



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC MISC. NO. E176 OF 2021

AGNES NYAMBURA MUNGA T/A UNISEX AERO SALON.....APPELLANT

=VERSUS=

CONVEST HOLDINGS LIMITED.....RESPONDENT

RULING

(Notice of Motion Application dated 2nd October 2021)

1. The application for consideration is the Appellant's Notice of Motion dated 2nd October, 2021, brought under Section 15 (1) and (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Sections 1A, 1B, 3, 3A, 63e, 79 and 79G of the Civil Procedure Act, Order 42 Rule 6(1) & 6(6) of the Civil Procedure Rules, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks the following orders:

i. Spent

ii. THAT the Honourable Court be and is hereby pleased to extend time by 14 days within which the Applicant should have filed her intended Memorandum of Appeal and intended Record of Appeal emanating from the Ruling and Orders of the Business Premises Rent Tribunal at Nairobi (the Hon. Gakuhi Chege Vice Chair Business Rent Tribunal) dated, signed & delivered at Nairobi on the 30th day of July, 2021 in Tribunal Case No. 544 of 2019.

iii. THAT, upon order 2 hereinabove being granted the Honourable Court be and is hereby pleased subject to payment of the requisite Court Fees to deem the Draft Intended Memorandum of Appeal hereinafter annexed as Exhibit "ANM 30" as duly filed before the Court.

iv. THAT upon Order 2 hereinabove being granted the Honourable Court be and is hereby pleased subject to payment of requisite Court Fees to deem the Intended Record of Appeal hereinafter annexed as Exhibit "ANM-31" as duly filed before the Court.

v. THAT, the Honourable Court be and is hereby pleased to order in the interests of justice and expediency that the Intended Appeal be set down for directions within a maximum period of 30 days from the date of actual filing of the Intended Memorandum of Appeal and Intended Record of Appeal.

vi. THAT, the honourable court be and is hereby pleased to Order Stay of Ruling dated, signed & delivered this 30th day of July 2021 as rendered by Hon. Gakuhi Chege, Vice Chair, Business Premises Rent Tribunal pending the hearing and determination of the Intended Appeal.

vii. THAT, the Honourable Court be and is hereby pleased to Order Stay of Execution of the Orders dated 30th July, 2021 and issued on 19th August, 2021 as rendered by Hon. Gakuhi Chege, Vice Chair, Business Premises Rent Tribunal pending the hearing and determination of the Intended Appeal.

viii. THAT, the Honourable Court be and is hereby pleased to order that the Applicant herein bares the costs of this Application.

2. It is supported by the grounds on the face which could be summarized as follows:

i. That, via Tribunal proceedings dated 6th May 2021 before Honourable Charles Chege Gakuhi, the Ruling before the Tribunal was reserved for 18th June, 2021.

ii. That the Appellant's Counsel sought to be advised on the scheduled Ruling date vide the Letter dated the 5th August, 2021.

iii. That in response to the said email new date of delivery of the Ruling after being deferred on 5th September 2019 was never communicated to the applicant nor its counsel.

iv. That upon an official visit by the firm's representative to the Tribunal, the Appellant's Counsel was informed that the Ruling was rendered on 30th July, 2021 in their absence contrary to the initial correspondence of the 5th August, 2021.

v. That a certified copy of the Ruling was supplied on the 11th August, 2021 and on the same day the Respondent's Counsel purported to execute the Ruling in an effort to recover outstanding rent arrears which, according to the Appellant are vivid attempts to circumvent Nairobi CMCC 1536 of 2019 which matter is still pending.

vi. That certified copies of proceedings were supplied to the Appellant's counsel on 20th August, 2021 and the Order on the 30th July, 2021.

vii. That after unfortunately upon receipt of the Order, the Appellant had a mental breakdown owing to stresses of life in a foreign state and as all attempts by her Advocates to reach her for instructions on the prosecution of the Intended Appeal as well as the Stay of Execution Application were curtailed as she was unreachable on phone and email.

viii. That the Appellant only regain contact with her Advocates on the 29th September, 2021 and she promptly instructed her Advocates on record and file the Intended Application for Stay and Intended Appeal.

ix. That the delay in filing the Appeal was only 21 days which is not inordinate hence excusable by legal precepts.

x. That in the light of the above facts and considering the Overriding Objectives in the Civil Procedure Rules and that she has an arguable Appeal with high chances of success.

