



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 48 OF 2015

SELESTICA LIMITED.....APPELLANT

VERSUS

GOLD ROCK DEVELOPMENT LTD.....RESPONDENT

RULING

This ruling determines three applications on record. The first application by the appellant is dated 12/2/2015 seeking for stay of execution pending appeal whereas the second application is dated 16/2/2015, seeking for an order to restore or reinstate the appellant into the respondent's premises. There is also the respondent's application dated 18th February, 2015 seeking to set aside the *ex parte* orders of 17th February 2015 reinstating the appellant into the suit premises. This court directed, with the consent of both parties' advocates that the three applications be heard together.

The application dated 12/2/2015 is brought under section 1A, 1B & 3A of the Civil Procedure Act, Order 42 rule 6, 7, and 8 of the Civil Procedure Rules seeking the following orders:

1. *Spent*
2. *Spent*
3. *There be a stay of execution of the orders of the subordinate court made on 30/1/2015 pending the hearing and determination of this appeal.*
4. *Further order as will meet the ends of justice in this appeal.*

The application by the appellant **SELESTICA LIMITED** is supported by the affidavit sworn by **Hector Como**, the Managing Director of the appellant/applicant Company. Mr Como deposes that due to inadvertence of the advocate who attended court on that day when the ruling for the respondent amended application dated 20/5/2014 was set, and who forgot to diarize the said date, they did not attend the ruling date. That the said ruling was delivered on 30th January 2015 and the application was allowed in its entirety. That their advocates sent a clerk to the registry on 11/2/2015 and upon perusal of the court file discovered that the ruling had been delivered granting the respondent a mandatory injunction which had initially been prayed for but abandoned by way of amendments made on 20/5/2014. That the said order purported to direct the Provincial Police Officer Nairobi to assist in evicting the appellant/applicant from the suit premises. The appellant claims that it owns and operates a bar and restaurant business within the suit premises since August, 2011.

It is alleged by the appellant that the respondent wants to demolish the premises upon which the appellant carries on his business and construct a high rise building. The appellant argues that if it is evicted and

eventually the appeal is successful, it will be impossible to seek reinstatement into the premises as the property will have changed its nature completely and that the appellant will also run out of business.

The application is opposed through the affidavit of Mr **Wu Hong Kun**, the Director of the Respondent Company **GOLD ROCK DEVELOPMENT COMPANY LIMITED** sworn on 2nd March 2015. Mr **WuHong Kun** deposes that the respondent is the registered proprietor of the suit premises on property Land Reference Number 2/122 Kilimani Estate Nairobi having acquired the same on 3rd August 2011. That the said property as purchased was subject to a lease dated 1st September 2008 between Tusk Construction Company Limited and the appellant herein for a fixed term of Five (5) Years and Three months from the 1st April 2008.

It is claimed that the annual rent under the old expired lease was USD 47,610.00 which translated to USD 3,967.50 per month with bi-annual increments of approximately USD 6,000.00. That the said lease expired on 30th June 2013 and the same could not be renewed. It is further deposed that, however, the appellant continued to hold on the premises irregularly and without the respondent's consent and without making any payment of *mesne* profits since 30th June 2013 to date therefore denying the respondent an opportunity reap any benefits from the said property.

The respondent claims that the appellant has approached this court with unclean hands and is undeserving of this court's discretion since it deliberately misrepresented to this court that it was a lessee of the respondent while the lease expired on 30/6/2013. Further, that the appellant also failed to disclose material facts of this matter including the fact that it has been illegally holding over in the respondent's property without paying rent. The respondent argues that there is no substantial loss that will be occasioned to the appellant in the event the orders are not granted because the applicant knew or ought to have known that unless the lease is renewed the appellant would move its business and relinquish vacant possession of the premises to the respondent.

