



**Odhiambo & another v Nderito (Commercial Appeal E023 of 2024)
[2024] KEHC 14833 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL E023 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

JOB DONDI ODHIAMBO 1ST APPELLANT

BETICO AUCTIONEERS 2ND APPELLANT

AND

JOHN NDERITO RESPONDENT

RULING

Brief facts

1. The application dated 30th August 2024 seeks for orders of stay of execution in respect of the ruling in Ruiru MCCCMM No. E016 of 2024 delivered on 26th August 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 16th September 2024 and Replying Affidavit dated 28th October 2024.

Appellants'/Applicants' Case

3. The applicants state that the 1st applicant is the registered owner of the property known as LR No. Ruiru/Mugutha/Block 1/2112 which he leased out to the respondent pursuant to a tenancy agreement dated 1st August 2023. Pursuant to the said agreement, the respondent was to pay the applicant rent at the rate of Kshs. 150,000/- per month.
4. The 1st applicant states that the respondent paid rent for two months at the time of the execution of the tenancy agreement being rent for the months of August and September and thereafter stopped paying rent. Despite failing to pay rent, the 1st applicant states that the respondent continued to run his bar and restaurant business on the said premises. The 1st applicant states that since the respondent



- failed to pay the rent, he was unable to fulfill his loan obligations to the bank exposing the property to possible loss to the bank through the exercise of statutory power of sale.
5. The 1st applicant states that sometime in April 2024, he wrote to the respondent asking him to pay the outstanding rent in the sum of Kshs. 1,050,000/- which had accumulated for seven months but the respondent ignored the said letter and refused to pay the outstanding rent.
 6. The 1st applicant states that he was thus forced to instruct Betico Auctioneers to recover the outstanding rent whereupon the auctioneers proceeded to issue a proclamation under the *Distress for Rent Act*. Upon receiving the proclamation, the respondent rushed to the Chief Magistrates Court and sought interim injunctive reliefs against the 1st applicant.
 7. The 1st applicant states that the court issued interim orders which barred him from proceeding with distress for rent against the pendency of the application. Despite obtaining the interim orders, the respondent still did not pay any rent for the period the matter was in court yet he continued to occupy and run his business on the suit property.
 8. The 1st applicant states that the trial court delivered its ruling on 5th July 2024 ordering the respondent to deposit Kshs. 1,050,000/- into an escrow account in the names of both parties advocates herein and further directed the respondent to pay him rent that had accrued from the months of April 2024. Despite the court's directions, the respondent failed to pay the rent arrears exposing the suit property to loss to the bank.
 9. The 1st applicant states that due to the respondent's indifference, he was left with no option but to instruct the auctioneers to levy distress for rent to recover the sum of Kshs. 1,650,000/- which was outstanding as at the time aforesaid. On 20th July 2024, the auctioneers proceeded and attached the respondent's goods in distress for rent whereupon the respondent vacated the property.
 10. The 1st applicant states that after the respondent left the suit property, he offered it for lease and leased it to new tenants who paid rent and took possession of their respective spaces. Meanwhile, on 29th July 2024, the respondent returned to court with another application whereupon he obtained an interim order that stopped the sale of attached goods. On 26th August 2024, the trial court delivered its ruling which directed him to unconditionally return to the respondent the distrained goods and reinstate the respondent to the suit property to run his business thereon.
 11. The 1st applicant argues that it is highly prejudicial for the trial court to order him to return the distrained goods and reinstate the respondent unconditionally to the suit property yet the respondent's failure to pay rent causes him to continue to default in his loan obligations exposing his property to possible loss to the bank.
 12. The 1st applicant argues that it is not fair that the trial court would overly protect a tenant by issuing orders that embolden him to continue to occupy someone else's property without paying for it.
 13. The 1st applicant states that he is not able to reinstate the property to the respondent as the same has been leased out to new tenants to whom he owes legal obligations. The 1st applicant is apprehensive that he shall be cited for contempt of court of the impugned court orders unless the court issues the orders sought.

