Mburu v Kariuki (Environment and Land Appeal E012 of 2023)
[2024] KEELC 1307 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1307 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E012 OF 2023

FO NYAGAKA, J

MARCH 13, 2024

BETWEEN

PETER MBURU ..... APPELLANT

AND

SOLOMON KIM KARIUKI ..... RESPONDENT

RULING

1. Before me is an Application dated 25/11/2023. It was brought under Article 159 of the *Constitution of Kenya*, Section 1A, 1B, 3, 3A and 63 (c) & (e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 12 Rule 7, Order 2 Rule 6 and Order 51 of the *Civil Procedure Rules, 2010*, "and the inherent jurisdiction of this honorable court." The applicant sought the following orders:-

    1. ...spent.

    2. That pending the hearing and determination of this Appeal, this Honorable Court be pleased to restrain the respondent, his employees, agents, servants, and any other person acting at his behest from evicting, harassing, or levying distress against the appellants on the basis of the orders given in the Ruling dated 27th October 2023 in Eldoret BPRT Case No. E027 of 2023.

    3. That the costs of this application be awarded to the appellants.

2. The application was based on the grounds that following the Ruling the Honourable Chairperson of the Business Premises Rent Tribunal delivered in on 27/10/2023 in BPRT Case number E027 of 2023; the Respondent already started levying distress against the Appellant in blatant breach and or abuse of Orders of stay which were for 30 days, issued on 30/10/2023. The Orders were to expire on 27/11/2023; he did so by levying distress by way of permanent locking of the Appellant out of the premises; that the Appellant was therefore unable to dispense with statutory payments, issue receipts to suppliers, write cheques and so on since all official documents were locked inside their offices; that the Tribunal made a blanket condemnation of the Appellant that he was in rent arrears which arrears

were not pleaded and ascertained. That the Respondent was not suffering any prejudice in that the open space premises which were leased to the Appellant had been developed to the tune of Kenya Shillings 25,000,000/=.; the Respondents claim over arrears which was denied was to a tune of Kshs. 200,000/=. That the Respondent had deposit paid by the Appellant which sum was higher than the sum claimed by the Respondent.

3. The other grounds were that the Respondent has, over time, made conditions so cruel for him and his employees to work thus causing their business not to perform at optimum, hence significant business losses. That since late last year the Respondent has been hiring goons to disrupt the business operations of the Appellant and at times threatened not only the employees of the Defendant but also his clients, which acts have significantly led to the loss of business. The Appellant did not owe the Respondent any money, since he has recently contributed to the downfall of the business and should not therefore benefit his illegal actions. That the issue of the rent areas was not for consideration before the Tribunal but the only issue before it was the legality of the purported termination notice, which the Tribunal found was an illegal one. That unless this Court urgently intervened by granting the orders sought, the Appellant would suffer prejudice. It was only fair, just and equitable to grant the orders sought. That the custom and practice of this Court to always protect the sanctity of appeal proceedings by issuing restraining orders against execution. That should the orders fail to issue, the Appellant would suffer grave and irreparable harm.

4. The application was supported by the Affidavit sworn by Peter N. Mburu. He deponed that after the Tribunal delivered its Ruling on 27/10/2023 in Eldoret BPRT Case E027 of 2023 the Respondent started levying distress despite the Tribunal issuing Orders of stay of execution for 30 days with the effect from 27/10/2023. He annexed and marked as PNM1-1 a copy of the order. That the Respondent did so by locking the Appellant out of the premises, thereby making him unable to access the premises and carry out his work. He annexed photographs of the locked premises and marked them as PNM 2. He also annexed a copy of the Ruling of the Tribunal and marked it as PMS-3.

5. Much of the other deposition of the deponent was a repeat of the contents of the grounds in support of the Application. Thus, this Court needs not to repeat it. But besides that he stated that he had made the application timeously hence the Orders ought to be granted, otherwise he would suffer grave and irreparable harm.

6. The Respondent opposed the Application strongly. He did so through an Affidavit he swore on 11/12/2023. He deponed that the premises had been released through a lease agreement dated 12/02/2022 and, among other things, the Appellant's obligation under the lease was to pay rent failing which it would be terminated. Further, that by the agreement the Appellant was prohibited from sub-letting the premises or sharing in possession. That contrary to the lease agreement the Appellant leased the property to a third party. He annexed a copy of the agreement of sub-lease and marked it SKK-041A. He deponed again that the Appellant fell in arrears of more than 11 months from 11/11/2022, thereby violating the terms of the lease agreement as it was held by the Tribunal in the Reference decision appealed from. He marked the Ruling of the Tribunal as a SKK-01B.