When the appellant approached the court under certificate of urgency on 13th February, 2015, it was granted an interim order of stay of eviction from the premises pending *inter partes* mention on 20th February, 2015. However, on 17th, February, 2015 the appellant returned to court with another application seeking reinstatement into the premises on the basis that the respondent had brazenly disobeyed the order issued on 13th February, 2015 and forcefully evicted it even upon service of the said orders upon the respondent before the said eviction could be carried out. This court therefore gave a temporary restorative reprieve to the appellant pending the scheduled mention on 20th February, 2015. The said application for reinstatement into the premises is dated 16/2/2015 seeking the following orders:

1. **Spent**
2. ***That the applicant be re-instated into the suit premises pending the hearing and determination of this application interpartes.***
3. ***That order 1 above be enforced with the aid of the Officer Commanding Police Division (OCPD) Kilimani.***
4. ***That further or other orders be made as will meet the ends of justice.***
5. ***That the cost of this application be provided for:***

The application is supported by the affidavit of Hector Como, the Managing Director of the appellant. He deposes that the orders of stay issued on 13/2/2015 were duly served by the process server on the **respondent advocate** who also acknowledged service and on the respondent who refused to accept service. That a group of people forcefully raided the suit premises at 10:30 am and harassed the appellant's staff purporting to act under the instructions of the respondent to carry out the eviction.

Mr Como further deposes that the said individuals tampered with equipment and fixtures. The appellant claims that the respondent did not afford the applicant the humanity and courtesy of prior notice in order to organize of the proper handling, transportation, relocation and storage of crucial items. The appellant believes that unless it is reinstated into the suit premises, it will conclusively be denied its lawful recourse to seek justice before this court.

The Notice of motion dated 18th February 2015 by the respondent is brought under the provisions of sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 rule 6, order 51 rule 1 of the Civil Procedure Rules 2010 seeking:

1. *Spent*
2. *Spent*
3. ***That the honourable court be pleased to discharge, stay and /or set aside its order made on 17th February 2015 pending the hearing and determination of the appeal.***
4. ***That costs of this application be provided for.***

The respondent's application is supported by the affidavit of Wu Hong Kun, a Director of the respondent Company who deposes that the application filed in CMCC no 1534 of 2014 sought for mesne profits and eviction orders against the applicant as a result of the appellant's refusal to hand over vacant possession of the suit premises after the lease expired on 30th June 2013. He deposes that the appellant continued to hold over the respondent's property after the lease had expired without paying rent. That the respondent filed an application dated 10th March 2014 in the subordinate court seeking eviction orders pending the hearing of the suit.

Further, the respondent avers that the said application in the lower court was subsequently amended with leave of the court. In addition it was deposed that a ruling was delivered by the court which allowed the said application in its entirety. That the respondent executed the orders by instructing Valley Auctioneers to enforce the eviction orders and also wrote to the Provincial Police Officer who also instructed the Officer Commanding Police Division, Kilimani Police Station to assist in the eviction.

It is further deposed by the respondent's Director, Mr Wu that on 13th February 2015 between 10.00m and 11:30 am the said, eviction was successfully conducted thereby effecting the orders and delivery of vacant possession of the premises to the respondent/applicant. Further, that on the same day at 12:30 pm, the applicant advocates were served with an order staying the eviction orders pending interpartes hearing.

The Respondent/ applicant claims that the orders issued by this court could not be effected as the eviction had already taken place and completed. The respondent complained that the order was served without the application on the basis of which the interim orders were granted. That the respondent perused the court file and discovered that the court had issued the orders on 17th February 2015 reinstating the respondent into the property.

The respondent averred that the reinstatement was made without hearing the applicant whose effect is to allow the appellant's appeal in its entirety. The respondent argues that the court had no jurisdiction to grant reinstatement orders at the ex parte stage without hearing the applicant since the subordinate eviction orders had already been enforced. The applicant claims that unless the orders issued on 17th February 2015 are stayed, the respondent will force its way back into the premises rendering the appeal nugatory.

The respondent's application for vacating of orders of 17th February, 2015 is opposed through the replying affidavit of Hector Como dated 12th March 2015. Mr Como deposes that the application by the respondent is based on blatant misstatement of facts and material information. The appellant contends that it validly renewed its lease with the respondent following the notice of intention given prior to the lease coming to an end and it is that contention that is the basis of the proceedings. Mr Como contends that the respondent engaged a process server to serve the order at around 11:40 am having received the information that the applicant was trying to evict the applicant. That the said order was pasted on the wall of the suit premises but the respondent's agents continued with the eviction in contempt of the court order. The appellant claims that on the material day the appellant never enjoyed vacant possession of the suit premises at the time of the service since a group of people forcefully raided the premises and harassed the staff and interfered with equipment and features.

The respondent stated that the applicants have not enjoyed vacant possession of the suit premises having been served with the order of this court of 13/2/2015 and 17/2/2015 and that the respondents have tried to

evict the appellant by trying to curtail goods and fixtures out of the suit premises in order to give an illusion that they had acquired vacant possession thereof. The appellant further claimed that on 17/02/2015 at around 12:40 pm the respondent's agents raided the suit premises in order to effectively steal from the appellant its items, fixtures and vacant possession. The appellant claims that it has a right to the suit premises and enjoy quiet possession of the suit premises.

