



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELCA NO. 26 OF 2015**

**DANIEL GICHERU KARANGU ...**

**APPELLANT/APPLICANT**

**-VERSUS-**

**RICHARD GICHERU IRUNGU .....**  
**RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion dated **30th July, 2015**. In that application, the appellant seeks stay of execution of the judgment/ order of the Chairman Business Premises Rent Tribunal (BPRT) delivered/issued on 26th June, 2015. In that judgment/decreed the Chairman had, *inter alia*, ordered the appellant/applicant to-

**“...pay all the outstanding arrears of rent from April, 2013 upto June, 2015 at the monthly rate of Kshs. 3,500/= within fourteen days...”**.

The appellant/applicant was also ordered to pay the monthly rent of Kshs.3,500/= in advance until he delivered vacant possession of the suit premises, which he was ordered to do on or before 31st December, 2015.

2. Aggrieved by the judgment/order of the Chairman BPRT, the appellant preferred an appeal to this court.

3. To protect his interest in the suit premises, before the hearing and determination of the appeal, the appellant filed the notice of motion referred to herein above seeking the prayers indicated therein.

4. The application is premised on the grounds that the respondent has threatened to execute the judgment/order.

5. Explaining that he is still in occupation of the suit premises where he operates a car wash, the applicant contends that execution of the judgment would render the appeal nugatory.

6. The application is supported by the affidavit of the applicant, Daniel Gacheru Karangu, in which the grounds thereon are reiterated.

7. In opposing the application, the respondent filed the grounds of opposition dated **17th August, 2015** and a replying affidavit sworn on the same date. Through the said grounds of opposition and replying affidavit, the respondent opposes the application on the grounds that the application is brought under the wrong provisions of the law (**Order 22 Rule 25** as opposed to **Order 42 Rule 6** of the Civil Procedure Rules); the applicant has not demonstrated what substantial loss he stands to suffer if stay is denied and that there has been inordinate delay in bringing the application.
8. Terming the application lacking in merit, incompetent and misconceived, the respondent contends that execution of the monetary part of the decree cannot render the appeal nugatory. Pointing out that the order appealed from cushioned the applicant from eviction until 31st December, 2015 the respondent explains that the objective of the application is to avoid paying the rent arrears.
9. The respondent further explains that he is capable of refunding any compensation awarded to the applicant, in case the appeal succeeds.
10. It is the respondent's case that granting the orders sought will be prejudicial to him as he continues to pay rent/rates to the Government yet the applicant has not been meeting his rent payment obligations.
11. When the application came up for hearing on 23rd September, 2015 this court ordered the applicant to deposit the decretal amount being Kshs.105,000/= in court within 14 days and extended the interim orders issued in favour of the applicant for the said period of time.
12. Before the end of the time within which the applicant was to deposit the decretal sum in court, the applicant moved the court by way of an application dated 29th September, 2015 seeking review of the order issued on 23rd September, 2015 and praying that he be allowed to deposit Kshs. 20,000/- and the balance thereof after three months. The court directed him to serve the application and that the same be heard alongside the application for stay of execution.
13. When the applications came for hearing on 21st October, 2015 the appellant reiterated that he was unable to comply with the order requiring him to deposit the decretal sum in court pending appeal because he had loan obligations he was meeting. He urged the court to order the respondent to repay him the money he had invested in the suit premises to enable him be able to meet the order of the court.
14. In opposing the applicant's plea, counsel for the respondent **Mr. Karigithu**, urged the court to note the conduct of the applicant. In this regard, he pointed out that the applicant had failed to comply with both the orders of this court and the Tribunal, within the time given and at all. Pointing out that the applicant has been carrying on business at the suit premises since 2013 without paying rent, counsel submitted that the applicant had moved the court with unclean hands.
15. Reiterating the respondent's contention that he is a person of means capable of compensating the appellant should he succeed in his appeal, Mr. Karigithu reiterated the respondent's contention that granting the orders sought would be prejudicial to the respondent who continues to pay rent/rates to the Government yet the applicant has not been paying rent in respect of the suit premises.
16. Based on the decisions in the cases of **Tropical Commodities suppliers Ltd and Others v. International Credit Bank Ltd, in liquidation** (2004)2 E.A 331, **Elite Studios Ltd & another v. International Hotels Ltd** (2005) e KLR; **Ann Wanjiru Waigwa & another v. Joseph Kiragu Kibarua**-Nyeri High Court Civil Appeal No.92 of 2009; Mr. Karigithu submitted that the applicant has not satisfied the conditions for grant of an order of stay pending appeal.
17. In the case of **Elite Studios Ltd & another v. International Hotels Ltd** (2005) e KLR **Visram J** (as he then was) stated:-

**“For the applicants to succeed in his application (application for stay of execution of judgment of BPRT) they must demonstrate to the satisfaction of this court that substantial loss would ensue if the order is not granted; that they have filed this application without delay; and they are willing**

and able to give such security as is ordered by the court for the due performance of the decree. That is plain reading of the rule, and the onus is on the applicants to satisfy all the conditions through their deposition, and not through bold statements from the bar.”