3. The application is supported by the Affidavit of **Agnes Nyambura Munga**, the Appellant herein and the supplementary affidavit sworn by Badia A. Fiona.

4. The Respondent responded by way of a Replying Affidavit sworn by **Mr. Haren Patel**, the Director of the Respondent on 22nd October, 2021.

5. The Respondent case is that no tangible reason has been put before the Court by the Applicant to explain the delay. The respondent contends that the information on rulings at the Business Premises and Rent Tribunal is readily available on the Judiciary E-filing platform which is easily accessible to the public. Further that no evidence of mental illness while outside the Country has been demonstrated.

6. The Respondent argues that the Appeal as framed has been overtaken by events as the Respondent has since effected the Termination Notice and the Applicant is no longer its tenant. She has since vacated the suit premises. Therefore no substantial loss will be occasioned on the Appellant as she has not even been paying the Rent arrears.

7. The Respondent states that it is indeed the Landlord who continues to suffer loss of rental income for the unoccupied space within the suit premises which the Applicant claims entitlement to. Finally, the Respondent avers that the Applicant has also not shown any indication whatsoever that she is ready and willing to deposit the rent arrears owed to the Respondent. He argues that equity aids the vigilant not the indolent. The Applicant had reasonable opportunity to seek stay of execution as well as filing her Memorandum and Record of Appeal which she squandered.

Directions by the Court.

8. Directions were given for the application to be disposed of by way of written submissions. Both parties complied with the directions.

Submissions by the Parties

9. The Applicant submits that the Respondent's Replying Affidavit offends the mandatory provisions of Order 9 Rule 2(c) of the Civil Procedure Rules hence should be struck off with costs for being a nullity. Accordingly, the Application should be treated as unopposed. The Applicant expresses the view that the replying affidavit offends the mandatory provisions of Order 9 Rule 2(c) of Civil Procedure Rules having been filed on behalf of a limited liability company without a Board of Directors Resolution. She relied on the case of **Nairobi Civil Case 118 of 2015; Harleys Limited v Ripples Pharmaceuticals Limited & Another (2015) eKLR.**

10. On whether the Applicant has met the legal threshold for granting leave to Appeal out of time, the Appellant cited Section 15 (1) (4) of the Landlord And Tenant (Shops, Hotels And Catering Establishments) Act, Cap 301 Laws of Kenya as well as Section 79G of the Civil Procedure Act, 2010. She cited numerous authorities for consideration and if I do not refer to them all, it is not out of disrespect for her extensive research.

11. The Applicant stated that the principles that guide the exercise of judicial discretion in an Application for Extension of Time to File an Appeal out of time were outlined in the case of **Nairobi Civil Application 55 of 2020; Vishva Stone Suppliers Company Limited vs. RSR Stone Limited (2020) eKLR.** She also relied on the Supreme Court of Kenya **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** where the principles for extension of time for appeal were discussed.

12. The Applicant argued that she had met all the principles so as to be granted leave to file appeal out of time. The delay in filing the Appeal was merely 21 days of the required timeline. The reasons stated by the Applicant are reasonable, the Appellant has an arguable Appeal based on the attached Draft Memorandum of Appeal and finally that no prejudice will be occasioned on the part of the Respondent. The Appellant urges the Court to uphold the overriding objective principle that binds the Court and the Constitutional provisions that requires the Court to administer justice without undue regard to procedural technicalities.

13. On the issue of whether the Applicant has met the threshold for grant of stay of execution orders, the Learned Counsel relied on the provisions of Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules. She cited the case of **Masisi Mwita vs. Damaris Wanjiku Njeri (2016) eKLR**, where the learned judge relied on the Court of Appeal case of **Halal & Another vs Thorntorn & Turpin Ltd.** The Court of Appeal set out the conditions for such an application. The conditions are that the Applicant must demonstrate sufficient cause, prove that substantial loss would ensue from a refusal to grant the stay, and further that the Applicant must furnish security. Finally, the application must be made without unreasonable delay.

14. The Applicant submits that she has an arguable appeal and there was no inordinate delay in presenting the Application before the court.

15. On substantial loss, the Applicant submits that the Ruling of the Tribunal allowed the Respondent to levy distress for rent based on an illegal and defective Tenant Notice. The Applicant stands to lose her only source of income. Further the said Notice was issued by the Respondent to circumvent Nairobi CMCC 1536/2019, a suit pending before the Chief Magistrates Courts over the subject matter. Therefore, the Applicant submits that she satisfies the threshold for Grant of Stay of Execution Orders.

16. On costs, the Applicant submits that costs should abide the outcome of the intended Appeal.

Respondent's Submissions

17. The Respondents submissions are dated 18th November 2021. In regard to the Applicant's objection to the Respondent's replying affidavit, the Respondent submit that the Deponent Mr Haren Patel being a director of the company is an officer competent to bring evidence on behalf of the company. He is possessed of the facts and information that he has deponed on. The Respondent relied on the case of **Peter Adams Ludavaa Vs HFCK Ltd (2021) eKLR** where the court held that the affidavits sworn by officers of the company were not in contravention of order 9 Rule 2(c) of the Civil Procedure Rules bearing in mind the positions occupied by those officers in the company.

18. The Respondent cited the decision of the court in **Ajiwa Shanji Ltd Vs KENHA & Another (2018) eKLR**.

19. The court in this case agreed with the holding of D K Maraga J (as he then was) in **Mombasa HCCC 496/1995 – Peter Onyango Onyiego Vs KPA**. He had stated that: -

“Other than verifying affidavits which as I have stated must be sworn by plaintiffs themselves or their authorized agents all other affidavits filed and used in courts are not among the acts covered by Order 3 Rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he depones on, that in the rules of evidence, would be admissible. Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity which courts, can under Order 18 Rule 7 of the Civil Procedure Rules, ignore”.

20. On the prayer for leave to appeal out of time, the Respondent concedes that the court has the authority to grant leave to appear out of time. However, the court should only exercise the discretion when the Applicant has given sufficient reasons to warrant the grant of leave the Respondent cited the supreme court in application 16/2014, **Nicholas Kiptoo Arap Salat Vs IEBC & 7 others (2014) eKLR** where the court laid down the principles to be followed in exercising the discretion to extend time. The Respondent is of the view that the Applicant has not qualified for the grant of the order. The Respondent also cited the case of **Diplack Kenya Ltd Vs William Muthama Kitinyi (2018) eKLR** in the said case the court held that in an application for extension of time, where the court is being asked to exercise discretion the Applicant must place some material before court to enable it exercise its discretion. The rule being that, where there is no explanation, there should be no indulgence.

21. On the prayer for stay of execution, the Respondent submits that the Applicant is no longer a tenant in the suit premises. Therefore, there is no point in issuing a stay of execution order. Otherwise the court will be acting in vain.

Analysis and determination

22. I have considered the Application, the affidavits, submissions by the Parties and authorities cited. The applicant seeks leave to file appeal out of time and a stay of execution of the judgment and decree pending the hearing of the intended appeal. She however contends the legality of the Respondent's Replying Affidavit having been filed without a Board of Directors Resolution.

23. I agree with the parties in this case that the issues for determination are:

i. Whether the Respondent's Replying Affidavit as sworn by Haren Patel is legally and fatally defective.

ii. Whether the Applicant should be granted leave to file appeal out of time.

iii. Whether the Applicant should be granted Stay of Execution of the ruling and orders of the Business Premises Tribunal.

Whether the Respondent's replying affidavit as sworn by Haren Patel is defective.

24. The Applicant raised an objection to the Replying affidavit by the Respondent. The Applicant contends that the said affidavit offends the provision of Order 9 Rule 2(c) of the Civil Procedure Rules. The Rule provides that a corporation may only act or be represented in any court by an officer of that corporation duly authorized under its corporate seal.

25. What I understand the Applicant to be saying is that the deponent of the replying affidavit, Haren Patel has not demonstrated that he was duly authorized to swear the affidavit on behalf of the Respondent, a limited liability company. It is her submission that the affidavit as it is fatally defective. The Applicant urges the court to strike out the affidavit, expunge it and treat her application as unopposed.

26. The Court has considered the submissions of both parties in respect of this issue. The Court is persuaded by the holding in the case of **Peter Onyango Onyiego vs Kenya Ports Authority (2004) eKLR** and the subsequent authorities that have been pronounced thereafter over this issue.

27. On the issue of swearing of affidavits on behalf of Limited Liability Companies, the law is now settled. Affidavits, save for the verifying affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he depones on (per D. K Maraga J as he then was).

28. Accordingly, the Applicant's objection to the Replying affidavit is overruled. The deponent is a competent person to swear the affidavit that he did on behalf of the Respondent. He is a director of the Respondent company.

Whether the Applicant should be granted leave to file appeal of time.

29. Section 79G of the Civil Procedure Act gives this court discretion to allow filing an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. Section 15(1) (4) of the Landlords and Tenant (Shops, Hotels, and Catering Establishments), Cap 301 of the Laws of Kenya also gives this court the jurisdiction to grant leave to an appellant to file an appeal out of time.

30. In arriving at a decision on the issue, this court makes reference to the case of **Paul Musili Wambua Vs Attorney General & 2 others (2015) eKLR** and **Jane Waceke Kori Vs John Githui Kori (2021) eKLR**. In both cases the Courts upheld the position that:-

“It is now well 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 whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are;

- *the length of the 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.”*

31. The delay in this case was attributed to the Tribunal's decision to read its ruling on a date other than the one it had earlier indicated. This change of dates was not communicated to the parties more so the Applicant in this case. When the Ruling was read, the Applicant was not present. Consequently, the Applicant was late in filing the Appeal by 21 days.

32. In my opinion, the delay of 21 days is not inordinate and has been reasonably explained anyway. The Applicant has attached a draft memorandum of appeal. I am convinced that she has an arguable appeal. I see no prejudice that will result to the Respondent is the Applicant is granted leave to file her appeal out of time and letting her have her day in court. In any event, the Respondent has deponed that the Applicant is no longer in its premises.

33. Accordingly, I allow the Applicant's prayer number 2, extending time by 14 days within which the Applicant should have filed her intended memorandum of Appeal.

34. The Applicant's prayers number 3 & 4, I must add were not necessary. What is before the court is a Miscellaneous Application file. The file was opened merely for the purposes of considering the Applicants Application seeking extension of time to file her Appeal. Once the Application has been dispensed with, the Miscellaneous Application file is closed. The Appeal will be filed in a new file to be opened by the court registry as a civil appeal file. Therefore, the draft intended memorandum of Appeal and the draft intended record of appeal will be filed in the civil appeal file not this Misc. Application file.

35. I appreciate the Applicant's zeal to expedite the hearing of the appeal. However, the appeal once filed will take its own cause in accordance with the provisions of the Civil Procedure Act and the Rules. I see no need to grant the prayer number 5 to the effect that the Appeal be set down for directions within a maximum period of 30 days. That is tantamount to putting the cart before the horse. The Appeal once filed must be admitted first under the provisions of Section 79B of the Civil Procedure Act, before proceeding to the next stages. That and the other stages are dependent on the time the original file is brought from the Business Premises Tribunal.

Whether the Applicant should be granted an order for stay of execution.

36. The grant of stay of execution pending appeal is provided for under Order 42 Rule 6 (2) of the Civil Procedure rules.

37. The Court of Appeal in **Halal and Another Vs Thorton & Turnip Ltd (1990) eKLR**, in not so many words set the preconditions for the grant of an order of stay of execution pending appeal. The court stated that:-

“Thus the superior court’s discretion 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 stay; and thirdly, the Applicant must furnish security. The application must off course be made without unreasonable delay.”

38. The Respondent in its replying affidavit stated that the Applicant is no longer a tenant in the suit premises. In short, what the Applicant was seeking to prevent by an order for stay of execution has already happened. The Applicant did not deny that averment by the Respondent. The question before the court then is, what substantial loss will the Applicant suffer then?

39. On that point alone, the court refuses to grant the Applicant’s prayer for stay of the ruling and orders of the Business Premises Tribunal dated 30th July 2021. Prayers number 6 and 7 are therefore not granted.

Conclusion.

40. In summary, the Applicants Application dated 2nd October 2021 is allowed in terms of prayers number 2 only.

41. The costs of the Application shall abide in the intended appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Badia for the Applicant

Mr Okech for the Respondent

Court Assistant: Hilda

M.D. MWANGI

JUDGE