



**Nduati v Hoven Company Limited (Environment and Land Appeal  
E023 of 2022) [2022] KEELC 14612 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14612 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E023 OF 2022  
OA ANGOTE, J  
NOVEMBER 3, 2022**

**BETWEEN**

**LEAH WAMAITHA NDUATI ..... APPELLANT**

**AND**

**HOVEN COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Tenant/Appellants' Notice of Motion application dated March 22, 2022 seeking for the following reliefs;
  - i. That pending the hearing and determination of the Appeal herein, there be a stay of execution of the Ruling delivered by the Nairobi Business Premises Tribunal in BPRT Case No 311 of 2021-Leah Wamaitha Nduati vs Hoven Company Limited on the March 22, 2022.
  - ii. That this Honourable Court be pleased to grant such other orders as it may just and fit to protect its dignity.
  - iii. That the Costs of this Application be provided.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the Appellant/Tenant of an even date. It is her deposition that she is a lawful tenant of the Respondent/Landlord situate on property known as LR No Kikuyu/Kikuyu/9224/9 which is a hotel premise (the suit property) and that she is on the premises as a controlled tenant.
3. According to the Appellant, the formal written lease having expired on the July 1, 2020, the Respondent threatened to unprocedurally terminate her tenancy leading to her filing a Reference together with an urgent application for injunction before the Business Premises Rent Tribunal on April 7, 2021 and that the Tribunal issued interim orders stopping the eminent illegal termination and eviction by the Respondent.



4. It was deponed by the Appellant that the Respondent replied to the application by filing a Preliminary Objection and an application for eviction; that due to the Respondent's disregard of the Tribunal's orders, she filed an application on November 4, 2021 seeking *inter alia* police enforcement of the temporary injunctive orders and that she has been faithfully paying rent for the premises being Kshs 70,000 per month which has been variously acknowledged by the Respondent.
5. It is the Appellant's deposition that vide its Ruling of March 22, 2022, the Tribunal dismissed the Respondent's Preliminary Objection as well as her application and reference but allowed the Respondent's application for eviction and that she is strongly opposed to the Ruling and wishes to lodge an appeal against the entire Ruling. It is the Appellant's case that she has requested for typed proceedings and Ruling for purposes of the Appeal.
6. The Appellant lastly deponed that she is apprehensive that the Respondent will attempt to evict her and having heavily invested and stocked the subject premises and having several bookings for clients, she will be extremely frustrated by the eviction and that she is ready to provide reasonable security as the Court may order to give room to pursue her Appeal.
7. In response to the application, the Respondent through its Director deponed that he was the Landlord in the Business Premises Rent Tribunal Case No 311 of 2021 Nairobi in which the Tribunal vide its Ruling of March 22, 2022 and orders of April 1, 2022, dismissed the Appellants' Reference in its entirety on the basis that it was founded on misrepresentation and concealment of material facts.
8. According to the Respondent, vide the Ruling aforesaid, the Tribunal made a specific finding that the ex-parte orders of April 12, 2021 issued in the Appellant's favour were obtained through misrepresentation and concealment of material facts and that the Tribunal further found that the Applicant was not a Tenant but a trespasser for the reasons that after the expiry of the formal Lease Agreement on July 1, 2020, the Respondent had vide its letter of August 10, 2022 asked her to vacate the premises. It was deponed that the Tribunal further found that the Appellant was not a controlled tenant having been in arrears as at the time of the expiry of the lease.
9. According to the Respondent, notwithstanding the Tribunal's ex-parte orders, the tenancy agreement had already lapsed; that the Appellant has come before the Court with unclean hands and through misrepresentation, particularly on her allegations that she has been faithfully paying rent as and when it falls due and that a perusal of documents alluded to by the Appellant clearly demonstrate that she is a habitual rent defaulter who pays rent erratically and is currently in arrears of mesne profits and/or rent of Kshs 110,000 being the balance of Kshs 40,000 for the month of March 2022 and Kshs 70,000 for the month of April 2022.
10. According to the Respondent, the last payment of rent by the Appellant was done on March 14, 2022; that the payments made by Appellant were undertaken pursuant to the Tribunal's intervention where it issued directions for payment of rental arrears that has accrued as at November 16, 2021; that a Court cannot purport to rewrite a new contract on behalf of parties and impose a tenant upon a landlord whose tenancy agreement has expired by effluxion of time and that the Appellant boldly speaks of its scheduled bookings while refusing to pay the rent.
11. According to the Respondent, the Appellant has failed to demonstrate what irreparable damage she stands to suffer; that no borehole has been sunk on the property as alleged; that there is no proof of any purported improvements on the property and that further, the Appellant has all along been aware that the tenancy was coming to an end and should have made the necessary arrangements to vacate.
12. It was deponed that the Appeal will not be rendered nugatory in the event of the Appellant's eviction; that the Appellant's alleged guests can always be moved to other hotels and that the Appeal is a non-



starter as the Court cannot impose a tenant on a landlord. According to the Respondent, the issuance of the now expunged interim orders of April 12, 2021 greatly prejudiced him because he could not assert his rights over the property leading to the property being run down and that allowing the application will further impinge on his constitutionally guaranteed rights to property and will prevent the Respondent from levying distress on the owed rent.

