under section 4 of the Land Lord tenant (Shops, Hotels and Catering Establishments) Act-Cap 301 of the Laws of Kenya has ever been served upon the Applicant.
4. He deposed that the Respondent served a Tenancy Notice dated 19<sup>th</sup> July, 2016 under section 4 of Cap 301 upon Dr. Anil Ratilal Tailor T/A Ram Hospital Limited, an entity which is non-existent in law and one which has never been the Respondent's tenant.
5. It was his deposition that the Respondent filed an application dated 24/2/2017 in Kisii CM Misc Civil Application No. 37 of 2017 seeking adoption of a purported decision of the Business Premises Rent Tribunal (BPRT) against two parties that is to say Dr. Anil Ratilal Tailor and Ram Hospital Limited. When the Applicant was notified of the Respondent's notice to evict, she lodged an application dated 1.3.2017 seeking inter alia to dismiss the application dated 24.2.2017.

The Chief Magistrate's Court vide its ruling delivered on 4/7/2018 allowed the Applicant's application dated 1.3.2017 and directed that there be a stay of proceedings of the order dated 6.10.2016 by the Chairman of the Business Premises Rent Tribunal (BPRT) pending inter partes hearing and determination on priority basis.

6. He deposed that being aggrieved by the said ruling the Respondent preferred an appeal against the same vide Kisii HCCA No. 52 of 2018. The Honourable Court in its judgment in the appeal delivered on 25.3.2021 upheld the order of the trial court allowing the application dated 1.3.2017 and stated as follows:

“The ruling and order of this Honourable Court staying proceedings on the order dated 6.10.2018 by the Chairman of the Business Premises Rent Tribunal (BPRT) be vacated.

The order of the court returning the matter back to the BPRT for inter partes hearing and determination on priority basis be vacated”.

7. Dr. Anil Tailor deposed that the High Court in its judgment found that the Applicant herein is a separate legal entity from its directors and shareholders and that the 2<sup>nd</sup> Respondent is not the same entity as Dr. Anil Ratilal Tailor T/A Ram Hospital Limited against whom the Notice to terminate Tenancy was issued and against whom the BPRT's decision was entered. The court further held that the orders sought against the Applicant on the basis of the determination of the BPRT dated 6.10.2016 could not issue and therefore the dismissal of the application dated 24.2.2017 by the court was merited.
8. Dr. Tailor contended that after the Respondent lost its quest to evict the Applicant, it went back to Kisii CM Misc Civil Application No. 37 of 2017 where Dr. Anil Ratilal Tailor is named as the 1<sup>st</sup> Respondent and sought orders of eviction against the 1<sup>st</sup> Respondent purporting that he is still its tenant.
9. Dr. Tailor deposed that the Applicant has since the filing of HCCC No. 7 of 2017 paid rent to the Respondent through its advocates and he has annexed copies of receipts thereof.



10. It is his deposition that in view of the intended eviction of Dr. Anil Ratilal Tailor which is in effect an eviction of the Applicant herein, the Applicant lodged a reference vide Kisii BPRT No. 78 of 2021, in the BPRT seeking to protect its tenancy from illegal termination and sought an injunction to restrain the Respondent from evicting it. A temporary order of injunction was issued by the BPRT on 20.9.2021. The Respondent then filed an application dated 1.10.2021 seeking a review of the ex-parte orders of injunction.
11. Dr. Tailor averred that in its ruling delivered virtually on 10.3.2022 the Tribunal held that it did not have jurisdiction to determine the Reference as the Applicant was not a tenant of the Respondent and that the Reference was both res judicata and sub-judice. The Tribunal also discharged the orders issued on 20.9.2021.
12. He depones that being aggrieved by the said ruling the Applicant appealed to this court raising the grounds inter alia that the Applicant is a tenant of the Respondent. He thus deponed that the appeal has high chances of success. Dr. Tailor however indicated that he had not yet obtained a copy of the ruling of the BPRT and he undertook to furnish it to the court.
13. He expressed fear that the intended eviction if effected would occasion irreparable harm as innocent patients would be exposed to intolerable suffering, death and/or risk of death and the indignity of eviction would result in loss of business goodwill which cannot be remedied by any award of costs.
14. He further deponed that the substratum of the appeal would be lost if the order of temporary injunction was not granted.
15. The Respondent filed a response vide a Replying Affidavit dated 18<sup>th</sup> August, 2021 sworn by on Ashawin Ramji Gudka. Mr. Gudka averred that the application was full of falsehoods, which was geared to mislead the court. The Respondent deponed too that Dr. Anil Tailor, who swore the Affidavit in support of the application entered into a tenancy agreement with the Respondent, whereby Dr. Anil Tailor, allowed the Applicant to take possession of the premises situated on the suit property.
16. He reiterated that the Tenancy agreement was entered between Dr. Anil Tailor and not otherwise since the importation of the Applicant into the premises was at the instance of Dr. Anil Tailor who as a matter of fact was a director of the Appellant. He deponed that upon entering into a tenancy agreement with the Respondent, Dr. Anil Tailor was obliged to remit rents due and owing to the Respondent. He claimed that Dr. Anil Tailor however failed or neglected to pay the rent that had accrued to 24,000,000 for a period of two years (2014 to 2015).
17. He averred that in 2016 the Respondent and Dr. Anil Tailor negotiated and agreed to sign a one-year lease running from January to December 2016 wherein Dr. Anil Tailor undertook to clear the outstanding rent together with the rent for 2016. He deponed that Dr. Anil Tailor once again defaulted in paying the rent which accumulated to Kshs. 37,000,000 and the Respondent was compelled to institute a suit vide Kisii HCC NO. 7 OF 2017.
18. Mr Gudka further averred that the court delivered a judgment in favor of the Respondent where it held that Dr. Anil Tailor and the Appellant, who were Defendants in the suit were justly indebted to the Respondent. He explained that arising from the default and failure to pay the outstanding rent, the Respondent had also lodged a Notice to terminate the Tenancy against Dr. Anil Tailor sometime in 2016.
19. Mr Gudka claimed that the said notice was served upon Dr. Anil Tailor. He deponed that despite Dr. Anil Tailor being served, he neglected to oppose the notice and the same matured. He deponed that



