Chege v Osidai Limited (Environment and Land Appeal E011 of 2024) [2024] KEELC 1507 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1507 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E011 OF 2024

JO MBOYA, J

MARCH 20, 2024

BETWEEN

RENEE NG'ENDO CHEGE .... APPLICANT

AND

OSIDAI LIMITED .... RESPONDENT

(Being an appeal on the whole of the ruling and orders of Hon. Mike Makori (Mr.) the Honourable Chairperson of the Business Premises Rent Tribunal delivered on 30th January 2024 at Nairobi BPRT Case No. E1016 of 2023)

RULING

Introduction and Background:

1. The Appellant/Applicant herein has approached the Honourable court vide Notice of Motion Application dated the 6th February 2024; brought pursuant to the provisions of Order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 and in respect of which [Appellant/Applicant] has sought for the following reliefs [verbatim]

   i. ....Spent.

   ii. That the Honorable court be pleased to order stay of execution of the Ruling delivered on the 30th January 2024; by Honorable Mike Makori in *BPRT Case No. E1016 of 2023* and consequential orders therein pending the hearing and determination of this Application.

   iii. That the Honorable court be pleased to order stay of execution of the Ruling delivered on the 30th January 2024; by Honorable Mike Makori in *BPRT Case No. E1016 of 2023* and consequential orders therein pending the hearing and determination of the Appeal before this Honorable court.

iv. That the Honorable court be pleased to order stay of proceedings in of the in *BPRT Case No. E1016 of 2023* pending the hearing and determination of this Appeal.

v. Costs of this Application be provided for.

2. The instant Application is premised on numerous grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the affidavit of Renee Ng'endo Chege [Applicant] sworn on even date and to which the deponent has highlighted various pertinent issues for due consideration by the court.

3. Upon being served with the subject Application, the Respondent herein filed a Replying affidavit sworn on the 19th February 2024; and in respect of which the Respondent has annexed a total of eight [8] documents thereto.

4. Suffice it to point out that the Application beforehand came up for hearing on the 5th March 2024; and whereupon the advocates for the respective Parties covenanted to dispose of the Application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timeline[s] for the filing and exchange of the written submissions.

5. Furthermore, it is worthy to underscore that the Parties indeed proceeded to and filed written submissions. For good measure, the Appellant/ Applicant herein filed submissions dated the 14th March 2024; whereas the Respondent herein filed written submissions dated the 8th March 2024.

6. For coherence, the two [2] sets of written submissions are on record.

Parties' Submissions:

a. Applicant's Submissions:

7. The Applicant herein filed written submissions dated the 14th March 2024; and in respect of which same has adopted and reiterated the grounds contained at the foot of the Application ; as well as the averments enumerated in the body of the supporting affidavit.

8. Furthermore, Learned counsel for the Applicant has thereafter proceeded to and raised, highlighted and canvassed two [2] salient and pertinent issues for due consideration and determination by the Honourable court.

9. Firstly, Learned counsel for the Applicant has submitted that the Application beforehand meets and or satisfies the requisite conditions to warrant the grant of an order of stay of execution pending the hearing and determination of the subject appeal.

10. Further and at any rate, Learned counsel for the Applicant has submitted that the instant application has been mounted and/or filed timeously and without any unreasonable delay and hence the Applicant beforehand has acted with due promptitude.

11. On the other hand, Learned counsel for the Applicant has also submitted that the Applicant herein shall also be disposed to suffer substantial loss, if the orders sought are not granted. In this regard, Learned counsel for the Applicant has submitted that the demised premises which are the subject of the instant proceedings have since been leased out to a Third party, with whom the Applicant has entered into and executed a Lease agreement.

12. Consequently and in the premises, Learned counsel for the Applicant has contended that if the orders sought are not granted, then the new tenant [sic, the Third Party], would stand evicted from the

demised premises and hence the Applicant will be exposed to Double jeopardy and a claim for breach of contract.

13. Additionally, Learned counsel for the Applicant has also submitted that the appeal beforehand, which challenges the ruling of the tribunal rendered on the 30th January 2024 raises and espouses substantial grounds, which ought to be interrogated by this court during the hearing of the appeal.