Parties agreed to prosecute the applications by way of written submissions which were dutifully filed and exchanged. The appellant submitted that the court cannot devolve in this matter of whether or not the appellant is illegally holding over in the suit premises as any interrogation of the issue and finding thereon would also embarrass both the trial court and the judge who will ultimately hear this appeal and any appeal that may be filed from the judgment of the lower court after trial of the main suit.

On the grounds for stay of execution, the appellant submitted that the application has been brought without undue delay; the appellant argued that the delay of 13 days is not inordinate since the application was filed 14 days after delivery of the ruling. The appellant also submitted that unless the stay of execution is granted, the respondent will forthwith proceed to demolish the building comprising the leased premises and put up a high rise building. The appellant also stated that if the appeal succeeds, the appellant cannot be reinstated into the business. That the appellant will be driven out of business in excess of one year which will amount to irreversible loss.

The appellant further submitted that the court has power to order stay of execution pending appeal which is discretionary and therefore equitable. The appellant stated that the prayer for an order of temporary injunction compelling the appellant to vacate the suit property was amended to replace the prayer for a mandatory injunction, yet the order used to evict the appellant purported that the magistrate gave orders for mandatory injunction which is not what the court ordered. The appellant argued that what the respondent holds is an order with relief that the court did not grant and that the same is a nullity.

The appellant also submitted that upon obtaining an order of eviction, the respondent ought to have given the appellant a notice to vacate and in default of the appellant vacating the property within a reasonable time would an eviction follow. The appellant argued that although under Order 42 Rule 6 of the Civil Procedure Rules the appellate court hearing an application for stay of execution will need not to look at the merits of the intended appeal yet it cannot shut its eyes to an illegal order that has been given by the trial court especially where the same has been given without jurisdiction. The appellant submitted that under Order 40 of the Civil Procedure Rules, a trial court can only entertain an application for temporary injunction, not a mandatory injunction.

On the application to set aside the reinstatement orders granted on 17/2/2015, the appellant submitted that the court ought to consider the evidence before the court. The appellant stated that it is instructive that whereas it is purported that Valley Auctioneers carried out the purported eviction, the respondent has not shown what took place on 13/2/2015 in support of the prayer for setting aside the restoration order. The appellant argued that the respondent has not also shown when and where the handing over of the suit premises by Valley Auctioneers took place to the respondent and the person that instructed the eviction. The appellant stated that the evidence by Hiram Nyaburi advocate and Wu Hong Kun that is before the court is hearsay and does not meet the threshold of order 19 Rule 2 of the Civil Procedure Rules.

On the application dated 12th February 2015, the respondent submitted that the appellant must show that it will suffer substantial loss if the orders are denied, that the application was filed without undue delay and thirdly security for the due performance of decree that may be binding on the appellant must be given. The respondent relied on the decision in the case of **New Ocean Transport Co. Ltd vs. M.A Bayusuf (2009) eKLR**. The respondent submitted that the appellant ought to show the substantial loss that it will suffer in the event the orders sought are not given. It argued that it is not enough to merely state that loss will be suffered. On this ground, the respondent relied on the case of **Pan African Insurance Company (U) Ltd vs. International Air transport Association (HCT-00-CC-MA-086-2006), Osero & Company Advocates vs. Easy Properties Limited (2014) eKLR**. The respondent submitted that the appellant's contention that it will suffer loss by the fact that of it being asked to vacate the premises had not been demonstrated.

The respondent argued that the appellant is asserting a right of perpetual occupation of the respondent's suit property. The respondent also stated that the assertion that it has the intention of putting up a high rise building on the suit property has not been supported by any evidence. It argued that even if it intended to develop the property that would be a good ground for granting the orders sought in its application.

On the security to be offered, the respondent submitted that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. The respondent argued that the appellant has not proved the substantial loss that it stands to suffer which failure renders the application defective and disentitles the appellant the exercise of discretion of the court in its favour. The respondent argued that the appellant was required to provide the actual security for consideration by the court as to sufficiency. The respondent relied on the case of **Vista Holdings International Ltd vs Span Image (K) Limited (2014) eKLR**.

