



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. E076 OF 2021

REFRIGERATION COMPONENTS LIMITED.....APPELLANT

VERSUS

EAST AFRICA CULTURAL TRUST AND AFROPRESS LIMITED.....RESPONDENT

RULING

(Being an Appeal from the Judgment and Orders of the Honourable Chairman of the Business Premises Rent Tribunal Mr. Cyprian Mugambi Nguthari delivered on 10th September 2021 in the Business Premises Rent Tribunal Case No. 711 of 2021(Nairobi)

A. INTRODUCTION

1. This ruling is in respect to the Appellant's Notice of Motion dated 17th September 2021. The application seeks the following orders:

i) Spent...

ii) That there be stay of execution of the judgment and order of the Chairman of the Business Premises Rent Tribunal in Tribunal Case Number 711 of 2021 Nairobi pending hearing and determination of this application.

iii) That there be stay of execution of the judgment and order of the Chairman of the Business Premises Rent Tribunal Case No. 711 of 2021 Nairobi pending hearing and determination of the Appeal.

iv) THAT the costs be in the cause.

2. The grounds on the face of the application are: -

a) That judgment was entered against the Appellant in the Business Premises Rent Tribunal and the Appellant being so aggrieved by the said judgment has appealed against the same.

b) That substantial loss has been made without unreasonable delay.

c) That the Applicant is willing, ready and able to continue paying rent as he has been doing to the Respondent or deposit the same before this Honourable Court or as the Court may direct.

d) That the Applicant has cogent grounds of appeal.

e) That the Appeal will be rendered nugatory if the stay orders are not issued or made, since there is eminent danger of distress which will derail the tenant's business.

3. The Application is supported by the Affidavit of **A. Tejani** a director of the Appellant.

4. The Respondent has opposed the said Application vide the Replying Affidavit sworn by **Eddy Nderitu Wainaina** on 5th October 2021 and grounds of opposition dated 28th September 2021.

5. On 21st October 2021, the Court directed the Application to be disposed off by way of written submissions. The Appellant's submissions were filed on 28th October 2021 while the Respondent filed their submissions on 3rd November 2021.

B. PARTIES RESPECTIVE SUBMISSIONS

Appellant's submissions

6. In respect to compliance with the conditions for stay, the Appellant submitted that the ruling of the Tribunal was delivered on 10th September 2021 and that the current application had been filed expeditiously thus complying with the conditions for grant of stay.
7. The Appellant also submitted that they had complied with **Order 42 Rule 6 of the Civil Procedure Rules** and further that they had established that they will suffer substantial loss in terms of the rent payable and clientele owing to the fact that they had been in the premises for many years.
8. It was also submitted that no security should be granted since according to the order of the Tribunal, each party owes each other money.
9. The Appellant further urged the court to allow the application and grant stay and they relied on the case of ***Odhiambo Mugambi v Joyce Ncoro [2021] eKLR***.

Respondent's submissions

10. The Respondent opposed the Application vide the Replying Affidavit sworn by **Eddy Nderitu Wainaina** on 5th October 2021 and grounds of opposition dated 28th September 2021. It was their contention that the Application had not met the criteria for grant of stay of execution.
11. It was the Respondent's submission that the Appellant had not demonstrated how they would suffer substantial loss and the averment that they would lose a client base was not adequate in the circumstances.
12. The Respondent also attacked the grounds of the Memorandum of Appeal and submitted that the said grounds were incompetent and fatally defective since they contained untrue statements.
13. On the offer for security, it was the Respondent's contention that none had been offered by the Appellant and hence no good faith had been shown in bringing the application.
4. In support of their submissions, the Respondent relied on various authorities including the case of ***Halai & Anor v Thornton & Turpin (1963) Ltd (1990) eKLR, Century Oil Trading Co. Ltd v Kenya Shell Limited Nairobi (Mililmani) HCMCA No. 1561 of 2007, Kenya Shell Ltd v Kibiru & Anor [1986] KLR 410, Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63*** among others.
15. For the said reasons, the Respondent urged the Court to dismiss the application with costs.

C. DETERMINATION

16. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties. The single issue which arises for determination is whether or not the Appellant has satisfied the criteria for grant of stay of execution.
17. Under **Order 42 rule 6 (2) of the Civil Procedure Rules, 2010** the conditions for stay of execution are as follows:

“No order for stay of execution shall be made under sub-rule (1) unless

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.”

19. From the provisions of order **42 rule 6 of the Civil Procedure rules**, the Applicant must demonstrate that he has filed the application without unreasonable delay, that the applicant will suffer substantial loss and that there is an offer for security.

20. In the instant case, the Tribunal delivered a ruling against the applicant on 10th September 2021. Consequently, the Applicant filed a memorandum of appeal on 20th September 2021 together with the Notice of Motion herein. This court finds that Application has indeed been brought without unreasonable delay.

21. The Appellant also averred that they stand to suffer substantial financial loss occasioned by the loss of its clientele and rent payable as a result of any adverse action by the Respondent from the premises having been in the premises for several years. As a result, this Court is satisfied that the requirement on substantial loss has been demonstrated.

22. The Appellant also submitted that they had filed a memorandum of appeal which raised triable and weighty issues. The Respondent attacked the said grounds of appeal stating that the same were incompetent and fatally defective as they contained untrue statements. However, at this stage the Court is not concerned with the merits or otherwise of the appeal as the applicable considerations in **Order 42 Rule 6 of the Civil Procedure Rules** do not include such a requirement.

23. On the final requirement on whether or not there is an offer for security, the Appellant did not offer any security save to submit that the same should not be granted since no party was ordered to pay each other's costs and further, that according to the Ruling of the Tribunal, each party owes each other money. The Respondent countered the said position and submitted that the Appellant's unwillingness to offer security was in bad faith and solely meant to deny the Respondent its fruits of its judgement.

24. With regard to the issue of security, the court in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

25. In *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR*, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals.

26. From the above decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Looking at the circumstances of the case, it is evident that the ruling of the Tribunal did provide that the tenant was entitled to defray from the rent owing to the landlord Ksh 1,797, 934/- and further the Appellant was directed not to deduct Ksh 4,296,101/- being cost of repairs. In essence the Respondent was entitled to recover the sum of Ksh 2,498,167 as rent arrears. The basis upon which the Appellant filed its appeal. The Appellant averred that the stay should be granted but they should not be condemned to offer security.

27. It is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment and in view of the foregoing, the Appellant cannot evade the requirement for provisions of security as a conditional requirement for grant of stay.

28. The Appellant also averred that they have never defaulted in paying rent whenever the same has fallen due and they are willing and ready to continue paying the same to the Respondent when its due.

D. DISPOSITION

29. The Applicant is desirous of exercising its right of Appeal. On the other hand, the Respondent wishes to enjoy the fruits of his judgment. To balance the competing interests of both parties, I allow the application and make the following orders: -

i) An order for stay of execution of the judgement and order of the Chairman of the Business Premises Tribunal in Nairobi BPRT No. 711 of 2021 be hereby issued pending hearing and determination of this Appeal on condition that the Applicant do deposit Ksh 2,498,167/- as security in a joint interest earning account of both advocates within 30 days from today.

ii) The Appellant to compile, file and serve the record of Appeal within 30 days from the date hereof.

iii) In default of compliance to (i) and (ii) above, the stay of execution shall automatically lapse.

iv) Costs of this application to abide the outcome of the Appeal.

30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kithinji Thurania for the Appellant.

Mr. Monda h/b for Mr. Mereka for the Respondent.

Court Assistant; Caroline Nafuna.