14. In short, Learned counsel for the Applicant has contended that the Applicant beforehand has met and established the requisite threshold to warrant the grant of the orders of stay of execution of the impugned order pending the hearing and determination of the Appeal.

15. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on *inter-alia Butt v Rent Restriction Tribunal* (1982)KLR 417 and *Charles Kariuki Njuri v Francis Kimaru Ruara (Suing as the Administrator of the Estate of Ruara Kimaru Alias Benson Ruara Kimaru (deceased)* (2020)eKLR, respectively.

16. Secondly, Learned counsel for the Applicant herein has submitted that the Applicant herein is the registered proprietor of the suit property, wherein same [Applicant] collects rents of Kes.300, 000/= only per month.

17. Nevertheless, Learned counsel has submitted that by dint of Order 42 Rule 6(2) (b) of the *Civil Procedure Rules*, the said rental income ought to be deposited in an Escrow account in the names of the respective advocates pending the hearing and determination of the appeal.

18. Pertinently, Learned counsel for the Applicant has pointed out that the Applicant beforehand is ready and willing to offer and provide security for the due performance of the decree that may ultimately ensue and/or arise.

19. All in all, Learned counsel for the Applicant has submitted that the Applicant has demonstrated sufficient cause and/or basis to warrant the grant of the orders sought and hence [Applicant] has implored the Honourable court to proceed and grant the orders sought at the foot of the application beforehand.

b.Respondent's Submissions:

20. The Respondent herein filed written submissions dated the 8th March 2024; and in respect of which same has raised, highlighted and canvassed three [3] pertinent issues for due consideration and determination by the Honourable court.

21. First and foremost, Learned counsel for the Respondent has submitted that the Ruling which is sought to be appealed against touches on and concerns a plethora of issues, *inter-alia* dismissal of a Preliminary objection that had hitherto been filed by and on behalf of the Applicant.

22. Furthermore, Learned counsel for the Respondent has submitted that to the extent that the Ruling which was delivered by the chairperson of the tribunal was an omnibus Ruling, which touched on and/or concerned assorted issues, then it behooved the Applicant herein to seek for and obtain Leave of the court [Tribunal] before filing the subject appeal.

23. Nevertheless, Learned counsel for the Respondent has submitted that the Applicant herein neither sought for nor obtained Leave to appeal and hence the instant appeal, which touches on and includes the limb concerning the dismissal of the Preliminary objection, is premature and misconceived.

24. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on *inter-alia* the case of *Kenya Commercial Bank Ltd v Manase Esipea* (1999)eKLR, *Lucy Wanjiku*

Nyaga v James Mwaniki Munyi & Another (2018)eKLR and *Peter Nyaga Muvake v Joseph Mutunga* (2015)eKLR, respectively.

25. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein has neither tendered nor placed before the Honorable court any credible/ plausible evidence to demonstrate the necessity to grant an order of stay of execution pending the hearing and determination of the appeal.

26. Instructively, Learned counsel for the Respondent has submitted that the Applicant herein has failed to demonstrate that same shall be disposed to suffer substantial loss or at all, to warrant the grant of an order of stay of execution.

27. At any rate, Learned counsel has averred that it is not enough to recite and or rehash the statutory provisions underpinning the grant of stay of execution pending appeal and thereafter imagine that such rehearsal [recital] suffices to anchor an application for stay of execution.

28. On the other hand, Learned counsel for the Respondent has submitted that the grant of an order of stay of execution pending an appeal is a discretionary reliefs and hence an Applicant, the current Applicant not excepted, is obligated to approach the court with clean hands and not otherwise.

29. However, in respect of the instant matter, Learned counsel for the Respondent has submitted that the Applicant has approached the Honourable court with uncleaned hands, insofar as same has failed to adhere to and/or comply with the terms of the orders of the tribunal or at all. Consequently and in this regard, Learned counsel for the Respondent has therefore invited the court to find and hold that the Applicant herein is not deserving of equitable intervention.

30. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on *inter-alia* the case of *Machira T/a Machira & Company Advocate v East African Standard* (2002)eKLR and *M N v T A N & Another* (2015)eKLR, respectively.

31. Thirdly, Learned counsel for the Respondent has similarly submitted that the Applicant herein has also failed to satisfy the requisite ingredients and/or conditions to warrant the grant of an order of stay of proceedings pending the hearing and determination of the appeal beforehand.

32. Pertinently, Learned counsel for the Respondent has submitted that an order of stay of proceedings is a grave order and thus same ought to be granted sparingly and with necessary circumspection, taking into account the consequences attendant thereto and arising from such an order.

33. Additionally, Learned counsel for the Respondent has submitted that prior to and before an order of stay of proceedings can be granted, if at all, it behooves the Applicant to demonstrate credible basis and/or circumstances to warrant the grant of such an order.

34. Be that as it may, Learned counsel for the Respondent has submitted that the Applicant herein has neither espoused nor satisfied the threshold to warrant the grant of the orders sought, namely, the Orders of Stay of Proceeding[s]. In this regard, counsel has invited the court to find and hold that the impugned application is devoid of merits and ought to be dismissed.

35. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on the holding in the case of *Meta Platforms, Inc & another v Samasource Kenya EPZ Limited t/a Sama & 185 others; Central Organization of Trade Unions Kenya & 8 others (Interested Parties)* (Civil Application E178 of 2023) [2023] KECA 999 (KLR) (28 July 2023) (Ruling).

36. Premised on the foregoing, Learned counsel for the Respondent has thereafter invited the Honourable court to find and hold that the Application beforehand courts dismissal with costs.

Issues For Determination:

37. Having appraised and reviewed the Application beforehand and the Response thereto; and upon consideration of the written submissions filed by and on behalf of the Parties, the following issues do arise [emerge] and are thus worthy of determination.

    i. Whether the Applicant has established and espoused Sufficient cause and/or basis either as required under the law or at all.

    ii. Whether the orders which were issued and granted by the Honorable Tribunal and which are the subject of the instant Appeal can attract an order of stay of execution pending appeal or otherwise.

    iii. Whether the Applicant has established and demonstrated that Substantial Loss will accrue and/or arise.

    iv. Whether the Applicant herein has met and/or established the requisite threshold to warrant the grant of an order of stay of proceedings; either as sought or at all.

Analysis And Determination:

Issue Number 1 - Whether the Applicant has established and espoused Sufficient cause and/or basis either as required under the law or at all.

38. The Respondent herein appears to have filed a reference before the Business Premises Rent Tribunal [the Tribunal], and wherein same sought to challenge the Notice to terminate tenancy issued and served by the Applicant.

39. Following the filing of the said Reference, it appears that the Applicant herein proceeded to and filed an Application before the Tribunal and wherein same procured and obtained Ex-parte orders on the 19th October 2023; which *inter-alia* included an order for recovery and or retaking of vacant possession of the demised premises.

40. Be that as it may, upon the issuance of the impugned order, which was issued on the 19th October 2023, the Respondent herein proceeded to and filed an Application for review, rescission and discharge of the Ex-parte orders and which application was dated the 27th November 2023.

41. Subsequently, the Application under reference, namely, the Application dated the 27th November 2023; was fixed and/or scheduled for hearing before the chairperson of the tribunal.

42. Suffice it to point out that upon being served with the Application under reference, the Applicant herein took out and filed a Notice of Preliminary objection dated the 1st December 2023; and in respect of which same sought to have the Application under reference struct out on account of *inter-alia* lack [sic] of Jurisdiction.

43. Arising from the foregoing, it is evident that the chairperson of the tribunal proceeded to entertain both the Application dated the 27th November 2023, the Preliminary objection dated the 1st December 2023; and another Application dated the 1st December 2023, respectively. For good measure, all the three [3] items were heard and disposed of together.

44. Subsequently, the chairperson of the tribunal proceeded to and rendered a Ruling dated the 30th January 2024; and wherein same *inter-alia* dismissed the Preliminary objection, discharge the Ex-parte

orders which had hitherto granted and dismissed the Application for stay of execution which had hitherto been filed by the same Applicant.