7. That the Appellant sublet the premises to a third party on 14/02/2022, hence violating the terms of the lease agreement as was held by the Tribunal in the Ruling delivered on 27/10/2023. He annexed a copy of the lease to a third party and marked it as SKK-2. He deposed that the Appellant had no arguable appeal since the grounds demonstrated that it was an abuse of the process of the court. Further, that he (the Respondent) had made an application before the Tribunal on 10/07/2023, in which he prayed that pending the determination of the Reference the rent which was Kenya shillings 500,000/= at the time be paid before the determination. He annexed and marked as SKK-03 a copy of the Application he had made and the Tribunal made a finding on that it was merited and granted him permission to

levy distress against the Defendant (now Appellant) within 30 days. He marked as SKK-04A-B the order of the Tribunal.

8. His further deposition was that the Appellant failed to pay the rent within 30 days granted by the Tribunal and that was when he (Respondent) moved to lock the doors of the part of the premises as part of levying distress for rent. That he locked the premises on 28/08/2023. That before the premises were locked the Appellant had removed all his belongings from the offices during the 30 days granted, and there was nothing left in the offices to levy distress on. That the appellant had not demonstrated that he would suffer any substantial loss if execution was actualized or that the appeal would be rendered nugatory. Moreover, the Appellant owes more rent than what he had invested in the premises. That the levying of distress would not interfere with the Appellant's activities on the said property as it is not a termination of the lease agreement because he would still be able to continue enjoying the use of the suit property as the appeal was being heard and determined.

9. He deponed further that he was levying distress pursuant to orders of the Tribunal as issued on 20/07/2023, an order which the Appellant had not appealed from and not the Orders of 27/10/2023. That the orders of the Tribunal lapsed on 27/11/023 by which time the Appellant had not approached this court, which he did on 29/11/2023, two days after the lapse of the orders. He annexed and marked as SKK-04B a copy of the Tribunal's order. He deponed further that the Appellant never opposed the application for him to pay rent arrears, and he had not annexed any evidence to demonstrate that he had no rent arrears hence it was only fair that he be ordered to deposit security to the tune of Kenya shilling 750,000/= being rent for the months of November and December 2022 and January 2023 to December 2023 at a rate of Kenya shillings 50,000/= per month, which was the monthly rent.

10. That the levying of distress was a lawful act of the landlord recovering his rent since the tenant had refused to perform his cardinal duty. That staying the process, would amount to denying the Respondent what was his right and promoting the breach of the tenancy agreement. He also deponed that the appellant had not given any evidence to counter the allegation of rent arrears much in the same way he did not counter the allegations at the Tribunal. That the Court should order the Appellant to pay the sum which as at the time of the application totaled to Kenya shillings 750,000/= as security. Lastly, he deponed that the Appellant had no arguable appeal and the same should be dismissed summarily.

11. When the application came up for inter partes hearing, the Appellant contended that the premises were locked, while the Respondent argued that they were not. Therefore, the court ordered that the Deputy Registrar to visit the premises and ascertain the position. The Deputy Registrar visited the premises and found that indeed they were closed. The gate was locked with the Respondent's padlocks and the suit premises' front outer metallic door too locked with the Respondents padlocks and when the back metallic door was locked by both the Appellant's and Respondent's padlocks.

Submissions

12. The appellant filed his submissions dated 27/02/2024 on 05/03/2024. He began by summing up the application, the orders sought, and the grounds the application was brought on. He argued that the application was brought under Order 42 Rule 6(2) of the *Civil Procedure Rules*, which he cited in full. That it was clear from the report by the Deputy Registrar that the premises were indeed locked and the decision to lock them during the pendency of an Order of stay of execution flew in the face of the rule of law, and the Respondent did not come to court with the clean hands. Further, that an Applicant was supposed to convince this Court of three things, namely, whether he would suffer substantial loss, and if the application was made without unreasonable delay and finally security.

13. He argued that in regard to delay, the application was filed within the statutory prescribed timelines. On substantial loss, he submitted that whereas the premises were locked, the Appellant still continued to charge rent, and this presented as a scenario where on one hand, that the rent is needed, and with the other, the rent could not be generated. And in the long run, therefore, the Appellant stood prejudiced, and if he was compelled to pay the rent he continued to suffer loss. Further, that the Respondent had not demonstrated any prejudice he would suffer. That in any event the Appellant had developed the premises massively to a tune of Kenya Shillings 25,000,000. And so, it was the Appellant who stood to suffer. Finally, on security, he argued that the rent alleged to be in areas was not ascertainable and in any event, it was in dispute as one of the issues to be conversed during the instant appeal.

14. He relied on the case of *RWW. v. EKW* [2019] eKLR which considered the purpose of stay of execution. He urged this court to exercise its discretion and order the grant of the order of stay of execution. Lastly, he argued that he would be willing to pay the rent when it falls due if the premises were reopened.

