REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELCA CASE N0. E008 OF 2021

CHRISTOPHER WERE BARASA

BEATRICE MUTHONI...........................APPELLANTS

=VERSUS=

JOSEPH NDICHU NGIGE.....................RESPONDENT

(Being an Appeal from the ruling/order/determination of the Business Premises Rent Tribunal in Business Premises Rent Tribunal (BPRT) Case No. 684 of 2015 Nairobi Joseph Ndichu Ngige Versus Christopher Were Barasa and Beatrice Muthoni delivered on 4th day of December 2020)

RULING

A. Background

1. The Applicant filed a Notice of Motion dated 17/09/2021 filed under Sections 9, 12, 13, 14 and 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Chapter 301 of the Laws of Kenya) and Rule 3 of the Landlord and Tenant (Shops, Hotels and Catering Establishments (Tribunals) (Forms and Procedure) Regulations, Order 22 Rule 25 of the Civil Procedure Rules and all other enabling Acts, Rules and Regulations. The Applicant is seeking for the following: -

1. ***Spent.***

2. ***THAT this Honourable Court be pleased to issue an Inter-partes Order for Stay of Execution of Ruling/Order/Determination/Judgment made ex parte by the Honourable Tribunal on 4/12/2020 and in particular Stay of Levy of Distress for alleged rent arrears and/or Recovery of Costs until the proposed Appeal is heard and determined.***

3. ***THAT the costs of this Application be provided for.***

4. ***THAT such other or further order, orders, reliefs and/or any other remedies this Honourable Appellate Court may deem fit, just and expedient to grant.***

2. The Respondent herein opposed this application vide a Replying Affidavit filed on the CTS on 5/11/2021 seeking the court to dismiss the application with costs. The said Replying Affidavit is however not clear/legible.

B. The Appellant's Case

3. The Application is premised on the grounds on its face and further by the Supporting Affidavit sworn by Christopher Were Barasa (the Appellant herein) on 17/09/2021.

4. The Applicant avers that upon filing the above Appeal, the Appellants filed an Application dated 12/02/2021 to the Honorable Business Premises Rent Tribunal for Stay of Execution of its Ruling/Determination/Order/Judgment/Decree given/made on 4/12/2020.

5. Upon the said Application coming up before the Honorable Tribunal on 15/02/2021, an Interim Order of Stay of Execution of the said Ruling/Order/Determination/Judgment/Decree given or made by the Honourable Tribunal on 4/12/2020 was granted pending further Orders of the Tribunal inter partes.

6. After the said inter partes hearing of the said Application, the Honourable Tribunal made the following orders on 6/09/2021 inter alia: -

1. "THAT the Appellants do pay the outstanding rent arrears within 14 days from the date of the order.

2. THAT in default, the orders issued on 4th December 2020 to take effect.

3. THAT the Appellants/Applicants to pay costs of the Application."

7. That: -

a. **The Reference hitherto before the Honourable Tribunal and the subject** ***matter of this Appeal related and relate to the alleged Business Premises on Plot No. 2104 Gitathuru, Mathare Squatters Resettlement Scheme in Nairobi.***

b. The Appellants/present Applicants have nothing to do with the alleged premises on the said Plot No. 2104, Gitathuru; Mathare Kosovo in Nairobi which premises are occupied/rented by residential tenants who are total strangers to the Appellants/ Applicants herein.

c. The Appellants/Applicants herein only know/knew of Plot No. 2102 Gitathuru, Mathare Squatters Resettlement Scheme in Nairobi whose registered owner of Title is Genesis Joy Project Institute.

d. The said School, Genesis Joy Project Institute, is a National Government aided and community joint project run/managed by the Appellants/Applicants to assist the disadvantaged and poor school children from Mathare Squatters Resettlement Scheme community.

e. Contrary to fraudulent misrepresentation by the Respondent, the said School is operated/operating on Plot No. 2102, Gitathuru, Mathare Squatters Resettlement Scheme and not on the alleged Plot No. 2104 nor any part thereof nor do the Appellants/Applicants owe any rent arrears as alleged or at all to the Respondent.

f. The said school has never occupied, allegedly rented nor operated on the alleged Plot No. 2104 as alleged or at all and any alleged arrears of rent are not legally due notwithstanding the said order of the Tribunal.