The Respondent's Case

14. The respondent states that he is the sole proprietor of Jisambaze Steak House that was operating on LR. No. Ruiru/Mugutha/2112 owned by the 1st applicant. The respondent states that after entering into a tenancy agreement with the 1st applicant for a three year term beginning 1st January 2024 until



- 31st December 2027 at an agreed rent of Kshs. 150,000/- per month, he heavily invested and made extensive renovations on the suit property to align with his business.
15. The respondent states that he paid rent on a timely basis until sometime in April 2024 when he received a demand letter from the landlord stating that he was in breach of the lease agreement as he had accrued rent arrears of 8 months totaling to Kshs. 1,050,000/-. Further, the respondent states that he had an informal visit by agents, servants and employees of the 2nd applicant claiming that they had instructions from the 1st applicant to levy distress for unpaid rent arrears. They proceeded to proclaim and issued him with a proclamation notice.
 16. The respondent argues that he approached the Chief Magistrates Court in Ruiru vide MCCCMM No. E016 of 2024 seeking among others orders of temporary injunction restraining the applicants from interfering with the quiet use, enjoyment and occupation of the leased premises where he was operating his business from. On 5th July 2024, the trial court rendered its ruling and directed him to deposit the disputed sum of Kshs. 1,050,000/- in an interest earning account with a reputable bank in the joint names of the respective advocates within 30 days of the order and that he continues to pay the rents falling due since April 2024 directly to the 1st applicant.
 17. The respondent argues that since the order was issued on 5th July 2024, he was to comply paying rent on or by 5th August 2024 but the 1st applicant was impatient and did not wait for the expiry of the timelines set by the trial court but opted to unlawfully levy distress and forcefully evict him from the premises.
 18. The respondent further states that on the order to pay rent directly to the landlord, the trial court did not give specific timelines within which to comply. However, although the trial court directed that status quo be maintained, the 1st applicant went ahead to unlawfully evict him from the premises.
 19. The respondent argues that the applicants were at law meant to issue a fresh proclamation notice for rent allegedly outstanding for the months of April, May and June before distressing. Further, the respondent argues that the applicants had not issued any notice of default or demanded payment of any monies from him as is required by law.
 20. On 18th July 2024, the respondent states that a group of unidentified men, under the instructions of the 2nd applicant forcefully gained access to the premises hosting his business and proceeded to cart away personal items, valuable assets and good without preparing a proper schedule of what was being distressed.
 21. The respondent states that the court order as presented did not have a mandatory 7 day notice as required and further it was addressed to James K. Nderitu as opposed to himself, John K. Nderito. The respondent states that although his wife produced a copy of the court order dated 5th July 2024, the auctioneers did not halt the distress.
 22. The respondent states that he prepared a comprehensive list of omitted schedule of goods and stock removed by the 2nd applicant which amounts to Kshs. 3,549,100/- while the entire stock amounts to Kshs. 1,934,900/- all totaling to Kshs. 5,484,000/-.
 23. The respondent further states that the 1st applicant denied him access to the premises whereby he had perishable foodstuffs that all went bad. The respondent states that he reported the incident at Mugutha Police Station vide OB No. 06/20/07/2024 and lodged a complaint against the police officers from Mugutha station with the Independent Policing Oversight Authority registered as IPOA/CMU/2374/2024.



24. The respondent states that he thereafter filed an application in the trial court on 29th July 2024 whereby the trial court issued interim injunctive orders barring the 1st applicant from selling the respondent's goods and granted the respondent unconditional access to the suit premises within 3 days of the order. The respondent states that despite his advocates writing to the applicants' advocates imploring upon them to comply with the said court orders, they declined and refused to comply with the said orders.
25. The respondent argues that the applicants are obviously in contempt of the orders of the court issued on 5th July 2024 but have elected to approach this court with the hope of seeking refuge defying the equitable principles of he who seeks equity must do equity and one must approach equity with clean hands.
26. The respondent states that the illegal distress of goods and unlawful eviction have rendered him impecunious as the loss of income runs into hundreds of thousands of shillings. The respondent argues that he is unable to meet his obligations and he is therefore exposed to law suits from his suppliers, creditors and former employees who lost employment due to the applicants illegal and unlawful actions.
27. The respondent argues that he has suffered immense financial loss and it is only fair that he is fully compensated by the applicants. The respondents further argue that the applicants are undeserving of any orders from this court having on a number of occasions blatantly disobeyed court orders from the trial court.
28. Parties disposed of the application by way of written submissions.

