



**Taifa Sacco Limited v Saleh (Environment and Land Miscellaneous Application
E009 of 2024) [2024] KEELC 4430 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2024**

A OMBWAYO, J

MAY 30, 2024

BETWEEN

TAIFA SACCO LIMITED APPLICANT

AND

SALEH OMAR SALEH RESPONDENT

RULING

1. Taifa Sacco Limited, hereinafter referred to as the applicant has come to court against Saleh Omar Saleh, intended respondent seeking orders that there be a stay of execution the ruling delivered on November 1, 2023 and stay of further proceedings in Nakuru Business Premises Rent Tribunal Case No. E153 of 2022 pending the hearing and of the intended Appeal. That an order of temporary injunction be issued against the Respondent, his agents, employees and servant or any his behalf from evicting the applicant from the Business Premises leased on Plot No.Nakuru /Municipality Block 10/31 pending hearing and determination of this application and the intended appeal. The Honorable Court be pleased to extend time in which the Applicant may file its Appeal out of time. The annexed draft Memorandum of appeal be filed within time to be granted by the honorable court.
2. The application is based on grounds that the time for filing memorandum of appeal has expired through no fault of the applicant/intended appellant. The Ruling was delivered on November 1, 2023 in absence of the applicant and no prior notice has been issued.
3. The Applicant's Advocates were only served with a copy of the ruling by the Respondent's Advocates on February 19, 2024 electronically via whatup, 3 months after the ruling was delivered, where 30 days allowed for Appeal under cap 301 Laws of Kenya had lapsed. The applicant was greatly surprised when served with eviction notice together with copy of the ruling on February 19, 2024 by the Respondent's Advocates.



4. The applicant upon perusal of the ruling were dissatisfied with the whole ruling and are desirous of filing an appeal and will be greatly prejudiced if the appeal is not filed. The applicants are willing to comply with the conditions the honorable court would give for granting a stay of execution. The applicant will suffer great prejudice, loss and embarrassment since execution of the order arising from the ruling delivered on 1st November, 2023 as it is evident that the respondent can execute the order any time pending hearing and determination of the application and the intended appeal. The intended appellant has brought this application without delay since being served with the Tribunal ruling demand to vacate on 19th February 2024. The gist of the supporting affidavit of Samuel Ngugi is that the ruling in B.P.R.T case E153/2022 was delivered without notice. The applicant was served with eviction notice with a copy of ruling on 20th February 2024. They instructed their advocate to appeal.
5. The applicant states that the cause of action before the Business Premises Rent Tribunal arose from a lease Agreement over a Business Premises on a Building known as Roma Building in Nakuru Entered between 7 lessors and Taifa Sacco Society Limited (the applicant) in the year 2016.
6. Upon perusal of the said Lease Agreement the Sareh Omar Saleh as the lessor is not appearing in the lease agreement and without prejudice to the pleadings filed before the Business Premises Rent Tribunal, he is a total stranger to the intended Appellant. Also there being 7 Lessors, the intended Appellant/Applicant questions the authority of the Saleh Omar Saleh's capacity and authority to issue Notice of Termination against the Applicant herein an issue which the Business Premises Rent Tribunal failed to address.
7. The alleged Land Lord's Notice to terminate or alter terms of Tenancy dated 25th August, 2022 was never effected on the intended applicant prior to commencement of the proceedings before the Business Premises Rent Tribunal but was served as an annexure in the certificate of urgency dated 16th November, 2022 which commenced the proceedings before the Business Premises Rent Tribunal
8. Failure to file reference as required was occasioned by lack of service of the Notice to terminate or alter terms of tenancy, and we came to know of existence of the proceedings before the Tribunal, when they were served with an order dated 17th April 2023 from Business Premises Rent Tribunal ordering them to vacate. It was upon service of the Order to vacate, which was the only Court document served upon us, that they instructed their advocates on record to peruse the Tribunal file and to represent them before the Tribunal and obtain the necessary remedy.
9. The business premises Rent Tribunal case ended with the ruling delivered on 1st November 2023, without notice and in absence of their advocates. Their advocates have annexed a draft memorandum of Appeal which as informed has, high chances of success. They are ready to comply with the conditions to be given by the honorable Court for grant of the orders sought. They have been advised by their Advocates on record which advise they believe to be true that the Tribunal dealt with a matter outside its jurisdiction. It is only mete and just that the application be allowed as prayed.
10. In the replying affidavit Saleh Omar Saleh states that the applicant entered into a lease agreement with respondent but breached the terms of the lease by partitioning the leased space into smaller units and sublet the premises. The respondent issued notice to terminate the lease dated 25th August 2022 with effect on 1st November 2022. The applicant ignored the notice. The respondent filed a reference in the B.P.R.T to compel the applicant to vacate the premises. The applicant failed to participate in the proceedings. The Tribunal gave its directions for the applicant to vacate the premises on 1st March 2023. The applicant filed an application to set aside the orders requiring it to vacate. The application was allowed by consent.



11. The reference was heard and both parties participated and a ruling was delivered on 1st November 2023 in favor of the respondent.
12. The respondent states that notice was served upon the applicant. Moreover, that the application advocate had a duty to make a constant follow up with the Tribunal to find out if and when the ruling was to be delivered. According to the respondent the memorandum of appeal does not raise any issue of law to warrant the court to entertain the appeal.
13. In the supplementary affidavit the applicant states that the lease agreement allows partitioning of the premises and subletting. The partitioning was made with consent of the landlord. The applicant was never served with notice to terminate tenancy dated August 25, 2022 that was to take effect on 1st of November 2022. There is no evidence of service. The applicant states that the rent payment is upto date. Moreover, the B.P.R.T had no jurisdiction to entertain the dispute as the lease period exceeded 6 years three months.
14. The applicant submits that there was no service of the ruling notice to parties. The file record shows that the ruling was read in absence of parties. The respondent sprang into action four months after delivery of the ruling. On leave to appeal out of time, the applicant submits that the reason for failure to appeal within time was the fact that they were not aware of the ruling until the 20th February 2024.
15. On the issue of stay of execution pending appeal, the applicant submits that they are likely to suffer substantial loss if stay is not granted as they will be evicted and suffer irreparable loss. Moreover, that the applicant has the ability to deposit any security ordered by the court.
16. The applicant further submits that it has a high chance of success on appeal because the Tribunal lacked jurisdiction to entertain the dispute as the lease period exceed 5 years.
17. On his part, the respondent submit that the application falls short of the requirement of order 42 rule 6(2) because it has not been shown the damage to be suffered if stay is not granted. Staying the orders would mean status quo and therefore denying the respondent to enjoying the fruits of the ruling. On temporary injunction the respondent states that the applicant has not satisfied the grant of temporary injunction on appeal.
18. On extension of time to file appeal out of time the respondent submits that the applicant does not deserve the orders as equity does not aid the indolent as he had a duty to constantly follow up with the tribunal to find out when the ruling was delivered.
19. I have considered the application, affidavit on record, rival submissions. The applicant has stated that he was not served with the notice of delivery of the ruling. The respondent has argued that the applicant was indolent and should not be assisted by equity, because he never checked with the Tribunal to see if the ruling was ready. I do find the respondents argument on this issue to be a misapprehension of the doctrine of Equity because the doctrines of equity are supposed to ensure that there is fairness. It was the Tribunal duty to give the applicant a notice of the ruling date and not the applicant to request for a ruling date from the Tribunal. The Tribunal was bound by the principles of fair administrative action that are enshrined in the article 47 of the *Constitution of Kenya* 2010 and the *Fair Administrative Action Act*. In *Dry Associates Ltd v Capital Markets Authority and another*, [2012] eKLR the Court observed;

“ Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”



- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - (a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
 - (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
 - (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.
20. I do find that the applicant has satisfied this court that though the ruling was delivered on November 1, 2023, he was not aware of the delivery of the same until the February 20, 2024. The application was filed on March 7, 2024 approximately three weeks after the ruling which I do find was timeously. On whether an order of stay of execution pending Appeal should be granted. I do find that the application had been filed timeously and that the applicant is threatened with an eviction and yet has invested in the premises and therefore if evicted she is likely to suffer substantial loss. Moreover, she is willing to deposit security in court.
21. On temporary injunction, I do find that this court has jurisdiction to grant temporary injunction pending appeal, however this only applies where the ruling delivered is negative. The ruling delivered herein was positive and therefore in injunction can't issue as doing so will amount to issuing an injunction against the court. A stay of execution pending appeal is sufficient in such circumstances.



22. On whether the applicant has an arguable appeal, I do find the issue of jurisdiction is arguable as jurisdiction is everything and a court without jurisdiction has no basis delving into the dispute. In this case the Tribunal's jurisdiction is being challenged. Secondly, it is disputed that the applicant was given a notice to vacate the premises. This is an arguable issue on appeal. The upshot of the above is that the applicant has satisfied this court that he deserves the orders sought save an order of temporary injunction.
23. I do grant an orders that there be a stay of execution of the ruling delivered on November 1, 2023 and stay of further proceedings in Nakuru Business Premises Rent Tribunal Case No. E153 of 2022 pending the hearing and of the intended Appeal. Further, I do grant the applicant 10 days to file and serve its memorandum of appeal out of time and thereafter to file the record of appeal within 30 days after service. Costs to be in the appeal. Orders accordingly

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MAY 2024.

A. O. OMBWAYO

JUDGE

