



Lulu East Africa Limited v National Social Security Fund & 3 others (Civil Appeal (Application) 212 of 2018) [2024] KECA 16 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 16 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 212 OF 2018
P NYAMWEYA, A ALI-ARONI & PM GACHOKA, JJA
JANUARY 25, 2024**

BETWEEN

LULU EAST AFRICA LIMITED APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND 1ST RESPONDENT

SOKOMANIA LIMITED 2ND RESPONDENT

VALUE ZONE LIMITED 3RD RESPONDENT

HASMO AGENCIES LIMITED 4TH RESPONDENT

(An application for injunction pending the hearing and determination of an appeal from the judgment of the Environment and Land Court (S. Okong'o, J.) delivered on 14th February 2018) in ELC Case No. 60 "B" of 2016)

RULING

1. Before us is a Notice of Motion dated 6th July 2023 expressed to be brought under rules 5(2)(b), 42 and 43(1) of the Court of Appeal Rules 2010 (now 2022), sections 3A and 3B of the Civil Procedure Act, Articles 159(2)(d) of the Constitution, seeking the following prayers:

- a.
- b. That this Honourable Court be pleased to grant an order restraining the 1st respondent from leasing, disposing of and or in any manner interfering with the business premises known as LR No 209/11331,11412 and 12220 along Kenyatta Avenue in Nairobi pending the hearing and determination of this application.
- c. That this Honourable Court be pleased to grant an order restraining the 1st respondent from leasing, disposing of and or in any manner interfering with the business premises known as LR



No 209/11331,11412 and 12220 along Kenyatta Avenue in Nairobi pending the hearing and determination of the appeal hearing.

2. To contextualize the application, it is necessary to give a background, albeit in summary. But before we do so, we hasten to add that it is important for parties to invoke the jurisdiction of the Court properly by citing the relevant provisions of the law. The Court of Appeal Rules 2022 have been in force for more than a year and yet the applicant who is represented by an advocate is relying on the 2010 rules (now repealed). Further, the applicant is relying on sections 3A and 3B of the *Civil Procedure Act*, whereas the oxygen principles that this Court applies are in sections 3A & and 3B of the *Appellate Jurisdiction Act*. That said, we shall focus on substantive justice and deal with this application under the applicable rules that this Court has restated in several decisions of this Court.
3. The 1st respondent is the registered proprietor of parcels of land known as LR No 209/11331, LR No 209/12219 and LR No 209/12287 situated along Kenyatta Avenue in Nairobi. On 26th April 2023, the applicant, and the 3rd respondent signed a park management contract under which the 3rd respondent undertook to manage and collect parking fees on behalf of the 1st respondent.
4. Following the signing of the contract the 3rd respondent, as the agent of the 1st respondent entered into a car park license agreement with the 2nd respondent. The 3rd respondent entered into a similar car park license agreement with the applicant in respect of the parking bay constructed on land reference Numbers LR No 209/11331,11412 and 12220. The car park management contracts expired on 30th September 2015 and they were extended to 31st December 2015. Thereafter, the 1st respondent floated a tender, in which the 4th respondent emerged as the winner and notices were issued to the applicant, the 2nd and 3rd respondents to vacate the land.
5. The notice to vacate triggered a dispute between the applicant and the 1st respondent, which was ruled in the applicant's favour. Dissatisfied with the ruling of the Business Premises Rent Tribunal, the 1st respondent appealed to the Environment and Land Court (ELC) Nairobi. The 1st respondent was successful in the appeal, and it is the judgment of the ELC that is now the subject of appeal in this Court. The relevant part of the judgment reads as follows:

“I am not in agreement with the finding of the tribunal that the 1st and 2nd Respondents had established a prima facie case against the Appellant and the 3rd Respondent. I am not persuaded that the 1st and 2nd Respondents established before the tribunal that they had a right that had been violated or was threatened with violation by the Appellant and the 3rd Respondent.

The tribunal considered at length the law on what constitutes a lease and a license. The tribunal in my view failed to apply that law to the facts that were before it. I am not persuaded that the agreement that was entered into between the 3rd Respondent and the Appellant (See page 55 of the record of appeal) constituted a lease that could enable the 3rd Respondent to enter into subleases with the 1st and 2nd Respondents. The Appellant was the owner of a parking bay with 455 parking spaces. The Appellant invited tenders for the provision of management services for the said parking bay. The duties of the service provider entailed the management of the parking bay and collection of the parking fees on behalf of the Appellant in consideration of an agreed commission. The 3rd respondent was awarded the tender pursuant to which, it entered into the contract dated 26th April, 2013 with the Appellant. The contract between the 3rd Respondent and the Appellant was in my view strictly a management and service contract. Contrary to the findings by the tribunal, there



was nothing in the contract between the Appellant and the 3rd Respondent that allowed the 3rd Respondent to sublet the said parking bay.”