The Applicants' Submissions

29. The applicants rely on Order 42 Rule 6 of the Civil Procedure Rules and submits that he has met the threshold to warrant the orders of stay of execution pending appeal. The applicants further rely on the case of *Wambua vs Mutua (Civil Appeal E215 of 2023)* [2024] KEHC 3105 (KLR) (8 March 2024) and submit that they have filed the instant application timeously as the impugned ruling was delivered on 26th August 2024 and the application was filed on 30th August 2024.
30. The applicants rely on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and submit that reinstating the respondent to the suit property yet the respondent is in rent arrears exposes him to the risk of losing his suit premises as he is defaulting on his loan obligations. Furthermore, returning the distressed goods to the respondent who was in rent arrears was unfair to him as he leased the said goods to new owners and evicting the new owners from the premises put him at risk of new legal battles. The applicants rely on the case of *Farkhandas N. Abdulkader vs Mohammed Hasham Bakarani & Another* (2014) eKLR and submit that there is no justification by the trial court to overly protect a tenant's right to occupy rented property while ignoring the landlord's right to earn income from his investment.
31. The applicants further argue that compelling the 1st applicant to return the property to the respondent despite the fact that the said property has already been leased out to other tenants will create a state of affairs that will irreparably affect and negate the very essential core of the applicant as the successful party in the appeal thus rendering the appeal nugatory. Further, for the suit property to be returned to the respondent, the new tenants who have since taken possession and settled thereon must be evicted causing more confusion and convolute the dispute further.



The Respondent's Submissions

32. The respondent submits that the application is not merited as the applicants have been in constant contempt of court orders issued by the trial court without any reasonable justification. The applicants disregarded court orders issued on 5th July 2024 and 26th August 2024 and thus a party who is in contempt of court orders does not deserve the mercy of the court. Furthermore, the respondent argues that the applicants are seeking equitable remedies yet they have not come to equity with clean hands. To support his contentions, the respondent relies on the cases of Econet Wireless Kenya Limited vs Minister for information and Communication of Kenya Authority [2005] eKLR and T. N. Gadavarman Thiru Mulpad vs Ashok Khot & Another [2005] 5SCC.
33. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Antione Ndiaye vs African Virtual University (2015) eKLR and submits that the applicants have not shown sufficient cause to be granted orders of stay of execution and are therefore undeserving of the court orders sought.
34. The respondent argues that he stands to suffer immense financial loss and prejudice arising from loss of business and its assets, illegal eviction, exposure to possible litigation arising from his planned termination of employment for his employees, unpaid debts to creditors in the event the orders sought by the applicants are granted.
35. The respondent further argues that the applicants have not properly demonstrated any loss that they stand to suffer should the court decline to grant the orders sought in their application. The respondent submits that in the event the court grants the orders of stay of execution, the court direct that the applicants deposit security of costs in the sum of Kshs. 5,689,000/- being the value of goods and assets illegally distrained.
36. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

37. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders 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 1st 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.

38. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

39. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

40. The 1st applicant contends that by the trial court ordering him to unconditionally return the distrained goods and reinstate the respondent to the suit property yet the respondent fails to pay rent causes him to default on his loan obligations thereby exposing the suit property to possible recovery by the bank in exercise of its statutory power of sale.

41. From the record it is evident that the 1st applicant and the respondent entered into a tenancy agreement in September 2023. The bone of contention is the issue of payment of rent and the subsequent levy for distress of rent. Although the respondent claims that he is not in rent arrears and has been paying rent all through, he failed to evidence the said payments through documentary evidence which may have led the 1st applicant to distress for rent which is within his legal right. Furthermore, the 1st applicant states that the failure by the respondent to pay rent has led to him defaulting on his loan obligations. As it cannot be determined at this juncture about the legality of the distress of rent and which may be compensated by way of damages, it is evident that the applicant will suffer substantial loss if he allows the respondent to enter back into the premises and yet he fails to pay rent. Furthermore, the 1st applicant has shown that he has leased the premises to new tenants which may cause more legal battles if he were to evict them. It is therefore my considered view that the applicants have demonstrated that they stand to suffer the substantial loss in the event that the orders sought are not granted.

Has the application has been made without unreasonable delay.

42. The ruling was delivered on 26th August 2024 and the applicant filed the instant application on 30th August 2024. It took the applicant about 4 days between the date the ruling was delivered and the time he filed the instant application, thus the application has been filed timeously.



Security of costs

43. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“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 the applicants 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 the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

44. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicants have not offered any form of security.

45. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

46. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they raise arguable points of law.

47. Having taken into consideration the evidence herein, it is my considered view that the applicants have met the threshold of granting stay of execution pending appeal.

48. Consequently, I find the application dated 30th August 2024 merited and it is hereby granted. Orders for stay pending determination of the appeal are hereby granted.

49. The costs of this application shall abide in the appeal in favour of the applicant.

50. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE

