



Parliamentary Service Commission v Kimani t/a Renco Car Identity (Civil Application E277 of 2022) [2023] KECA 191 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 191 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E277 OF 2022
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 17, 2023**

BETWEEN

PARLIAMENTARY SERVICE COMMISSION APPLICANT

AND

JM KIMANI T/A RENCO CAR IDENTITY RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Decree of the Environment and Land at Nairobi (Mogeni, J.) dated 6th June 2022)

RULING

1. The applicant and the respondent entered into a lease agreement by which the applicant let to the respondent the premises known as LR No 209/5412 in Nairobi (the suit premises) for a period of 5 years and 3 months with effect from April 1, 2017. The agreed rent was Kshs 40,000 per month revisable upward annually. The respondent was to use the premises for the business of a rental car park and related motor vehicle services. On May 29, 2008, the applicant served upon the respondent a notice of termination of the lease under section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The respondent objected to the notice and filed a reference in the Business Premises Rent Tribunal pursuant to section 6 of the same Act. Subsequently, the applicant withdrew the notice of termination upon which the dispute in the Tribunal was based. Instead, it served upon the respondent a 30-day notice to terminate the lease.
2. On September 10, 2008, the applicant locked out the respondent from the suit premises and the latter filed a suit in the High Court seeking, inter alia, compensation for loss of tenancy, general damages, interest and costs. In its defence and counterclaim, the applicant pleaded that it lawfully served upon the respondent a notice of termination of the tenancy and took possession of the suit premises upon expiry of the notice; that the respondent was in breach of the terms of the lease by falling into rent arrears, sub-letting the suit premises, violating City Council By-laws; and that the applicant required



the suit premises to construct offices for Members of Parliament. The applicant counter-claimed Kshs 536,000 from the respondent, being rent arrears.

3. The applicant raised a preliminary objection contending that the tenancy between the parties was not controlled because the applicant was part of the government. By a ruling dated May 22, 2009, the High Court (Nambuye, J. as she then was) ruled that the applicant was not a government agency. It appears from the record that the applicant did not appeal against that particular ruling.
4. It would appear that after the establishment of the Environment and Land Court, the suit was transferred to that court where it was heard and determined. By a judgment dated June 6, 2022, the trial court reiterated what the High Court had stated, namely that the applicant is not a government agency. The court further held that the applicant is not exempt from the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, and that the tenancy was a controlled tenancy, which the applicant had terminated illegally. Consequently, the court awarded the respondent Kshs. 2,000,000 as damages for wrongful termination of the tenancy and interest at court rates. The court similarly entered judgment for the applicant against the respondent for the rent arrears with interest at court rates from the date of the counterclaim. Lastly the court ordered each party to bear its own costs.
5. The applicant was aggrieved and after lodging a notice of appeal, filed the motion on notice that is now before us for stay of execution. In support of the application, the applicant relied on its submissions dated 9th October 2022 and list of authorities of even date. It's learned counsel, Mr. Mohammed, submitted that the intended appeal is arguable, and that the issues to be raised therein include whether the trial court erred by holding that the applicant is not part of the Parliament and Government despite its creation under Article 127 of the *Constitution*; whether the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is applicable to the applicant; whether the tenancy between the parties was a controlled tenancy; and whether the applicant's re-entry into the suit premises was unlawful. Counsel added that the issues intended to be raised in the appeal are matters of great public interest.
6. Counsel further submitted that absent an order of stay of execution, the applicant's appeal will be rendered nugatory because the respondent's means and ability to repay the awarded amount is unknown. He contended that the money would have to be paid from public coffers and, therefore, ought to be secured so that it is not lost through inability to recover. The respondent opposed the application relying on his replying affidavit sworn on 3rd October 2022 as well as his written submission dated 12th October 2022. His learned counsel, Ms. Wanjau, submitted that the appeal was not arguable because the applicant is a statutory body corporate established by the *Parliamentary Service Act*, and is therefore not part of the Government. Counsel contended that, under its constitutive Act, the applicant has capacity to sue and be sued in its own name and that, if indeed the applicant was part of the Government, it can only be sued in the name of the Attorney General. It was further argued that the trial court properly found the applicant liable because it terminated the respondent's lease without complying with the procedure provided therein. However, the respondent did not address the question as to whether or not the appeal risked to be rendered nugatory if stay of execution was not granted.
7. At the online hearing of the application, both parties elected to rely exclusively on their written submissions and authorities.
8. We have anxiously considered this application. It is trite that, to obtain an order of stay of execution, the applicant, in addition to having a notice of appeal on record, must establish that the intended appeal is arguable, and that it would be rendered nugatory if it succeeds in the absence of an order of stay. Both of those tests must be satisfied because it is not enough to satisfy only one of them.



9. An arguable appeal need not necessarily succeed on appeal and all that the applicant is required to demonstrate is that the appeal is not frivolous, and that it raises an issue or issues that the Court should consider fully. Such an appeal need not raise a multiplicity of issues and even one will suffice. In determining whether there is an arguable appeal, the Court eschews making any definitive findings because that is the bailiwick of the bench that will hear the appeal. As regards whether an appeal risks being rendered nugatory, the concern of the Court is to ensure that a successful appeal does not end us as mere pyrrhic victory due to irretrievable or irremediable alteration of the circumstances prior to the determination of the appeal. (For all these principles and propositions, see *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR).
10. Turning to this application, the grounds that the applicant has set out in its draft memorandum of appeal are not idle or frivolous issues. They deserve the considered opinion of this Court. On whether the appeal will be rendered nugatory, the applicant contends that the respondent does not have the means to repay the decretal amount if it is paid out and subsequently the appeal succeeds. Notwithstanding that express assertion in paragraph 17 of the affidavit sworn by Ms. Eunice Gichangi on August 2, 2022 in support of the application, the respondent did not respond to it either in his replying affidavit or even in the submissions.
11. In the circumstances, the applicant has satisfied both limbs under rule 5(2)(b) of the Court of Appeal Rules. Accordingly, we allow the motion dated August 2, 2022 and direct that there will be stay of execution of the judgment and decree of the trial court dated June 6, 2022 until the hearing and determination of the appeal. Costs of the application will abide the outcome of the appeal. It is so ordered.

Dated at Nairobi this 17th Day of February, 2023

K. M'INOTI

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JUDGE OF APPEAL

DR K I LAIBUTA

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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