18. In Ann Wanjiru Waigwa & another v. Joseph Kiragu Kibarua (supra) it was held:-

“...I need to state that as a general proposition that an appeal out of money decree would rarely be rendered nugatory....had he in the replying affidavit deponed that he was a man of means and would be in a position to refund the decretal sum in the event of the appeal succeeding, I would have perhaps looked at the application rather differently.”

#### Law applicable to an application for stay pending appeal

19. As pointed out by counsel for the respondent, the law on stay of execution is found in **Order 42 Rule 6** as opposed to **Order 22 Rule 25** of the Civil Procedure Rules (CPR) which deals with stay of proceeding generally.

20. Whereas the defect in the applicant’s application renders the application procedurally defective, that defect cannot prevent this court from addressing the application on its merits, bearing in mind that the defect has not occasioned any prejudice to the respondent.

21. The conditions that the applicant must satisfy before this court can grant him stay of execution pending appeal are those set out in **Elite Studios Ltd & another v. International Hotels Ltd** (supra). In this regard see **Order 42 Rule 6(2)** of the CPR and also the following cases:-

i) Sammy Some Kosgei v. Grace Jelel Boit (2013) eKLR where it was observed:-

“...The relevant provisions in relation to stay pending appeal are contained in order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provides as follows:-

(2) No order for stay of execution shall be made under subrule (1) unless....

It will be seen that the above provisions are couched in mandatory terms and three conditions must be satisfied before an applicant may succeed on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for due performance of the decree...

The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal..”

ii) Everlyn Jebitok Keter v. Henry Kiplagat Muge & 2 Others (2011) eKLR where it was stated:-

“It is usually a good rule to see if O.41 r.4 (present Order 42 Rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay...In this case the applicant has not shown how he stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.”

iii) Robert Ngaruiya Chutha vs. Joseph Chege Ndungu (2014) eKLR where it was stated:-

**“The Court of Appeal in the case of Charles Wahome Gethi v. Angela Wairimu Gethi, Civil Application No.302 of 2007 (2008) eKLR held that:-**

**“...It is not enough for the applicant to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them”....It is my finding that the defendant has not established that he shall suffer loss if the orders sought are not granted. Further, under Order 42 this court is not required to inquire into the merits of the intended appeal as that is a question that can only be determined by the Court of Appeal. Consequently, the ground that the appeal shall be rendered nugatory does not suffice....Lastly, the rules of procedure require that the applicant must offer security as the court may order. On perusal of the application before court, it is evident that the defendant has not stated that he is willing and ready to give security subject to the directions of the court....I accordingly decline to grant the orders sought.”** (emphasis supplied).

### **Analysis and determination:**

22. From the cases cited above, it is clear that for this court to exercise the discretion vested on it in favour of the applicant, the applicant must satisfy the conditions set out in **Order 42 Rule 6(2)** of the Civil Procedure Rules. More importantly, the applicant must by way of evidence demonstrate that unless stay pending appeal is granted, he/she will suffer substantial loss. The applicant must also furnish security for satisfaction of such decree as may ultimately issue against him.

### **Delay in bringing the application**

23. The instant application was filed on 30<sup>th</sup> July, 2015 barely 5 weeks from the time the order appealed from was made. Although there was a delay of slightly more than a month in bring the current application for stay, I am not persuaded that the delay is so inordinate that it can form the basis of refusing the orders herein sought.

### **Security for costs**

24. With regard to the requirement for security, I note that the applicant has not offered or expressed willingness to furnish security for due performance for such decree as may ultimately issue against him. In fact, he urges the court to order the respondent to pay the moneys he invested in the suit property to enable him to meet his obligations under the decree appealed from. From that plea by the applicant, it is reasonable to infer that the applicant is not ready, willing or capable of furnishing security for purpose of meeting his obligations if he ultimately fails in his appeal.

25. Whereas the applicant believes that the respondent owes him some money on account of the developments he effected on the suit premises, that belief or claim cannot satisfy the legal obligation imposed on the applicant to furnish security for his due performance of such orders as may ultimately issue against him, as whether or not the respondent owes him money is an issue to be determined in the appeal and not in this application.

### **Question of substantial loss**

26. On whether the applicant has demonstrated that he stands to suffer substantial loss if the orders sought are not granted, I note that the applicant has merely stated that if stay is not granted, the respondent may execute the judgment issued in his favour thus rendering the appeal nugatory.

27. Upon reading and considering the judgment appealed from, I agree with the respondent that part of the decree appealed from is for payment of rent arrears. Based on the persuasive authority of **Ann Wanjiru Waigwa & another v. Joseph Kiragu Kibarua** cited herein above and given the fact that the respondent has deposed that he is capable of refunding the decretal sum in case the applicant wins in his intended appeal, I am not satisfied that if the order sought is denied the appeal would be rendered

nugatory.

**Application for review of the order for security**

28. Concerning the application for review of the order for deposit of the entire decretal amount in court, having pointed out that the applicant has not offered any security, as by law required for the due performance of his obligation under the judgment or order appealed from, I am not satisfied that he deserves the review sought.

29. The upshot of the foregoing is that the applications herein are found to have no merit and dismissed. The respondent is awarded costs in respect of the application dated 30<sup>th</sup> July, 2015, which he defended.

**Dated, signed and delivered at Nyeri this 19th day of November, 2015.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Karingithu for respondent

Daniel Gicheru Karangu – applicant

Court assistant - Lydia