The respondent also submitted that the application has been brought after unreasonable delay. The respondent stated that the delay in this case is 2 weeks which the appellant has not offered any reasonable explanation save to state that it filed an application at the subordinate court and after being denied interim relief it came to the High Court.

The respondent also submitted that the application is overtaken by events. That the orders issued on 30/1/2015 by the subordinate court were implemented and fully effected on 13/2/2015 between 10:00 and 11:20 am and that by the time the appellant was filing the application for stay, the subject of appeal had been fully implemented such that nothing remained to be stayed pending the appeal. The respondent also submitted that the appellant only regained possession of the suit property pursuant to the *ex parte* orders granted on 17/2/2015.

On the application dated 16/2/2015, the respondent submitted that the orders of the subordinate court were enforced by the Auctioneers with the assistance of Police Officers from Kilimani Police Station on 13/2/2015. The respondent stated that the order and the replying affidavit reveals that the appellant's subtenant received her goods in good order, the exercise was supervised by IP Guyo; CPL Kinyua; PC Ndungu; PC Ann who confirmed that the law was followed. The process server also confirmed that during service guards from Ever Green Guards were on site. The respondent submitted that the appellant is attempting to use the legal process to protect its illegal position to wit that of an illegal occupier of the suit property without paying a single cent which the appellant has been doing since 30th June 2013, to the detriment of the respondent owner.

On the application dated 18/2/2015, the respondent submitted that the appellant deliberately misrepresented to the court that the respondent disregarded this honourable court's order issued on 13/2/2015. That the appellant failed to disclose that they had been evicted from the suit property on 13/02/2015. The respondent argued that the appellant should not be allowed to retain a position of advantage that it obtained through a planned and blatant misrepresentation and non-disclosure of material facts. The respondent urged the court to be guided by the case of **Moses Wachira Wamunyu vs. Fredrick Kagio Kinyua & 4 others (2001) eKLR**.

In response to the allegation that it abandoned its prayer of mandatory injunction, the respondent submitted that the amended Notice of motion filed by the respondent sought a mandatory injunction. That in prayer 2 of the application, the respondent sought for orders to compel the appellant to vacate the suit property and deliver vacant possession to the respondent. That under prayer 3, the respondent sought for the appellant to be evicted from the suit property and prayer 4 was directed to the police to assist during eviction.

The respondent submitted that the fact that the order uses the word mandatory injunction does not negate the fact that the respondent sought for mandatory order in prayer 2, 3, and 4.

Having set out the different perspectives of the parties in this case, the issues for determination are:

1. ***Whether stay of execution pending appeal should be granted or the same has been overtaken by events.***
2. ***Whether orders of stay and reinstatement into the premises were made without jurisdiction and should be vacated.***
3. ***What orders should this court make***
4. ***Who should bear the costs of the respective applications***

On the issue of whether stay of execution pending appeal should be granted or the same has been overtaken by events, 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 his 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 judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.

To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent. See **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997**

The appellant's contention in this case is that if the stay is not granted the respondent will proceed and demolish the building comprising the leased premises and put up a high rise building and in the event the appeal succeeds, the appellant cannot be reinstated. The appellant also claims that it will lose business therefore suffering irreparable harm which cannot be compensated in monetary terms. The appellant also claims that the appeal as filed has overwhelming chances of success as the lower court being a trial court had no jurisdiction to issue a mandatory injunction but that it could only issue a temporary injunction.

On the other hand the respondent claims that the appellant has not established any substantial loss that it will suffer if stay is not granted. The respondent contends that the appellant has no document to show that the respondent has the intention of demolishing premises and putting up high rise buildings. The respondent also argues that the application for stay was brought after unreasonable delay and that the applicant has not offered any security that may be binding upon it for the due performance of decree.

I will apply the said conditions of stay of execution in this case. On whether the appellant will suffer substantial loss this court in **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO MISC APPLICATION No 42 of 2011 [2012] eKLR (Gikonyo J)** stated that:

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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

Applying the same principles in this case, the subject matter of this appeal in my understanding is the possession of the suit premises which undeniably belong to the respondent and which the appellant was in occupation as a tenant with a registered lease before the respondent purchased it in 2011.

It is also not in dispute that the respondent had in its possession for enforcement an order of the court issued by the subordinate court on 30th January, 2015 compelling the appellant to vacate and deliver up vacant possession of the premises in favour of the respondent. The said orders of eviction were also stayed by this court on 13/2/2015 and later on 17th February, 2015 the appellant was ordered to be reinstated in the premises subject matter of this appeal following an alleged eviction on 13th February, 2015 even after the order of 13th February 2015 had been served upon the respondent's agents who were in the process of evicting the appellant.