45. It is the said Ruling and order, which was rendered on the 30th January 2024, which has aggrieved the Applicant herein, culminating into the filing of the instant appeal.

46. Having outlined the foregoing background, one of the pertinent question that will have to be interrogated and thereafter adjudicated upon, touches on and concerns whether the entire Appeal beforehand is competent or otherwise.

47. Better still, the other perspective that would arise is whether the limb of the appeal that touches on and concerns the dismissal of the preliminary objection, was/is appealable without Leave of the court [Tribunal] in accordance with the provisions of Section 75 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; as read together with the provisions of Order 43 Rule 1 of the *Civil Procedure Rules*, 2010, or otherwise.

48. Without endeavoring to adjudicate upon and determine the merits of the appeal beforehand, it suffices to highlight that where one files a Notice of Preliminary objection, which is ultimately heard and disposed of vide a dismissal order, no appeal lies as of right against such an order.

49. To the contrary, any Party/ Litigant, the Applicant not excepted, who will be keen to mount an appeal against such a Ruling and order, is called upon to seek for and obtain Leave either at the time of delivery of the impugned Ruling; or within 14 days from the date of delivery. [See the provisions of Order 43 Rule 1 f the *Civil Procedure Rules*, 2010].

50. Notwithstanding the foregoing, the Appellant/Applicant herein does not appear to have sought for and/ or obtained leave to appeal against a critical limb of the order that was made by the chairperson of the tribunal and which essentially, touched on and concerned the Preliminary Objection.

51. Putting the foregoing into perspective, it becomes apparent that the appeal beforehand by and on behalf of the Applicant, may not espouse sufficient cause and/or basis, which is a critical pre-requisite [precursor] to the grant of an order of stay of execution pending appeal.

52. Put differently, the establishment and/or espousal of sufficient cause and/or basis, is the key that unlocks the discretionary Jurisdiction of a court that is seized of an Application for stay of execution pending the hearing and determination of an appeal. [See Order 42 Rule 6(2) (a) of the *Civil Procedure Rules*, 2010].

53. In a nutshell, where an Applicant like the one beforehand has neither met nor established sufficient cause, it is debatable whether such an Applicant/ Claimant; can be able go the whole hog and partake of an Equitable order of stay of execution.

54. However, in my respectful view, the moment an Applicant is not able to establish/ demonstrate the existence of sufficient cause; then the door to pursue the Equitable Relief of Stay of Execution pending the Appeal, remains locked and thus the Applicant is deprived of the Right of entry without which, the application is negated.

55. Before departing from the issue herein, it is appropriate to highlight the holding of the Court of Appeal in the case of *Kenya Commercial Bank Limited v Manaseh Esipeya*[1999] eKLR, where the court stated thus;

> In the case of *G R Mandavia v Rattan Singh* [1965] EA 118, the appellant, as defendant in a civil suit, pleaded that the suit was barred as res judicata. This was taken as a preliminary issue and the trial judge ruled that res judicata had not been made out. The appellant,

without obtaining leave to appeal, lodged an appeal against this decision and at the hearing a preliminary objection was taken that the decision did not amount to a "decree" or "preliminary decree" within the meaning of section 2 of the *Civil Procedure Act* (K) , as it did not conclusively determine the rights of the parties with regard to any of the matters in controversy between them; alternatively it was submitted that if the judge's decision was an "order" as defined in that section itwas not appealable as of right and, as leave to appeal had not been obtained, the appeal was incompetent.

It was held, *inter-alia*, that where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave. In the course of his judgment Law JA said at page 124:

> " The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, a preliminary decree arises from which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal."

56. Additionally, the significance of procuring and obtaining Leave prior to and before filing an appeal, [where leave is a prerequisite], was also highlighted in the case of *Peter Nyaga Muvake v Joseph Mutunga* (2015)eKLR, where the Court of Appeal stated and held thus;

    21. In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant's appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the *Civil Procedure Rules*, the procurement of leave to appeal is a *sine qua non* to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.

57. From the foregoing discourse, what becomes apparent and crystal clear is that a segment of the appeal beforehand required Leave to be procured and obtained, which does not appear to have been procured or at all.