13. Vide a Supplementary Affidavit, the Appellant avers that she is yet to receive typed proceedings from the Tribunal despite making a follow up on the same; that she has faithfully paid all the rent as and when it falls due; that the Respondent has refused to issue to her receipts despite her faithfully paying rent and that no prejudice will befall the Respondent should the application be allowed. Both parties filed written submissions which I have considered.

### **Analysis & Determination**

14. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is whether the Tenant/Appellant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
15. By way of a brief background, the Motion herein relates to the Ruling and Orders of the Business Premises Rent Tribunal in BPRT Case No 311 of 2021 delivered on March 22, 2022 and orders issued on April 1, 2022. Vide the aforesaid Ruling, the Tribunal dismissed the Applicant's Reference and application of April 7, 2021 which sought injunctive orders against the Respondent and application of November 4, 2021 which sought to have the Respondent found in contempt of the temporary injunctive orders issued of 12th April, 2021.
16. The Tribunal further dismissed the Respondent's Preliminary Objection on its jurisdiction and vacated the temporary injunctive orders granted on April 12, 2021 on the basis that the same were obtained through misrepresentation and concealment of material facts. The court ordered the Appellant to pull down all structures illegally erected on the Respondent's property and directed the Appellant to grant the Respondent vacant possession of the suit premises, failure to which the Respondent would be at liberty to evict the Appellant with the aid of the police.
17. The Appellant has filed a Memorandum of Appeal against the aforesaid Ruling. In the meantime, the Appellant is seeking for a stay of execution pending appeal.
18. The law governing the grant of stay of execution pending appeal is Order 42 Rule 6 of the [Civil Procedure Rules](#), the relevant part of which states 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 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.”

19. This position was affirmed by the Court of Appeal in the case of *Halai & Another vs Thornton & Turpin (1963) Ltd* [1990] eKLR cited by the Respondent where the Court held inter-alia:-

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

20. It is evident from the above provisions and the cited authorities that the grant of orders of stay of execution are subject to the court’s discretion, the court being guided in this regard by the provisions of Order 42 Rule 6 of the Civil procedure rules. In discussing the question of how the court should exercise this discretion, the Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 expressed itself as follows:

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. 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 that appeal court reverse the judge’s discretion.
- 3. 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.
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

21. In determining whether sufficient cause has been established, the court will examine whether the Appellant has satisfied the three mandatory prerequisites to the grant of stay pending appeal.



22. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & another vs Priscillah Boit & another* [2014] eKLR where Munyao J stated:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”
23. In the instant case, the Ruling sought to be appealed against was delivered on March 22, 2022, the same day the Appellant filed her application. There can be no doubt that this application was filed timeously. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Rhoda Mukuma vs John Abuoga* [1988] eKLR where the court held as follows:
- “Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”
24. In the case of *Tropical Commodities Suppliers Limited & Others vs International Credit Bank Ltd (in liquidation)* (2004) 2 EA 331 the Court persuasively defined the aspect of substantial loss thus;
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal.”
25. In considering whether the Appellant will suffer substantial loss unless an order of stay of execution is granted, the court is guided by the decision of the Court of Appeal in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] eKLR in which the court stated as follows:
- “It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
26. At the onset, it appears to be undisputed that the Applicant and the Respondent were in a landlord-tenant relationship having entered into a Tenancy Agreement on May 1, 2012, which agreement lapsed on July 1, 2020. The Applicant asserts that after the expiry of the formal lease, it reverted to a month to month tenancy; that the existence of the landlord/tenant relationship and an appeal against the decision of the Tribunal constitutes sufficient cause to grant the stay and that if the stay is not granted, the Respondent will proceed to unprocedurally evict her from the suit property causing her substantial loss.
27. On his part, the Respondent contends that no landlord-tenant relationship exists between the parties and the Appellant is in fact illegally on the premises; that no substantial loss has been demonstrated



by the Applicant with respect to the alleged investments on the property and that the alleged hotel bookings were done after the filing of the application for stay and after the Applicant was made aware that she was required to vacate the premises.

28. Taking into account the affidavit evidence adduced by the Appellant, there is no proof of the alleged substantial investment to the suit property. As to the receipts indicating the bookings for scheduled events in the premises, the Court is of the view that being monetary, these can easily be compensated and may not in themselves amount to substantial loss.
29. Indeed, the Tribunal did not order for the business to shut down. That being the case, the Appellant will not encounter any peculiar hardship apart from the normal inconvenience in relocating or continuing with her business from alternative premises. Consequently, it is the finding of this court that the Appellant has not shown the substantial loss that she will suffer in the event the order of stay is not granted.
30. That being the case, the application dated March 22, 2022 is not meritorious. The application is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Bariki for Kirimi for the Appellant

Ms Mathangani for Respondent

Court Assistant: June