15. On his part, the Respondent began his submissions by the first issue as to whether a stay of execution should be issue. He too relied on Order 42 of the *Civil Procedure Rules* and submitted that the three factors to prove were primary. One was to demonstrate proof of substantial loss security for due performance and timeliness. He submitted that the Appellant had no arguable appeal. And therefore, since he was in breach of the lease agreement, sublet the premises to a third party and failed to pay rent since the 23rd November to the date of the application, the orders he sought should not be granted. He also submitted that the Appellant did not deny that he was in breach of the agreement of tenancy and he had not discharged the burden of proving substantial loss. He relied on the Court of Appeal decision of *Kenya Shell Limited versus Benjamin Karuga, Kibiru and Another* 1986 eKLR. He also submitted that the appellant had not demonstrated that he would suffer substantial loss.

16. Further, he submitted that the court must balance any prayers for stay of execution with the Respondent's ability to enjoy the fruits of their judgment. On this issue, he relied on the case of *Macharia t/a Macharia & Co Advocates v East African Standard*, [2002] eKLR. Regarding security for costs, he submitted that the Appellant had not demonstrated compliance by way of any payment or bank guarantee such willingness to pay. Therefore his willingness or ability to pay was doubtful that he would do so, considering that he had either neglected and refused to settle outstanding rent arrears owing to the respondent. So, he submitted that as security for costs, the Applicant should be ordered to pay the monthly rent as per the lease agreement, until the appeal is heard and determined. This is because the Appellant/Applicant was still in occupation of the property and earning from it. He submitted that he was not disputing timeliness of the application

Analysis, Issues and Determination

17. This court has deeply considered the application, the affidavits both in support and opposition, the law on stay of execution and the submissions of the parties as well as the authorities cited. The pertinent issues for determination are:

    a. Whether the applicant has met the conditions for the grant of an order for stay of execution pending appeal

    b. Who to bear the costs of the application.

18. The instant application stems from a determination of the Chairperson of the Business Premises Rent Tribunal in Eldoret E027 of 2023. In the dispute before the Tribunal the Chairperson determined that the application and reference dated 10/02/2023 were dismissed; the interim orders issued earlier were

vacated; the termination notice was defective and dismissed; the landlord (now respondent) was to issue a fresh termination notice under Sec 4(2) of Chapter 301 of the Laws of Kenya; and the tenant was liable to pay rent arrears owing and in default of which the landlord would be free to recover the same including levying distress..

19. Following that decision, delivered on 27/10/2023, the Appellant preferred an appeal from the decision of the Chairperson. It had three grounds, namely, whose content and merit I do not wish to go into at this stage. After that he filed the instant application.

20. In determining the issue, the starting point is Order 42 of the *Civil Procedure Rules* which, in providing for how appeals to this Court are handled, sets out, in Rule 6 thereof, the principles to be considered in deciding whether or not to grant an order of stay of execution. The provision comes into play when a party has already preferred an appeal, as in the instant case. Both parties allude to the same provision and the principles therein regarding the requirements to be met in order for a party to urge successfully an application for stay of execution of a decree or order.

21. It must be borne in mind that the Order itself stipulates in Rule (1) that it is not automatic that a stay of execution or proceedings is available automatically to a party who has filed an appeal. Thus, the filing of an appeal is not a guarantee that stay of execution or proceedings shall be granted. That is why the conditions to be met are given thereafter, meaning that there is a higher standard to reach, especially where a party has earned a judgment or decision in his favour following the laid down procedures.

22. The conditions to be met before such a stay is granted are basically three as was submitted by both the appellant and the Respondent herein. They are provided under Rule 6 (2) which stipulates as follows:

> " No order of stay of execution shall be made under sub-rule (1) unless-
>
> a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the applicant the application has been made without unreasonable delay; and
>
> b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

23. Therefore, for the Court to exercise judiciously its discretion which is not as wide as in other circumstances where it may be exercised, judiciously, it has to consider if four conditions are met, namely:

i. Establishment of sufficient cause;

ii. Demonstration of substantial loss;

iii. Furnishing of security;

iv. Making of Application without unreasonable delay.

24. The purpose of an application for stay of execution cannot be overemphasized. In *RWW -vs- EKW* [2019] eKLR, the Court addressed its mind to the purpose and stated as follows:

> ". The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of

the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however must balance the interests of the Appellant with those of the Respondent."

25. The entry point in determining whether or not this application succeeds is to consider whether it has been brought without undue delay. It is not in dispute that the application was brought without much delay. It was while it appears to have been prepared on 25/10/2023 it was filed on 27/11/2027 a date when the orders of stay of execution granted on 27/10/2023 were to expire. It was therefore timeously filed.

26. The Court then needs to determine whether the Applicant has established that it will suffer substantial loss if stay of execution of its judgment is not granted. Substantial loss is not ordinary loss. It must be loss that is peculiar in the circumstances of the case and execution. As was explained in the case of *Century Oil Trading Company Ltd -vs- Kenya Shell Ltd* Nairobi (Milimani) HCMCA No. 156 of 2007, Kimaru J stated as follows: -

> " The word "substantial" cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words "substantial loss" must mean something in addition to all and different from that which is ordinary. Where execution of a monetary decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his Judgment."

27. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR , a persuasive authority but with which I agree, the Court described substantial loss as follows:

> " 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 ... 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."

28. What is the substantial loss the appellant herein argues he would suffer? I see none at all. He argues that he does not owe rent. When the Court gave him change to demonstrate that he did not, whatsoever. Instead he argued that he cannot pay rent because the premises are locked by the Respondent. He wishes this Court to agree with him that that is reason enough not to pay rent. I think this is the highest form of abuse of the Court that a party can make of a Court.

29. I make the above finding because, I carefully analyzed annextures SKK-03 and SKK-04 of the Affidavit sworn by Solomon Kim Kariuki on 11/12/2023. They clearly show, starting with annexture SKK-03, that the Respondent herein moved the Tribunal on 10/07/2023 for orders that the Tribunal directs the tenant (now Appellant) to pay rent arrears which then stood at Kshs. 500,000/=, and by SKK-04

that on 25/07/2023 the Appellant was ordered to pay the rent arrears within 30 days, in default the landlord had the liberty to levy distress.

30. The Respondent deponed that those were the orders he was executing, and that he indeed moved to lock the doors in execution of the orders on 24/08/2023, by which time the Appellant had moved most of his items from the premises. Now he wants this Court to order a stay of execution of the orders of the Tribunal issued much earlier than the final determination of the Tribunal on 27/10/2023, even while knowing indeed that he has not complied with the orders of the Tribunal and also that he has not paid any rent arrears he owed as found by a judicial body. To the extent that the orders of the Tribunal were not and have never been obeyed, the Respondent is perfectly justified to levy distress as ordered by the Tribunal and the process may begin at the locking of the premises. The instant application can only be termed as nothing but sheer misuse of the process of the court and this Court cannot be part of such a crooked game.

31. I do not agree with the Appellant that the Respondent moved to execute the orders of the Tribunal as made on 27/10/2023 before the expiry of the 30 days granted for stay of execution. In any event if at all the premises were locked during the pendency of the stay of execution granted on 27/10/2023 the Applicant should have moved the Court the following day to challenge the same. But to wait until the last day of the same and move the Court is nothing but those gimmicks that parties who know they have no good case use to move the Courts, obtain favourable orders and pack their matters in the courts thereby clogging the system.

32. For the reason of the finding above, this Court needs not consider whether or not the requirement of furnishing security has been met.

33. Lastly, and which finding convinces this Court that the application herein is a mere abuse of its process and a backdoor way, by the Appellant, of going ground the orders which the Tribunal granted on 25/07/2023, it is clear that on 27/10/2023 the Tribunal, after dismissing the Notice of Termination of Lease Agreement, issued earlier and which gave rise to the Reference, granted leave to the Respondent herein to issue a fresh notice of termination of the tenancy. It is instructive that neither the memorandum of appeal nor the Application for stay of execution herein challenged that limb whatsoever. In actual sense, as the position is, and even if I could have granted the prayer sought, nothing stops the Appellant from issuing the fresh Notice for termination of the tenancy. It means the Appellant was satisfied with the finding of the Tribunal and wants to buy time before this Court by filing applications which are not directed to the orders of the Tribunal from which he has appealed. It further means that to the extent that the Tenant or Appellant now considers and holds himself by conduct or expressly that he is a tenant, unless the he complies with the order of the Tribunal as given on 25/07/2023 by paying rent arrears the Respondent is justified to execute the orders or the Tribunal and levy distress, and the rent will continue to accumulate irrespective of whether the premises are operational or locked pursuant to lawful orders.

34. The upshot is that the application dated 25/11/2023 but filed on 27/11/2023 is absolutely without merit and is hereby dismissed with costs to the Respondent

35. To make process in terms of this Appeal, the appellant is given only seven (7) days to comply with Order 42 Rule 2 of the *Civil Procedure Rule*s. And since the Appellant has not complied with Order 42 Rule 11, this appeal shall be placed before the judge on 19/03/2024 for consideration under the said Rule. Upon consideration under the said Rule, and depending on the outcome thereof, the appeal may be mentioned on 10/04/2024 to confirm compliance with Order 42 Rule 12 of the *Civil Procedure Rules*.

36. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 13TH DAY OF MARCH, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.