58. In view of the foregoing, I hold deep reservation[s] as pertains to the competence of the Appeal; or a substantial segment of the appeal beforehand, which thus negates the establishment of a sufficient cause in respect of and as pertains to the appeal beforehand.

Issue Number 2 - Whether the orders which were issued and granted by the Honorable Tribunal and which are the subject of the instant Appeal can attract an order of stay of execution pending appeal or otherwise.

59. Elsewhere herein before, this court has highlighted the nature and type of orders that were issued and/ or granted by the chairperson of the tribunal. For coherence, the Learned chairperson of the tribunal

vacated the orders which had hitherto been issued Ex-parte on the 19th October 2023; dismissed the preliminary objection dated the 1st December 2023; and similarly dismissed an application 1st December 2023, the latter which had been filed by the Applicant herein.

60. Essentially, the orders which were granted and/or issued by the chairperson of the tribunal were orders in the negative, insofar as same dismissed the reliefs that had been sought by the Appellant/Applicant herein.

61. Arising from the foregoing, the question that the court therefore needs to address and consider is whether the orders which were granted by the Honorable tribunal [Dismissal Orders] are of such a nature, which can procure and attract an order of stay of execution, either as sought or at all.

62. To start with, it is trite, established and hackneyed that a negative order [dismissal order], cannot attract an order of stay of execution and hence where a court has dismissed an Application; as well as a Preliminary objection, then such a dismissal order cannot found an application for stay of execution.

63. In respect of the foregoing observation, it suffices to point out that case law abound. Firstly, the Court of Appeal in the case of *Western College of Arts and Applied Sciences v Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

> " But what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered."

64. Similarly, the issue as to whether a dismissal order [negative order] can attract an order of stay of execution pending appeal was also elaborated upon in the case of *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others* (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR) (18 February 2022) (Ruling), where the court held thus;

> Further, in the more recent case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating: "
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> 16. In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C)."

65. In a nutshell, my answer to issue number two [2] is twofold. Firstly, the various limbs of the order that were made and/or rendered by the chairperson of the tribunal were in the negative and not otherwise.

66. Secondly, to the extent that the impugned orders were substantially orders in the negative, the plea for stay of execution of the impugned orders pending the hearing and determination of the instant appeal is therefore premature, misconceived and hence Legally untenable.

Issue Number 3 - Whether the Applicant has established and demonstrated that Substantial Loss will accrue and/or arise.

67. The crux of the orders being sought by and on behalf of the Applicant herein touches on and concerns stay of execution pending the hearing and determination of the instant appeal.

68. To the extent that the Application beforehand seeks an order of stay of execution, it is therefore incumbent upon the Applicant to demonstrate, inter-alia, the likelihood of substantial loss arising and/or accruing, if the orders of stay of execution are neither granted nor issued.

69. Put differently, it has been held and reiterated, on various occasion that substantial loss is the cornerstone to granting an order of stay of execution and thus where there is no evidence of substantial loss then no such order can issue and or be granted; unless, the Applicant can show some other exceptional circumstance[s].

70. To buttress the foregoing position, it suffices to adopt and cite the dictum in *Kenya Shell & Company Ltd v Benjamin Kibiru Karuga & Another* (1986)eKLR, where the court stated and held thus;

> "It is usually a good rule to see if order XLI rule 4 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. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money'.

71. Arising from the foregoing, it is therefore appropriate to interrogate whether the Applicant beforehand has placed before the court any scintilla of evidence of substantial loss arising and/or occurring, if the orders sought are not granted.

72. For coherence, the Applicant herein contend[s] that if the orders sought are not granted then the Respondent herein shall enter upon and retake possession of the demised premises. Consequently, the Applicant avers that in the event of such a scenario then same [Applicant] shall be forced to evict and kickout a new tenant, who has since taken possession of the demised premises.

73. To my mind, the Respondent herein lost possession of the demised premises pursuant to an Ex-parte order issued on the 19th October 2023 and which order has since been found to have been obtained illegally and/or unlawful.

74. Furthermore, the impugned order, which culminated into the parting with possession of the demised premises has since been vacated and discharged. Consequently, it then means that the order in question was rendered redundant and otiose.

