M/S Express Gebneral Insurance Brokers v Telkom Kenya Limited & another (Environment & Land Case E004 of 2021) [2022] KEELC 14498 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14498 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE E004 OF 2021

MC OUNDO, J

NOVEMBER 3, 2022

BETWEEN

M/S EXPRESS GEBNERAL INSURANCE BROKERS ..... APPELLANT

AND

TELKOM KENYA LIMITED ..... 1ST RESPONDENT

PAUL WAITHAKA T/A ARVIN PARK AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. Before me for determination is an application dated the February 17, 2022filed pursuant to the provisions of Order 42 Rule 6, Order 43 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* where the applicant seeks for orders of stay of execution of the orders given by the honorable Business Rent Tribunal on the October 12, 2021, pending the hearing and determination of their preferred Appeal. The applicant further seeks that the respondents be compelled to account on how they had arrived at the sum they were levying distress for.

2. The said application is supported by both the grounds thereto and a supportingaffidavit sworn on February 17, 2022by Martin Maurice Odhiambo, as theapplicant herein.

3. In opposition to the said application was the 1st respondent's replying affidavit sworn on March 17, 2022 wherein he has sought that the application be struck out in limine for lacking merit, being frivolous and an abuse of the court process. That the same was a ploy by the applicant to defeat and/or delay justice as it did not meet the threshold for grant of stay of execution.

4. The Applicant filed a further affidavit dated May 14, 2022 in response to the 1st respondent's Replying Affidavit, which I have also considered.

5. Via the directions issued by the court on 4 May 2022, the application was disposed of by way of written submissions to which I shall herein under summarize;

The Applicant's submissions

6. The applicant's submission was to the effect that being dissatisfied with the decision of the vice chairman of the Business Premises Rent Tribunal delivered on October 12, 2021and issued on October 25, 2021 in Nakuru BPRT case No.25 of 2021, he has filed an Appeal to this court for reasons that the Tribunal had failed to address itself on the relevant law based on the evidence placed before it.

7. That the 1st and 2nd respondents had closed down his business premises on the January 27, 2021 without following the laid down procedures. That the applicant was a controlled tenant and there had been no lease agreement or any binding contract signed between the parties.

8. That the decision of the ruling by the Tribunal in his application dated the February 24, 2021stating that there was no evidence and that the initial closure of the suit premises was neither executed by the landlord or its agent was erroneous, as there had been no investigations carried out, which was contrary to the pleadings and affidavit filed by him. That the said closure was illegal as he was a protected tenant.

9. That his application was not frivolous and a ploy to defeat justice. That indeed the 1st and 2nd defendants had admitted in their pleadings to having illegally closed business premises on January 27, 2021. That in the absence of a legal document defining the rights of the applicant and respondent herein, there was therefore no basis for the drastic measures such as distress for rent until such a time that the judicial process could intervene to determine the rights of the parties herein. Reference was made to a decided Civil Suit No 649 of 2005, (sic) *Professor Washington Jalango Okumu v Boffar Limited*.

10. That the construction of the two floors was not complete because the 1st respondent had not availed to the applicant the approved building plan. That the applicant did not accept the letter of offer dated 10th January 2015 because the commencement date had been back dated to January 2014 which was prior to the completion of the construction of the two storied building and the availability of the approval building plans.

11. That parties had agreed that the rent be deducted from the cost of the construction before the applicant could start paying rent which had to be after the completion of the construction and the signing of an acceptance lease agreement. That this had not been done to date. That since the amount of the rent had not been agreed upon by the parties, the applicant could not be coerced to pay the same by the 1st respondent. That the Vice Chairman of the Tribunal relied on the letter of offer to dismiss his claim despite there having been sufficient evidence to the contrary, annexed to the applicant's pleadings.

12. That the letter of offer dated December 20, 2015, which was not accepted by the applicant contravened the provisions of section 3 of the *Law of Contract* in that it had not been witnessed and therefore the same was void ab-initio.

13. That there having been no positive and enforceable order or Decree issued, both therespondents had no business to levy the distress which was illegal. That theapplicant had spent a colossal sum of money in the construction of the incomplete two storied building with the permission of the 1st respondent which monies were to be deducted from the rent and therefore it would suffer irreparable loss and damage which could not be compensated by the 1st respondent.

14. That immediately the applicant was served with a notice for distress, they had timelessly filed the application.

15. The applicant's submission was that his application was merited and the same should be allowed.

Respondent's submissions.

16. The respondent framed their issues for determination as follows;

    i. Whether the court can grant stay of a negative order.

    ii. Whether the applicant has met the threshold for stay of execution pending appeal pursuant to Order 42 Rule 6 (sic)

17. In the first issue for determination, therespondent confirmed that the ruling of the Tribunal had dismissed the applicants application dated February 25, 2021 with costs to the respondent wherein it had also vacated the *ex-parte o*rders issued on 1st March 2021. The Tribunal did not direct any party to do anything or desist from doing anything and therefore there were no positive enforceable orders capable of being stayed. That the orders issued by the Tribunal were negative orders in nature and therefor there was nothing to stay. Reliance was placed in the decided cases in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR and *Kanwal Sarjit Singh Ghiman v Kashevji Jivraj Shah* [2008] eKLR.