- the said failure prompted the Respondent to successfully move the BPRT to issue a decision on 6<sup>th</sup> October, 2016 confirming the coming into effect of the Termination Notice.
20. He contended that the BPRT in its decision delivered on 6<sup>th</sup> October, 2016 decreed that Dr. Anil had ceased being a Tenant and was thus eligible to be evicted. He deposed that he later filed an application dated 24<sup>th</sup> February, 2017 (Kisii CMCC Misc. App. No 37 of 2017) at the Chief Magistrate Court to seek the adoption the said decision of the BPRT which application was duly served upon Dr. Anil Tailor and the Applicant who were Respondents in the application.
  21. He further disclosed that the Applicant filed an application dated 1<sup>st</sup> March, 2017 at the Chief Magistrate's Court seeking to dismiss the application dated 24<sup>th</sup> February, 2017 on grounds that it was a separate legal entity from Dr. Anil Tailor and thus was not party to the tenancy agreement and that the claim would affect it as the current occupant.
  22. He deposed that the Chief Magistrate's Court dismissed the claim against the Applicant solely on an account of being a different entity from Dr. Anil Tailor while staying the claim seeking to terminate the tenancy agreement with Dr. Anil Tailor and eventually referring him back to the Tribunal for hearing and determination.
  23. He stated that he appealed against the decision of the Chief Magistrate's Court at the High Court vide Kisii Civil Appeal No. 52 of 2018. He further stated that the Respondent's Appeal was allowed partly whereby the High court vacated the order of the Chief Magistrate's Court staying the decision and the claim against Dr. Anil Tailor. He underscored the fact that the High Court upheld the dismissal of the claim against the Applicant solely on the grounds that the tenancy agreement did not concern it since it was a separate legal entity from Dr. Anil Tailor T/A Ram Hospital.
  24. He stated that his understanding of the judgment was that the termination of tenancy as against Dr. Anil Tailor stood and thus there was nothing stopping the Respondent from enforcing the decision of the BPRT entered on 6<sup>th</sup> October, 2016 to evict Dr. Anil Tailor and his associates from the suit premises. The Respondent therefore moved back to the Chief Magistrate's Court where the decision of the BPRT was ratified on 18<sup>th</sup> June, 2021 making the eviction of Dr. Anil Tailor imminent.
  25. Mr Gudka deposed that Dr. Anil filed a Miscellaneous Application on 30<sup>th</sup> July, 2021 seeking among other orders an order for stay of the orders granted by the court on 18<sup>th</sup> June, 2021 which order was granted ex-parte, pending Inter partes hearing. The Applicant on the other hand filed a Reference at the BPRT vide Kisii BPRT No. 78 of 2021 on 14<sup>th</sup> September, 2021 seeking to challenge its imminent eviction from the suit property that had emanated from the decision dated 6<sup>th</sup> June, 2016.
  26. Mr Gudka claimed that the reference was filed during the pendency of the application by Dr. Anil in the Chief Magistrate's Court. He therefore contended that the BPRT Chairman was right in his determination that the suit was sub-judice.
  27. Mr Gudka also contended that given that the High Court had in Kisii HCC No. 7 of 2017 found that both the Applicant and Dr. Anil were defaulters of an accumulated rent of Kshs. 37,000,000 and the Tribunal was right in its finding that the reference was res judicata.
  28. Mr Gudka argued that the application was wrongly lodged under order 40 rules 1 and 2 which deals with temporary injunctions. He contended that even if the court was to allow the injunction, it should consider that it does not meet the conditions set out under order 42 rule 6 (6) of the Civil Procedure Rules and those set out in the famous case of Giella Vs Casman Brown.
  29. The Court directed that the application be disposed of by way of written submissions and both parties filed their submissions.



## Issues for determination

30. The singular issue for determination is:

Whether the court should grant an order of injunction pending the hearing and determination of the Appeal against the determination of the BPRT.