The question is what substantial loss the appellant will suffer if stay of enforcement of that order of the subordinate court is not made in its favour.

It is not in dispute that the suit premises are used for commercial business venture. In my view, the appellant will suffer substantial loss if the eviction orders are enforced. It cannot therefore be denied that whether or not the appellant is illegally holding over the suit premises, eviction will no doubt occasion substantial loss in terms of not only business but employment for the staff that eke their living from the commercial business and who may sue the appellant for unpaid dues.

On the second condition of whether the application has been brought after an unreasonable delay, it is the respondent's contention that the appellant has not explained the delay in filing the application. The appellant submitted that the application was filed after 2 weeks following the delivery of the impugned decision. I agree with Munyao J in *Jaber Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 OF 2012[2014] eKLR* that unreasonable delay depends on the circumstances of the case. The court 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.”

In this case the court restrained the appellant from continuing to occupy the suit premises and it was also ordered to vacate and deliver vacant possession of the suit premises to the respondent. The order also required the eviction to be supervised by the Provincial Police Officer, Nairobi. The appellant having been in occupation of the said premises and carrying out business in the same premises ought to have been extremely vigilant in following up the progress of the matter now that the orders which were being sought were mandatory in nature. The appellant should have moved with speed to stay the execution which it did not for reasons that its counsel forgot to diarize the ruling date and was only made aware on 11th February, 2015 In *Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR*, the Court held that:

The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him.

The Applicant filed the appeal in a supersonic speed but did act likewise to cover his back by applying for stay of execution pending appeal. Indeed, going by his arguments, a prudent and diligent suitor should have been awakened by the applications by the Respondent to levy execution on his immovable property and apply without delay to have the execution stayed. But the Applicant waited for the Respondent to go through all the motions of execution until a prohibitory order on the immovable property was issued in execution. It should be noted that filing of an appeal alone will never operate as a stay of execution and order 42 Rule 6 of the Civil Procedure Rules is as clear. And therefore, with all due respect, the explanations offered by the Applicant for not applying in a timeous manner do not hold firm or at all. From the conduct of the Applicant in allowing the Respondent to go through time-consuming and costly rigours of the process of applying for execution renders credence to the Respondent's assertion that the Applicant deliberately allowed too much time to pass-by as a gimmick by the Applicant to obstruct and delay the course of justice in this matter. Surely, the Applicant did not bring this application timeously and is the indolent litigant whose conduct compromises his equity and may not excite any love from a court of equity. Except, I realize that notwithstanding, the fact that his equity is tinctured with laches, will need to be coupled with other grounds for the Court to state with absolute sanctification that the Applicant has not shown any sufficient cause for a stay to be ordered. This course ensures that the Applicant is not disentitled of a remedy in limine. That is why the court must go ahead and examine the other grounds under order 42 Rule 6 of the Civil Procedure Rules and take the overall impression of the entire circumstances of the case to see whether any sufficient cause has been shown as to order a stay of execution.

In my view there is unreasonable delay in this case which the appellant has not satisfactorily explained. No extract diary for the date when ruling was given and or ruling delivered was annexed to the affidavit. In addition, there is no material to show that the date for the ruling was given exparte. The application having been argued interpartes, it would only have been expected that the appellant acts with extreme vigilance in this matter. In my view, the appellant acted at the eleventh hour which was an extremely risky affair.

On the third condition of whether sufficient security has been offered for the due performance of decree, in the supporting affidavit, the appellant states that it is ready to furnish security to the court should the court so order. Order 42 Rule 6(2) (b) states in material particulars: “.....**such security as the court orders for the due performance....**”

In my view, the rule gives the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. I have no doubt therefore that I have the power to order such security for the due performance of decree or order, and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event, where the court orders for security deposit and there is default, then the orders for stay are rendered useless for a defaulting party.

On the issue of whether the orders for stay have been overtaken by events.

The respondent's contention is that the stay order the appellant is seeking has been overtaken by events. It is submitted that the lower court orders were successfully enforced. In my understanding the event in this case is the possession of the suit premises. As stated earlier, the appellant was in possession of the suit premises as at 13th February, 2015 when this court issued a temporary order of stay of eviction from the premises.