75. Secondly, the Respondent herein as the lawful tenant pending the determination of the appeal shall be obligated to pay the requisite rents during the period of occupation of the demised premises.

76. Thirdly, the The *Landlord and Tenants (Shops, Hotels and Catering Establishment) Act*, Chapter 301 Laws of Kenya, is a statute that was tailormade to protect the tenants from unscrupulous landlords, who may be hellbent to procure and obtain possession albeit through illegal mechanism.

77. Taking into account the various perspective[s] which I have highlighted herein before, I am afraid that the Applicant herein has neither met nor demonstrated the existence of substantial loss, which is critical and paramount, before the grant of an order of stay of execution pending the hearing and determination of an appeal.

78. Notwithstanding the foregoing, it is worth mentioning that it is not enough for an Applicant to recite and/or rehash the various statutory words alluded to and contained vide Order 42 Rule 6(2) of The *Civil Procedure Rules*, 2010; without venturing forward to avail and supply plausible evidence to underpin same.

79. In this respect, I adopt and reiterate the holding of the court in the case of *Machira T/a Machira & Company Advocates v East Africa Standard Ltd* (2002)eKLR, where the court stated and held thus;

> In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

80. Consequently and in my humble view, the circumstances surrounding the subject dispute, do not espouse any situation to warrant a finding and holding that substantial loss [in its various perspective] shall arise and/or accrue at all.

Issue Number 4 - Whether the Applicant herein has met and/or established the requisite threshold to warrant the grant of an order of stay of Proceedings either as sought or at all.

81. Other than the prayer for stay of execution pending appeal, which has been highlighted and discussed in the preceding paragraphs, the Applicant herein has also sought for an order for stay of proceedings as pertains to the hearing and determination of the reference that was filed before the Business premises rent tribunal.

82. Additionally, Learned counsel for the Applicant has submitted that the reference before the tribunal [BPRT] was scheduled to be heard on the 21st February 2024; and that the hearing of the said reference is likely to defeat the appeal beforehand and render same nugatory.

83. Arising from the foregoing, Learned counsel for the Applicant has thus contended that sufficient basis has been placed before the court to warrant the grant of an order of stay of proceedings pending the hearing and determination of the appeal beforehand.

84. To my mind, whereas a court of law is seized and/or possessed of the requisite Jurisdiction to grant an order of stay of proceedings, it must not be lost on the court that such an order is a serious and grave order, taking into account the consequences arising therefrom and attendant thereto.

85. Instructively, an order of stay of proceedings has the net effect of suspending and/or holding in abeyance the proceedings pending before the court of first instance and whenever such an order is issued, the impugned proceedings shall remain suspended pending the hearing and determination of the appeal; or the occurrence of the designated event.

86. Ostensibly, such an order has the likely consequence of delaying or defeating the expeditious hearing and disposal of the dispute beforehand and thus same infringes upon the import and tenure of *inter-*

alia, the Provision[s] of Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; as read together with Article 159 (2) (b) of the *Constitution* 2010.

87. Be that as it may, despite its consequences and implications, an order of stay of proceedings can still be granted and/or issued, albeit in a circumscribed manner and taking into account various factors and/ or considerations.

88. Nevertheless, there is no gainsaying that in determining whether or not to grant an order of stay of proceedings, the court exercises discretion and in this regard, the Honourable Court must weigh [take into account/ calibrate upon] *inter-alia*, the interest of justice; the right of access to justice; fair hearing and trial; the need to first- track hearing and disposal of suits and as well, the necessity to protect the undoubted right of appeal.

89. Having considered the foregoing ingredient[s], whose details have been highlighted in the preceding paragraph and taking into account that the appeal beforehand is an interlocutory appeal, I am not persuaded that the Applicant beforehand has espoused and/or established the requisite ingredients necessary before the grant of an order of stay of proceedings.