6. Aggrieved by that judgment, the applicant lodged a notice of appeal on 14th February 2018 and filed the instant appeal on 29th June 2018. All was quiet until 6th July 2023, when the applicant lodged the application that is now before us seeking orders to restrain the 1st respondent from proceeding with tender No NSSF SCM/C/2/3/25:2022/2023 for provision of management services on land parcels LR No 209/11331, 11412 and 12220, Kenyatta Avenue.
7. In a supporting affidavit sworn 6th July 2023, the applicant’s managing director states as follows: that the 1st respondent had advertised a tender for the provision of management services over the parcels of land that are the subject of this appeal; that it challenged the tender before the Public Procurement and Administrative Review Board, but its application was dismissed on 15th June 2023; that the appeal that is pending in this Court has high chances of success and it will be rendered nugatory if the business premises are let out to a new tenant; and that the tender was advertised in contravention of Article 227 of the Constitution, as it was not notified as a tenant and the property is the subject of the pending appeal.
8. The applicant has also filed written submissions dated 23rd October 2023, which were highlighted orally at the hearing. The submissions reiterate that the applicant has an arguable appeal and that the appeal will be rendered nugatory unless the orders restricting the 1st respondent from proceeding with the tender are granted.
9. In support of the application, the applicant cites Dolat Karim Waljee v Rose [1976] eKLR, Mbembe v Kamere KECA 266 (KLR), Turbo Highway Eldoret Ltd v Muniu [2022] KEHC 10197 (KLR), Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 others KECA 87 (KLR) and African Safari Club Ltd. v Safe Rentals Limited [2010] eKLR.
10. The applicant submits that it has arguable grounds namely: that the Judge erred in holding that the Business Premises Rent Tribunal had no jurisdiction; that final orders were made in an interlocutory appeal; and that the judgment dealt with issues that were not canvassed before the Business Premises Rent Tribunal.
11. In opposition, the 1st respondent has filed a replying affidavit through its acting legal manager Hellen Koech. The replying affidavit gives a background to the appeal and we take the liberty to summarise its contents as follows: that the orders of the Business Premises Rent Tribunal were set aside by the Judge of the Environment and Land Court (S. Okong’o, J.) on 14th February 2018; the applicant did not apply for stay of the judgment of the ELC; the application has been filed over 5 years since the delivery of the judgment of ELC; that after the judgment of the ELC, the respondent applied to the Business Premises Rent Tribunal for eviction orders which were given on 25th April 2013; the applicant was eventually evicted on 1st August 2018 and that the suit premises have been vacant since November 2020; that the applicant’s challenge of the tender was dismissed by the Public Procurement Administrative Review Board on 15th June 2023; that the applicant has no arguable appeal; and that in any event the appeal will not be rendered nugatory if stay is not granted.
12. The 1st respondent has filed written submissions dated 25th October 2023, which reiterate the facts deponed in the replying affidavit. Relying on the case of Chris Munga N. Bichage v Richard Nyagaka Tong’I & 2 others [2013] eKLR, it submitted that the applicant has failed to demonstrate that it has an arguable appeal and that the appeal will be rendered nugatory if the stay is not granted.



13. The principles that apply in applications under Rule 5(2)(b) of this Court’s Rules for stay of execution pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal, or appeal (if any) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory, if execution or further proceedings arising from a judgment, decree or order are not stayed. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the parties.
14. On the first limb of the twin principles, in *Anne Wanjiku Kibe* [2020] eKLR this Court held that for stay orders to issue, the applicant must demonstrate that the appeal or intended appeal would, in the absence of stay be rendered nugatory. This brings us to the question: Is the intended appeal arguable?
15. We have carefully considered the arguments of the applicant on the question of whether the appeal raises arguable grounds. To answer that question, it is important to note that the application that is before us is premised on the tender for the management of the suit premises that was advertised on 26th April 2023. The tender was not the subject of the hearing in the ELC. The tender was floated 5 years after the judgment of the ELC. As submitted by the 1st respondent, the applicant never applied to stay the decision of the ELC, and it was subsequently evicted from the suit premises on 1st August 2020. Further, its application to challenge the tender before the Public Procurement Administrative Review Board was dismissed.
16. In view of the foregoing, we are doubtful that the applicant has raised any arguable grounds in this application which in any event, do not emerge from the ruling of ELC. We will say no more on those grounds and we leave that issue for determination by the bench that will hear and determine the appeal. The applicant has therefore failed to satisfy the first limb for the grant of an order for stay of execution.
17. Even if, we were to consider the second limb whether the appeal will be rendered nugatory absent stay, it is difficult to see how the appeal will be rendered nugatory. All the grounds in the memorandum of appeal relate to the jurisdiction of the Business Premises Rent Tribunal and those questions can still be heard and determined by this Court. Having held that the issue of the tender floated on 26th April 2023 has nothing to do with the appeal pending before this Court, the applicant has also failed to satisfy the second limb for grant of stay of execution as prayed.
18. Accordingly, we find that this application has no merit and we dismiss it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original



Signed

DEPUTY REGISTRAR