8. The Applicant avers that besides, neither the said school nor the said children were/are parties to the above Reference.

9. The Appellants/Applicants herein have an arguable appeal with overwhelming chances of success.

10. The Applicant contends that unless this Application is heard and granted, the said poor, disadvantaged and innocent school children stand to suffer grievous and irreparable loss and damages and more particularly due to the current pandemic having only resumed classes recently after almost a year's break/suspension and so would the Appellants/Applicants so suffer irreparable loss and damages, and the present Appeal would be rendered nugatory and an effort in vanity.

C. The Respondents case

11. The deponent to the Respondent's Replying Affidavit has averred as follows: -

a. That the Tribunal held that the Appellants had no right to withhold rent on account of repairs done on the Premises since the Premises were leased to the Appellants and not the Appellants' school.

b. It was not in doubt that the respondent developed the suit premises.

c. The Respondent urges the Honourable Court to dismiss the said application with costs.

d. That, aggrieved by the Ruling of the Tribunal of 4/12/2020, the Appellants lodged an application for review dated 12/02/2021 on account that the Ruling was delivered in the absence of the Appellants.

e. THAT the Tribunal heard the Application for review and pronounced itself on 6/09/2021 and found that: -

i. The Tribunal ordered the Appellants to pay the outstanding rent within 14 days and in default, the orders made on 4/12/2021 were to take effect.

ii. The Tribunal held that there was no evidence to show that the respondent had misrepresented facts to the Tribunal.

iii. The issue of ownership of the suit premises was to be pursued differently at the Environment and Land Court.

iv. The respondent has legitimate expectation to earn a livelihood from the suit premises.

f. The respondent avers that the Appellants did not comply with both rulings of the Tribunal but have instead opted to appeal against the ruling delivered on 4/12/2020.

g. That the appeal has been filed outside the statutory limit of 30 days provided for under Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya.

h. It is the Respondent's contention that the Appellants have neither appealed against the Ruling delivered on 6/09/2021 nor sought for a stay of the orders issued by the Tribunal.

i. That the interim order for stay of execution of the orders made by the Honourable Tribunal ought to be vacated as it has been about a year since the orders sought to be stayed were issued, having been issued on 4/12/2020.

j. The Respondent contends that the Appellants stand to suffer no substantial loss.

k. Additionally, they contend that the Appellants have not furnished court with security for the due performance of the orders made by the Honourable Tribunal.

l. The respondent has suffered financial losses since May 2015 when the Appellants stopped paying rent in the suit premises.

m. The Appellants are using this Honourable Court to evade their responsibility of paying rent in the suit premises.

Submissions

Applicant's Submissions

12. Parties have not filed written submissions. The application was canvassed in open court on 18/11/2021.

D. Issues for determination

13. Having considered all the pleadings filed in this matter, the following arises as the issue for determination before this court.

a. Whether the appellant's application dated 17/09/2021 for stay is merited?

E. Analysis and Determination

a. Whether the appellant's application dated 17th September 2021 for stay is merited?

14. The appellant has lodged an appeal against the whole decision in the ruling delivered on 4/12/2020 by the Business Premises Rent Tribunal. The applicant during the pendency of the hearing of the appeal has now filed this application seeking a stay of execution of the said ruling pending hearing and determination of the appeal.

15. The appellants avers that the appeal is arguable with overwhelming chances of success. They stated that they operate a school and that it stands to suffer irreparably in the event the Respondent will be allowed to levy distress. Further, they allege that the school is located in Plot No. 2102, Gitathuru, Mathare Squatters Resettlement Scheme and not on the alleged Plot No. 2104 nor any part thereof nor do the Appellants/Applicants owe any rent arrears as alleged or at all to the Respondent.