On 17/2/2015, the appellant came back to court exparte and urged the court to reinstate it in the premises because the respondent's agents had refused to abide by the temporary order when they were served on 13th February, 2015 while they were in the process of evicting the appellant. The court did issue an order of reinstatement and therefore the appellant is in possession of the said premises following the court order issued on 17th February 2015 reinstating the appellant into the premises subject matter of this appeal.

In my view the orders were not issued in vain, the court issued the order to preserve the subject matter of

this appeal. There is evidence on record to show that there was a second attempt by the respondent's agents to remove some property from the suit premises and that they were thwarted by a traffic police officer who was on patrol. I believe the appellant that it still has possession of the premises even if the business has been interrupted by the partial eviction. I therefore hold the view that the application seeking stay has not been overtaken by events.

Whether orders of temporary stay and reinstatement into the premises should be vacated.

On whether the interim orders granted by this court staying eviction and reinstating the appellant into the premises should be vacated pending the hearing of this appeal, it is trite law that the court has residual jurisdiction to review, vary or rescind its decisions in exceptional circumstances. See Court of Appeal decision in **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR**.

In the Court of Appeal decision by Makhandia, Okwengu and Sichale JJA CA 16 OF 2014 NEW OCEAN TRANSPORT LIMITED, LESTK INVESTMENTS VS ANWAR MOHAMED BAYUSUF LIMITED where the Court of Appeal was confronted with an application for a restorative injunction and reinstatement into the suit premises pending the lodging, hearing and determination of an intended appeal from the ruling of the High Court the Court was categorical that

“The stay contemplated in Rule 5(2) is not restrictive and the court can grant any injunction known in law if circumstances of the case call for it in the exercise of its original jurisdiction. This was a positive injunction directing the restoration of the appellant into the premises. It is in the same category as a mandatory injunction, ordering something to be done or to undo a wrongful act, to restore the status quo ante so that the damage does not continue. The overriding objective principle of the law in sections 3A and 3B of the Appellate Jurisdiction Act enjoins this court to grant any order that may be necessary for the ends of justice. In the premise, we hold that the assertion that this court had no jurisdiction to grant the restorative order has no legal foundation or basis and reject it. In a suitable case, this court has jurisdiction to order for restoration into the premises even where an eviction has been completed. The only issue remaining is therefore whether this is a suitable case where the court should sustain the interim order of stay and or restoration into the premises...”

In this case, the appellants were being evicted pursuant to a lawful order of the subordinate court, and through a legal process. From the time the ruling in the lower court was made to the date of filing of the application, this court has established that having regard to the nature of the case, the delay was unreasonable. The record shows that even if the appellant sought an order of stay in the lower court before coming to the High Court, the said application came late in the day. There was therefore nothing in law stopping the respondents from enforcing the terms of the court order.

This court does not appreciate what notice the appellant required of the respondent to issue before such eviction, where there was no specific stay of the order of eviction. I do not see any mischief in the manner in which the eviction was carried out, even if it was not completed as it in essence effectively disrupted the appellant's operations of a bar and restaurant business. I do not perceive or find any impropriety on the part of the respondent in executing a lawful court order.

Indeed, the appellant delayed in seeking for stay until the day of enforcement is when they came to court. The respondent cannot be blamed for being diligent and vigilant in executing a lawful court order. The appellant, it is not disputed was in the process of being evicted when the appellant came to court on 13th February, 2015, and when the order of this court was being served. But as to whether that process had been completed, is not certain from the affidavit and documentary evidence on record since the evidence is conflicting in the following manner:-

- i. Annexure HC4 a statement by a police officer PC JULIUS TOO No. 79872 is to the effect that as at 17th February, 2015 the respondent's agents, auctioneers were still attempting to evict the appellant from the premises but their efforts were thwarted by the said police officer. This implies

- that the appellant's eviction from the suit premises was never completed otherwise there would be nobody to evict
- ii. A security guard who also recorded his statement averred that the auctioneers were carrying away items from the suit premises on 17th February, 2015
 - iii. The above statements have not been controverted
 - iv. The time of service of the order—according to Como and the process server, was at or about 11.40 am whereas according to the respondent, by 11.20 am the whole process of eviction was complete.
 - v. There is no evidence that when this court made an order of reinstatement of 17th February, 2015, the appellants had been fully evicted from the suit premises, and that they had to physically return from where they had back into the suit premises.
 - vi. There is no affidavit from the police officers who allegedly supervised or maintained law and order during the eviction process to ascertain that they are the ones who endorsed on the piece of paper annexed to the respondent's affidavit showing that by 11. 20 am they had overseen the entire eviction process. Not even their Police Force Numbers were given.
 - vii. The Auctioneers who were instructed to evict the appellants did not swear any affidavit to confirm that by 11.20 am they had completed the exercise of eviction.
 - viii. The eviction orders from the lower court had no specific timeframe within which the appellant was required to vacate the suit premises.

This court finds that indeed the respondent was in the process of evicting the appellant and such eviction was sanctioned by a court of law. However, there are serious issues of illegal occupation of the respondent's premises by the appellant, without paying rent from the year 2013. The appellant claims that the lease was extended automatically following it signifying the intention to renew the lease three months prior to expiry in December, 2012. The appellant has also raised serious issues of the pecuniary jurisdiction of the trial court to try the matter as filed. The main suit is still intact in the lower court. If evicted at this stage before the appeal herein is heard and determined, the same shall be rendered nugatory.

In the premise, it is only fair and just that the appellant is not evicted from the suit premises until the appeal is heard and fully determined.

This court is enjoined to find that the right of appeal is a constitutional right and the cornerstone of the rule of law. It is guaranteed under **Article 50(1) of the Constitution**, Section 75 of the Civil Procedure Act and Order 43 (1) of the Civil Procedure Rules. The said right was exercised under section 79G of the Act and stay sought under Order 42 rule 6 of the Rules. It is not the intention of this court to oust a party approaching it from the judgment seat. The orders sought are discretionary in nature and can be granted on terms to be stated by the court.

It has not been demonstrated that the appellant came to this court laced with unclean hands. It is the defendant in the lower court and being dissatisfied with the mandatory orders given by the lower court, it has an unfettered right of appeal. In my view, the dispute herein can be determined by application of the law hence, the right to a hearing and fair trial can only be guaranteed if stay pending appeal is granted to the appellant. There is no evidence that the appellant's intention to overreach or steal a march on the respondent. The respondent has its whole claim for mesne. Should it succeed, it will be compensated should it prove the claim.

The appellant is exercising its right of appeal. Even where there is delay in bringing the application due to blunders made by its counsel, this court can exercise its discretion in favour of a party, for as long as the interests of justice can still be served, and the respondent compensated by an award of costs. The only prejudice in this case, in my view is that the respondent would suffer some delay which can be compensated by an award of costs, this court ordering for fast tracking of the hearing of the appeal herein and an order for security for costs for the due performance of the decree as contemplated in Order 42 Rule 6 of the Civil Procedure Rules.

It is on those grounds alone and in the interest of justice that I shall exercise my discretion in favour of the appellant and make the following orders_

1. There be a conditional stay of execution of the orders of the lower court issued on 30th January, 2015 pending hearing and determination of this appeal in the following terms:-

- a. The appellant do deposit a sum of \$ USD 200,000 Two Hundred Thousand United States Dollars only to cover all the accumulated monthly rent of the suit premises from the date the lease expired thus, from 30th June 2013 to the date of delivery of this ruling as well as security for the due performance of decree
- b. The above sums of money to be deposited into a joint interest earning account to be operated by both advocates for the respective parties within 45 days from the date of this ruling and to be held until further orders of this court.

2. The appellant to compile, file and serve a record of appeal upon the respondent within 45 days from the date hereof.

3. The Deputy Registrar of this Court is directed to immediately call for the lower court file to be submitted to this court to facilitate consideration of the appeal by a judge under Section 79B of the Civil Procedure Act and in any event, not more than 21 days from the date of this ruling.

4. In default of Order No. 1 above, the application dated 12th February 2015 by the appellant applicant for stay of execution pending appeal shall stand dismissed with costs to the respondent.

5. The respondent shall have costs of the application for stay pending appeal by the appellant.

6. The respondent's notice of motion dated 18/2/2015 is dismissed with no orders as to costs.

7. The matter to be mentioned on 27th July, 2015 to confirm compliance with the orders and directives herein.

Dated, signed and delivered in open court this 10th day of June, 2015

R.E.ABURILI

JUDGE

In the presence of:

Mr. Chege advocate h/b for Mr. Wasuna advocate for the plaintiff /applicant; and

Mr. Nyaburi advocate for the Defendant/applicant

Court Assistant.....Simiyu

R.E.ABURILI

JUDGE