## Analysis and determination

31. It is the Applicant's contention that his application for injunction has been brought under order 40 rule 1 and 2 instead of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010 because there is no decree in BPRT Cause No. 78 capable of being executed. To the extent that the Tribunal dismissed the applicant's case, the decree emanating therefrom was not a positive order which could be executed. However, whereas order 40 rules 1 and 2 contemplate a situation where there is a suit pending hearing and determination, Order 42 Rule 6 provides thus: -

“(6) Notwithstanding anything contained in sub rule (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 subordinate Court or tribunal has been complied with.”

32. It is clear that the court has the discretion to grant an injunction pending appeal if it satisfied that the appeal has been properly filed. The said discretion must be exercised judicially on the basis of law and relevant affidavit evidence.

33. In the case of *Patricia Njeri & Others vs National Museum of Kenya* (2004 eKLR), Visram J. (as he then was) identified the following principles that should guide the Court in considering such an application. These are that:

1. An order of injunction pending appeal is discretionary and will not be granted where the appeal is frivolous.
2. The discretion should be refused where it would inflict greater hardship than it would avoid.
3. The applicant must show that if the injunction is not granted, the appeal will be rendered nugatory.
4. The Court should be guided by the principles set out in the case of *Giella vs Cassman Brown Ltd* 1973 E.A 358.

34. Further, in *Charter House Bank Limited vs Central Bank of Kenya & Others* C.A Civil Application No. 200 of 2006 (2007 eKLR), the Court of Appeal held that:

“The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the Court that the appeal or intended appeal is not frivolous, that is to say, that the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory”.

35. In the instant case the Applicant filed a Memorandum of Appeal setting out various grounds upon which it faulted the decision of the Tribunal. However, the ruling or order against which the appeal



was filed was not annexed to the supporting affidavit. In order to establish whether the Applicant/ appellants has an arguable case, it would have been necessary for the court to peruse the impugned ruling together with the Memorandum of Appeal. Unfortunately, the Applicant has not attached a copy of the impugned ruling thus making it difficult for this court to make a determination whether appeal is arguable or frivolous. Although I appreciate that the said ruling was not available immediately after it was delivered, the Applicant who undertook to supply the court with a copy had at the time of writing this ruling not availed the same.

36. Even if I were to consider the failure to attach a copy of the ruling as a procedural technicality worth ignoring, the affidavit sworn by Dr. Anil reveals that the reference filed at the BPRT was dismissed on the grounds that the Tribunal lacked jurisdiction to determine it since the same was Sub-Judice and Res-Judicata. The Applicant has not denied that at the time of filing BPRT Cause no. 78 of 2021, it had filed a similar application in Kisii CMCC Misc Application No.37 of 2017 where the Applicant sought orders to stop the implementation of the eviction order. As can be discerned from annexure “ARG 9” annexed to Mr. Gudka’s supporting affidavit the Applicant and Dr. Anil Tailor obtained an ex-parte order on 30<sup>th</sup> July 2020 in the following terms:

- a. “This application be and is hereby certified urgent for hearing ex-parte in the first instance for grant of prayers (b) and (c) herein.
- b. Pending inter partes hearing hereof a temporary order do issue to stay any further implementation (as the case may be) of the orders of this honourable court given on 18<sup>th</sup> June 2021 and issued on 30<sup>th</sup> June 2021 either by M/S Omwoyo Auctioneers or any other persons whatsoever.
- c. Pending inter partes hearing and determination of this application, the implementation of this honourable court given on 18<sup>th</sup> June 2021 and issued on 30<sup>th</sup> June 2021 either by M/S Omwoyo Auctioneers or any other persons whatsoever be stayed.
- d. Orders of this Honourable Court issued on 18<sup>th</sup> and issued on 30<sup>th</sup> June 2021 be discharged.
- e. The officer Commanding Kisii Police Station be served with the orders herein issued to ensure compliance
- f. The application dated 10<sup>th</sup> June 2021 be dismissed with costs
- g. Costs of this application be borne by the Respondent”

This is the reason why the Tribunal held that the matter was res judicata and sub judice.

37. It is also not in dispute that the High court had in KisiiHCC No. 7 of 2017 found that both the Applicant and Dr. Anil had defaulted in the payment of rent of a rent to the tune of Kshs. 37,000,000. The Applicant who has not denied that he owes the Respondent the said amount of money cannot allege that he will suffer more loss than the Respondent. Even though he has tried to demonstrate that he has been paying rent through the Respondent’s advocates since 2019, the receipts annexed to his Replying Affidavit show that the payments have been intermittent. I therefore agree with learned counsel for the Respondent that the Applicant has not come to court with clean hands and is undeserving of the orders sought. Granted that the Applicant is a hospital that has in-patients, the Applicant cannot use the plight of the patients to run away from its responsibilities and flout court orders by engaging in endless litigation through multiple suits.



38. In view of the foregoing, it is my finding that the Applicant has not met the conditions for grant of an injunction pending appeal. I therefore find no merit in the application and the same is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISII THIS 6<sup>TH</sup> DAY OF JULY, 2022.**

**J.M ONYANGO**

**JUDGE**