90. To buttress the foregoing position, it suffices to adopt and endorse the holding of the Court of Appeal in the case of *Meta Platforms, Inc & another v Samasource Kenya EPZ Limited t/a Sama & 185 others; Central Organization of Trade Unions Kenya & 8 others (Interested Parties)* (Civil Application E178 of 2023) [2023] KECA 999 (KLR) (28 July 2023) (Ruling), where the court held as hereunder;

> 42. The nature of an order of stay of proceedings and the principles, which should guide a court in exercising its discretion to grant or refuse an application for stay, were adequately stated by the Court of Appeal of Nigeria, Abuja Division in the case of *NNPC & Anor v Odidere Enterprises Nigeria Ltd* (2008) 8 NWLR (Pt. 1090) 583 at 616-618 per Aboki JCA as follows:
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> > " Stay of Proceedings is a serious, grave and fundamental interruption on the right of a party to conduct his litigation towards the trial on the basis of the substantive merit of his case, and therefore the general practice of the courts is that a stay of proceedings should not be granted, unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."
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> 43. Where an interlocutory order does not finally dispose of the case, the court should be slow to stay proceedings because of an aggrieved party. This is so because such an order could be made the subject of appeal if it ultimately becomes necessary following the final judgment. It saves time and expense to proceed with the case. It is the duty of every court to eliminate situations which may unnecessarily cause delay in the administration of justice. However, if a successful appeal will put an end to the proceeding in the trial court, prudence dictates that a stay of proceedings be granted.

91. Other than the foregoing decision, the circumstances under which an order of stay of proceedings can and does often issue, were also highlighted and indeed amplified at the foot of *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, that:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

> "This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
>
> "It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

92. From the foregoing, there is no gainsaying that a person who seeks to procure a favorable order of stay of proceedings must place before the Honorable court cogent evidence to underpin the prejudice, injustice and/or inconvenience that may arise unless the orders sought are granted.

93. Furthermore, the evidence in question must satisfy the strict requirement[s] to prove the grave injustice or prejudice and same must not just be any other evidence thrown on the face of the court, which is calculated to defeat the right to have dispute[s] heard and disposed of expeditiously.

94. Pertinently, in respect of the instant matter, the court has not been treated to any injustice or prejudice, that is [sic] likely to inflict the Applicant and/or affect the appeal beforehand, to warrant the grant of the orders sought.

95. Nevertheless, it is worthy to point out that the appeal before this court would be heard and ultimately determined; and if successful, the court would be disposed to make appropriate orders, inter-alia, proclaiming that the tribunal was divested of the requisite Jurisdiction and thereafter the proceedings before the tribunal would be invalidated, where appropriate.

96. Suffice it to point out that if such an eventuality does arise, the court is seized of the requisite discretion [Jurisdiction] to issue appropriate and suitable orders, which will be expedient and mete to atone for any loss of time and/or expenses that may have been incurred between the parties. [See the Provisions of Section 13[7] of the *Environment and Land Court*, 2011].

97. However, it cannot be said that the appeal beforehand will be rendered academic or otherwise to warrant the grave order of stay of proceedings, which is sought by and at the instance of the Applicant. For coherence, I do not find any exceptional and/or peculiar ground to underpin the grant of the order sought.

98. Finally, I beg to adopt, invoke and reiterate the holding of the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR, where the court held as hereunder;

> In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:
>
> > " ... The onus of satisfying us on the second condition, that un less stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted.
> >
> > The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance there with. The hearing in the superior court

might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."

These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.

99. In a nutshell, my answer to issue number four [4] is to the effect that the Applicant beforehand has similarly failed to meet and/or satisfy the requisite threshold to warrant the grant of the orders of stay of proceedings, either as sought or at all.

Final Disposition:

100. Arising from the discussion, [which has been highlighted in the preceding paragraphs], it must have become crystal clear that the Applicant beforehand has neither established nor demonstrated the requisite ingredients that underpin the grant of an application for stay of execution pending appeal; as well as stay of proceedings.

101. Consequently and in the premises, the Application dated the 6th February 2024; is devoid of merits. In this regard, same be and is hereby Dismissed with costs to the Respondent.

102. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF MARCH 2024.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson: Court Assistant

Mr. King'ori h/b for Mrs. Wangeci Akedi for the Appellant/Applicant.

Ms. Glory Kimani for the Respondent.