16. It is the appellant's case that it is in the greater interest of justice that the ruling delivered on 4/12/2020 be stayed as they shall suffer irreparable loss and damages, and the present Appeal would be rendered nugatory.

17. Ms. Rotich for the Respondents, on the other hand, contended that the premises were leased to the Appellants in their personal capacity and not the Appellants' school. They also aver that the appeal was lodged outside the statutory limit of 30 days provided for under Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

18. I am aware that the appellant herein lodged the appeal or intended appeal two and a half (21/2) months from the statutory period under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. However, I am guided by Article 159 (2) (d) of the Constitution of Kenya. For clarification purposes, **Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** provides that:

> ***"(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, <u>within thirty days</u> after the date of such determination or order, appeal to the Environment and Land Court:***
>
> ***Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit."***

19. I have considered the notice of motion before us, the affidavits, the ruling of the Business Premises Rent Tribunal delivered on 4/12/2020 and the law, with the above legal principles as my guide. Without going into details, lest I prejudice the hearing of the appeal, I am prepared to accept that the intended appeal is arguable; in so far as the ownership dispute in respect to Plots No. 2102 and 2104.

20. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held

that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act:***

> ***"the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."***

21. Given the above position the court must make sure that the fettered discretion is exercised judicially. The appellant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb.

22. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> ***"…… A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion…….. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."***

23. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules.

24. An application for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out. Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See ***Antoine Ndiaye vs. African Virtual University*** **[2015] eKLR.**

25. In ***Butt vs. Rent Restriction Tribunal*** **[1979]**, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

26. In the current suit the appellants a seeking a stay of the Order issued by the Tribunal On 4/12/2020 and in particular stay of Levy of distress for alleged rent arrears and recovery of costs. The Respondent has opposed the stay contending that the Tribunal has already pronounced itself on two occasions on the LandLord/Tenant relationship. Further that the Appellants are raising issues of ownership at the Tribunal and the Tribunal has no jurisdiction over issues of ownership. The Respondent has urged the court to throw out the application for stay and ask the Appellant to put in security for the appeal.

27. The court, in ***RWW vs. EKW*** **[2019] eKLR,** addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

> ***"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.***
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> ***Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."***

28. From the record, it is clear that the Appellant has offered no security as a condition for stay. The offer for security must always originate from the Applicant in any application for stay. There being none in this application, I am constrained to exercise my discretion in favour of the Applicant. In ***Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] KLR**, it was said:

> ***"… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."***

29. In ***RWW vs. EKW* (supra),** the court said:-

> ***"The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant……."***

30. From the above decisions it is clear that the issue of security is discretionary, and it is upon the court to determine the same.

31. In an application for stay such as this one the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties are on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

32. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her judgement. See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Mukuma vs. Abuoga [1988] KLR 645.**

33. As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

> ***"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."***

34. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in ***Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR,** where it was held that:

> ***"… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."***

35. I also associate myself with the holding in ***Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR,** where 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.***
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> ***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 … This 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. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.'

36. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

37. Accordingly, while appreciating that the Respondents made an oral application that the Appellants should put in security as per the amounts accruing I also note that the Appellants did not even attempt to dislodge the contentions. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the Respondent who is a decree holder from the decision of the Tribunal, I hereby order:

i) That the appellant has to deposit the outstanding rent arrears as ordered in the Ruling dated 04/12/2020 in an interest earning account in a financial institution of repute to be held in the joint names of counsel for both parties within 60 days from the date of this ruling. This will ensure that the Respondent will not be prejudiced since upon the determination of the appeal, the monies will be accessed with ease.

ii) In default of the Appellant complying with this order (i) above, the stay of execution orders shall stand vacated and the Respondent shall be at liberty to execute.

iii) In the upshot, I find that the application, dated 17/09/2021 has merit and I hereby allow prayer 2 of the application with no orders as to costs. Let the Deputy Registrar call for the original trial record from the Rent Tribunal, to pave way for directions on the disposal of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

....

MOGENI J.

JUDGE

In the presence of

No appearance for the Appellants

Ms Rotich Nelly for the Respondent

Vincent Owuor Court Assistant