18. On the second issue for determination, therespondent relied on the provisions of Order 42 Rule 6 (1) (2) (sic) to submit that the cornerstone of the court's jurisdiction under this provision was substantial loss. That the applicant had not demonstrated this specific aspect and therefore he was undeserving of the prayers sought. That the much theapplicant had alleged was that the suit premises was his source of income, however he did not discharge the burden placed on him. Reliance was placed on the decided case in the *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR wherein the court cited with approval the case in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCC 795 of 1997.

19. Therespondent further submitted that the application herein was not brought without unreasonable delay, the ruling of the Tribunal having been delivered in October 2021 and the application herein having been filed in February 2022 which was four months later. There was no explanation of the unreasonable delay. The application herein was filed as an afterthought because therespondent had initiated the process of execution.

20. It was further the respondent's submission that theapplicant had not met the third tenet for stay of execution to wit the provision of security for due performance of the Decree. That the issue herein was a dispute on an outstanding rent owed by the applicant to the respondent in the sum of Ksh. 4,876,245.73/= as at February 5, 2019. That should the orders of stay be granted, the respondent would be prejudiced as the applicant would continue being in occupation of the premises without a corresponding right on the part of therespondent to collect rent.

21. That should the court be inclined to grant orders of stay, the applicant be ordered to deposit the entire outstanding amount in a joint interest earning account pending the hearing and determination of the Appeal. The respondent sought for the applicant's application to be dismissed with costs.

Determination

22. I have considered, the applicant's application, the supporting affidavit and further affidavit as well as the written submissions with a lot of anxiety as the same were incoherent, were a resemblance of either Grounds of Appeal and/or a replying affidavit to the respondent's response. I have also considered the respondent's response to the application, the submissions thereto and the authorities cited. I find two issues for determination arising therein namely:

i. Whether the applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending an intended Appeal.

ii. What orders this court should make.

23. An application of stay of execution according to Order 42 Rule (6)(2) of the *Civil Procedure Rules* can only succeed if the applicant satisfies the following criteria:-

> " (1) The applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.
>
> (2) Secondly, from the facts of the case appealed from the applicant would suffer substantial loss unless stay of execution is granted.
>
> (3) That the applicant has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal."

24. In the instant application, the decision of the Vice Chairman of the Business Premises Rent Tribunal was delivered on October 12, 2021wherein the applicant filed his application on the February 17, 2022, a period of about 4 months which was inordinate delay in my opinion, and which delay was not explained.

25. The applicant states that he will suffer substantial loss if the application is not allowed, it was incumbent upon him to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour.

26. In the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held -

> " The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them."

27. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 where their Lordships stated that;

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

28. In an application of this nature therefore, the applicant ought to have shown the damages he would suffer if the order for stay was not granted since by granting stay it would mean that the status quo should remain as it were before the ruling and that would be denying the 1st respondent its rent. See *Kenya Shell Ltd vs. Kibiru & another* [1986] KLR 410

29. On the last condition as to provision of security, Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Again, the applicant has not furnished any security nor pledged to furnish any such security for due performance. In the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR the court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence theapplicants become and are judgment debtors in relation to the

respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicant s. I presume the security must be one which can serve that purpose."

30. On this ground, the application must also fail.

31. Lastly, I have considered the impugned decision of the Vice Chairman of the Business Premises Rent Tribunal which was delivered on October 12, 2021and to which theapplicant seeks to stay and the same was as follows;

    i. "The application dated February 25, 2021 is hereby dismissed with costs to the respondents.

    ii. The ex-parte orders given on March 1, 2021 are hereby discharged and/or vacated."

32. In the present case, the applicant has sought to have the execution of the above order stayed. This order, was in my humble opinion, and in agreement with the Respondent's submission, negative orders.

33. In the case of *Milcah Jeruto v Fina Bank Ltd* [2013] eKLR the court had held that an order for stay cannot be granted where a negative order had been issued.

34. Under section 2 of the *Civil Procedure Act*, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

'any person in whose favour a decree has been passed or an order capable of execution has been made..."

35. In the case of *Western college of Arts and Applied Sciences v Oronga* (1976) KLR 63, the Court of Appeal held that:-

> " But what is there to be executed under the judgment, the subject of the intended Appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court in an application for stay, to enforce or to restrain by injunction."

36. In the decided case of *Sonalux Limited & another S v Barclays Bank of Kenya Limited* [2008] eKLR, the Court of Appeal held:

> 'As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.'

37. It therefore obtains that there are orders that are capable of execution while others are not. In the present Ruling, the Tribunal did not order the parties to do anything or to abstain from doing anything. It therefore followed that the said holding was incapable of execution and therefore there can be no order of stay that can properly issue relating to that ruling.

38. For the foregoing reasons, the upshot of this court's Ruling to the applicant's application dated the February 17, 2022seeking for orders of stay of execution of the decision of the Vice Chairman of the Business Premises Rent Tribunal which was delivered on October 12, 2021, pending the hearing and determination of an Appeal is that the same is not merited and is therefore dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 3RD DAY OF NOVEMBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE