



REPUBLIC OF KENYA



Severin Sea Lodge (EA) Limited v Baracuda Kenya Limited (Miscellaneous Application E003 of 2023) [2024] KEELC 4390 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION E003 OF 2023**

**LL NAIKUNI, J
MAY 20, 2024**

BETWEEN

SEVERIN SEA LODGE (EA) LIMITED LANDLORD

AND

BARACUDA KENYA LIMITED TENANT

RULING

I. Introduction

1. This ruling is in respect to Notice of Motion application dated 26th July, 2023 by Severin Sea Lodge (E. A) Limited, the Landlord/ Applicant herein. It was brought under the provision of Order 42 Rule 6(1) of the Civil Procedure Rules, 2010; Section 3A of the [Civil Procedure Act](#), 2010.
2. Upon service of the application to the Defendant/ Respondent filed their replies accordingly. The Honourable Court shall be dealing with the raised issues at the opportune moment in this Ruling hereof.

II. The Landlord/ Applicant's Case

3. The Applicant sought for the following orders:-
 - a. Spent.
 - b. That upon hearing ex parte, this Honourable Court be pleased to stay the Ruling of the Chairman of the Tribunal delivered on 5th June 2023 and orders emanating therefrom and all further proceedings in Tribunal Case no. E012 OF 2023 pending hearing and determination of the intended appeal.



- c. That upon hearing “Inter – Partes”, this Honourable Court be pleased to stay the ruling of the Chairman of the Tribunal, any orders emanating therefrom and all further proceedings in Tribunal case no. E012 of 2023 pending hearing and determination of the intended Appeal.
 - d. That costs for this Application be in the Cause..
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 19th Paragraphed Supporting Affidavit of – Tuva Mwachunga, the General Manager of the Landlord/Applicant herein sworn and dated 19th August, 2023 with two (2) annexures marked as ‘SS – 1 & 2’. The Applicant averred that:
- a. On 19th January 2023, the Tenant filed a reference claiming that it had been operating its business at the Landlord’s Premises and the Landlord/Applicant had threatened to forcefully evict it from the subject premises. Subsequently, the Tenant/Respondent sought orders restraining the Landlord/Applicant from unlawfully terminating the alleged tenancy and from evicting the tenant from the business premises.
 - b. The Landlord/Applicant raised a Notice of Preliminary Objection dated 21st February 2023 in response to the said reference, which Notice was canvassed by way of written submissions and scheduled for ruling on the 5th June 2023.
 - c. The Landlord/Applicant argued that the Honourable Tribunal lacks the requisite jurisdiction to proceed to hear or entertain the said claim in its entirety as contemplated under Section 12 (4) of the *Landlord and Tenant (Shops, hotels and Catering Establishments) Act* (Hereinafter referred to as “The Act”).
 - d. The Preliminary objection came up for Ruling on 5th June 2023 when the Honourable Tribunal proceeded to dismiss it noting that the Licence between the Parties was for a defined period of One (1) year and after its expiry, the Parties entered into a Controlled Tenancy.
 - e. The day the Ruling was delivered, the Honourable Tribunal only pronounced itself as to its final finding and did not read the entire Ruling and it informed us that a copy would be availed to the Parties in the course of the week, but that was not the Case.
 - f. The Landlord/Applicant wishing to appeal against the Ruling of the Chairman of the Honourable Tribunal – the Business Premises & rent Tribunal (Hereinafter referred to as “The Tribunal”), followed up with the Tribunal for issuance of a copy from the date it was delivered but was not successful.
 - g. As a result, the Landlord/Applicant wrote to the Tribunal for a copy of the Ruling on 3rd July, 2023 to enable it prepare a conclusive Memorandum of Appeal and the Tribunal responded on 6th July 2023 requesting that we check after 21 days. (Annexed in the affidavit and marked as “SS – 1” was a copy of the said letter and response evidencing the fact).
 - h. The intended appeal was arguable with a high chance of success as the Landlord/Applicant believed that the suit property is not subject to controlled tenancy because the Tenant/Respondent wrote to the Landlord/Applicant in writing requesting for an extension of the licence to use to the end of January 2023 after the Landlord/Applicant. (Annexed in the affidavit and marked as “SS – 2” was a copy of the said letter and response evidencing the fact)
 - i. The said notice to extend and the Landlord/Applicant’s agreement to extend the licence to use for a further four months could not be decreed to convert the licence into a controlled tenancy.



- j. Further to 7 above, the delay in filing the Appeal was occasioned by the Honourable Tribunal's failure to issue a copy of the written Ruling in time so as to inform a conclusive appeal.
- k. The Landlord/Applicant was keen to prosecute the intended Appeal and had brought this instant application without unreasonable delay.
- l. This instant case was now coming for the hearing of the substantive claim on 27th July 2023 and it was in the interest of justice that the said hearing and any other proceedings be stayed pending the hearing and determination of the intended appeal.
- m. The Honourable Court should invoke its inherent jurisdiction and stay proceedings pending the hearing and determination of the intended appeal in upholding the provisions of Article 159 (2)(d) and Article 50 of *the Constitution* of Kenya, 2010.
- n. The prosecution of the instant Application would be rendered a mere academic exercise in the event this Honourable Court never certify this matter as urgent and never issued interim stay orders pending the hearing and determination of the instant Application.
- o. The present Application was not in any way intended to cause and delay and/or abuse the process of the Honourable Court.
- p. The Tenant/ Respondent would not be prejudiced should the instant Application be allowed.
- q. It was in the interest of justice and fairness that the prayers sought in the instant Notice of Motion be granted as prayed.

III. Submissions

- 5. On 1st November, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 26th June, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 22nd February, 2024 a ruling date was reserved on 6th May, 2024 by Court accordingly.

IV. Analysis & Determination.

- 6. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
- 7. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 26th July, 2023 seeking to stay the Ruling of the Chairman of the Tribunal delivered on 5th June 2023 and orders emanating therefrom and all further proceedings in Tribunal Case no. E012 OF 2023 pending hearing and determination of the intended appeal is merited?
 - b. Who will bear the Costs of Notice of Motion application dated 26th July, 2023.

ISSUE No. a). Whether the Notice of Motion application dated 26th July, 2023 seeking to stay the Ruling of the Chairman of the Tribunal delivered on 5th June 2023 and orders emanating



therefrom and all further proceedings in Tribunal Case no. E012 OF 2023 pending hearing and determination of the intended appeal is merited

8. Under this Sub – heading, the main issue is on granting stay of execution of the Ruling delivered by Tribunal pending the hearing and final determination of the impugned appeal before this Honourable Court. The law concerning stay of execution pending Appeal is found in under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which stipulates as follows:

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

- (2) No order for 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 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.

9. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of “Butt –Versus- Rent Restriction Tribunal {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its



own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

10. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.
11. The provision of Section 1A (2) of the Civil Procedure Act, Cap. 21 provides that:-
 - “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are:-
 - “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
12. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
13. I find issues for determination arising therein namely:
 - i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - ii. What orders this Court should make
14. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
 - “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
15. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.



16. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
17. The Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
18. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)”}.
19. As F. Gikonyo J stated in “Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with; -

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”
20. The Applicant herein filed an application dated 26th July, 2023 seeking orders to stay the Ruling of the Chairman of the Tribunal delivered on 5th June 2023 and orders emanating therefrom and all further proceedings in Tribunal Case no. E012 OF 2023 pending hearing and determination of the intended appeal. According to the Applicant, on 19th January 2023, the Tenant filed a reference claiming that it has been operating its business at the Landlord's Premises and the Landlord/Applicant had threatened to forcefully evict it from the subject premises. Subsequently, the Tenant/Respondent sought orders restraining the Landlord/Applicant from unlawfully terminating the alleged tenancy and from evicting the tenant from the business premises. The Landlord/Applicant raised a Notice of Preliminary Objection dated 21st February 2023 in response to the said reference, which Notice was canvassed by way of written submissions and scheduled for ruling on the 5th June 2023.
21. The Landlord/Applicant argued that the Honourable Tribunal lacks the requisite jurisdiction to proceed to hear or entertain the said claim in its entirety as contemplated under Section 12(4) of the Landlord and Tenant {shops, hotels and Catering Establishments} Act. The Preliminary objection came up for Ruling on 5th June 2023 when the Honourable Tribunal proceeded to dismiss it noting



that the Licence between the Parties was for a defined period of One {1} Year and after its expiry, the Parties entered into a Controlled Tenancy.

22. The day the Ruling was delivered, the Honourable Tribunal only pronounced itself as to its final finding and did not read the entire Ruling and it informed us that a copy would be availed to the Parties in the course of the week, but that was not the case. The Landlord/Applicant wishing to appeal against the Ruling of the Chairman of the Honourable Tribunal, followed up with the Tribunal for issuance of a copy from the date it was delivered but was not successful. As a result, the Landlord/Applicant wrote to the Tribunal for a copy of the Ruling on 3rd July, 2023 to enable it prepare a conclusive Memorandum of Appeal and the Tribunal responded on 6th July 2023 requesting that we check after 21 days. (Annexed in the affidavit and marked SS 1 is a copy of the said letter and response evidencing the fact).
23. The intended appeal is arguable with a high chance of success as the Landlord/Applicant believes that the suit property is not subject to controlled tenancy because the Tenant/Respondent wrote to the Landlord/Applicant in writing requesting for an extension of the licence to use to the end of January 2023 after the Landlord/Applicant. (Annexed in the affidavit and marked SS 2 is a copy of the said letter and response evidencing the fact). The said notice to extend and the Landlord/Applicant's agreement to extend the licence to use for a further four months cannot be decreed to convert the licence into a controlled tenancy. Further to the above, the delay in filing the Appeal was occasioned by the Honourable Tribunal's failure to issue a copy of the written Ruling in time so as to inform a conclusive appeal. The Landlord/Applicant is keen to prosecute the intended Appeal and has brought this instant application without unreasonable delay. This instant case is now coming for the hearing of the substantive claim on 27th July 2023 and it is in the interest of justice that the said hearing and any other proceedings be stayed pending the hearing and determination of the intended appeal. The Honourable Court should invoke its inherent jurisdiction and stay proceedings pending the hearing and determination of the intended appeal in upholding the provisions of Article 159(2)(d) and Article 50 of *the Constitution* of Kenya, 2010.
24. The prosecution of the instant Application will be rendered a mere academic exercise in the event this Honourable Court does not certify this matter as urgent and does not issue interim stay orders pending the hearing and determination of the instant Application. The present Application is not in any way intended to cause and delay and/or abuse the process of the Honourable Court. The Tenant/Respondent will not be prejudiced should the instant Application be allowed. It is in the interest of justice and fairness that the prayers sought in the instant Notice of Motion be granted as prayed.
25. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
26. Regarding the pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of "Kenya Shell Limited –Versus - Benjamin Karuga Kigibu & Ruth Wairimu (Supra)". I find that the Applicant has proved that he will suffer substantially if the orders for stay of the execution are not granted as prayed.
27. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the ruling being appealed against was delivered on 5th June, 2023 and the application herein was filed on 26th July, 2023, the Applicant also filed a draft memorandum of appeal dated 26th July, 2023. This application was filed after about 2 months of the ruling. In this



Honourable Court's opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.

28. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no provisions for security in his application.
29. However, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
30. In the case of "Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates" the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

31. Stay of execution is exactly what it states; it is an order of the court barring a decree holder from enjoying the fruits of his judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the judgment debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6. This Court observes that in this matter there was no decretal sum as the Landlord was restrained from evicting the tenant by the Chairman of the tribunal.
32. The Court observed in "Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Ltd [2019] eKLR", thus:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In



any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)

33. As already demonstrated in “James Wangalwa & Another vs. Agnes Naliaka Cheseto (supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer and there is no security to be remitted.
34. Resultantly, I proceed to grant the order for stay of execution on condition that the Applicant shall refrain from evicting the Tenant/ Respondent until the conclusion of the intended appeal. .

ISSUE No. b). Who will bear the Costs of Notice of Motion application dated 26th July, 2023.

35. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
36. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

V. Conclusion & Disposition

37. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed analysis to the application, this court arrives at the following decision and makes the orders below:-
 - a. That the Notice of Motion application dated 26th July, 2023 be and is hereby found to have merit hence allowed in its entirety.
 - b. That this Honourable Court do hereby issue an order to stay the execution of the ruling of the Chairman of the Tribunal delivered on 5th June, 2023 and orders emanating therefrom and all further proceedings in Tribunal Case No. E012 of 2023 pending and hearing determination of the intended appeal.
 - c. That for expediency sake, the matter to be mentioned on 5th June, 2024 for purposes of taking direction on the disposal of the Appeal under the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Order 42 Rules 11, 13 & 16 of the Civil Procedure Rules, 2010.
 - d. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF MAY 2024.

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HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Isika Advocate holding brief for M/s. Omuyu Advocate for the Landlord/Applicant.
- c. Mr. Hassan Ali Advocate for the Tenant/Respondent.

