



**Mohammed & another v Biliel (Environment and Land Appeal
E037 of 2023) [2024] KEELC 4799 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E037 OF 2023
SM KIBUNJA, J
JUNE 19, 2024**

BETWEEN

BADAWY ALI MOHAMMED 1ST APPELLANT

MOHAMED ABDULQADIR 2ND APPELLANT

AND

MOHAMED ALI BILIEL RESPONDENT

(Order of stay of execution of the judgment entered on 6th October, 2023 pending the hearing and determination of the Appellants appeal against the judgment in BPRT No. 261 of 2020.)

RULING

[NOTICE OF MOTION DATED 26TH OCTOBER 2023]

1. Vide the notice of motion dated 26th October 2023, the appellants seeks for the following *inter alia* orders:
 - a. Spent.
 - b. Spent.
 - c. That there be an order of stay of execution of the judgment entered on 6th October, 2023 pending the hearing and determination of the Appellants appeal against the judgment in BPRT No. 261 of 2020.
 - d. That the costs of this application.

The above application is premised on the fourteen (14) grounds, on its face and supported by the supporting and further affidavits sworn by Badawy Ali Mohammed, 1st appellant, on 26th October 2023 and 11th March 2024 respectively. It is the case of the appellants inter alia that they have been tenants, and have continuously lived and carried out business, on the suit property since 1987, for 35



years which has accumulated goodwill; that when the landlord died in 2018, the respondent took over as landlord and changed the terms of the tenancy agreement dated 9th September 2020 by seeking an increase of rents payable by more than five hundred percent; that they filed a reference at the Business Premises Rent Tribunal No. 261 of 2020, and judgment was delivered on 15th July 2022 in favour of the respondent; that they filed a review of the said judgment through an application dated 1st March 2023 for reasons of material non-disclosure and misrepresentation of facts which was dismissed on 6th October 2023; that they filed the instant appeal, and that if stay is not granted the appeal would be rendered nugatory; that they are elderly citizens and rely on their business at the suit property; that the respondent has already instructed auctioneers to execute judgment; that they had not acquiesced to the authority of the respondent as landlord and continued to pay rent in the name of his deceased father, but respondent refused to accept the cheques; that they are not paying rent now but, waiting for an administrator of the deceased's estate; that they are ready to provide bank guarantees for the arrears at the original rent of Kshs.3,000 and 2,400, security of costs totalling as at November 2023 Kshs.348,000 and 282,600, respectively.

2. The application is opposed through the replying affidavit of Mohamed Ali Billel, sworn on 20th November 2023, in which he inter alia deposes that he had served the appellants with notices of increments of rent, which the appellants opposed and filed separate references being BPRT No. 261 and 262 of 2020; that the references were later consolidated into the former, heard and judgment entered on 15th July 2022, increasing the rent payable by the appellants to Kshs. 10,000 and Kshs. 15,000 p.m, with effect from 1st January 2022; that as the appellants were in arrears, he instructed Beyond Auctioneers, through his advocates, to levy distress for rent; the appellants filed an application for review of the orders of 15th July 2022, but the same was dismissed; that this appeal is over the order that dismissed their review application, and being a negative order, it is not capable of being stayed; that the application is an abuse of the court process; that if the court is inclined to grant stay, then it should be conditional on them depositing the arrears of Kshs.456,000 and Kshs.351,000 for the first and second appellant respectively.
3. The learned counsel for the appellants and the respondent filed their submissions dated the 11th March 2024 and 23rd January 2024 respectively, which the court has considered.
4. The following issues are that the court finds relevant for determination of this application:
 - a. Whether the appeal was against the review dismissal order only, and if so, whether an order of stay of execution can issue in respect of the orders of 6th October 2023 inBPRT No. 261 of 2020.
 - b. Whether the appellants' have met the threshold for stay of execution order to issue pending hearing and determination of the appeal.
 - c. Who bears the costs?
5. The court has considered the grounds on the notice of motion, the affidavit evidence, submissions by the learned counsel and come to the following determinations:
 - a. Stay of execution pending appeal is provided for in Order 42 rule 6 of the [Civil Procedure Rules](#) which states as follows:

“

“(1) 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 subrule (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.”

Section 1A(2) of the *Civil Procedure Act* chapter 21 of Laws of Kenya 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 section 1B of the said Act, sets out some of the aims of the said objectives as; “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.”

- b. The memorandum of appeal dated the 26th October 2023, filed by the appellants, indicates at the heading that they were “dissatisfied with the judgment of Hon. Gakuhi Chege in Mombasa BPRT No. 261 of 2020 delivered on 6th October 2023, and appeals against the whole of the said judgement and the ensuing orders and decree on the following grounds:” What follows that are the eleven (11) grounds relied upon, inter alia that the tribunal erred in law and fact in failing to hold that the respondent had not disclosed details on ownership of the suit premises, and that it was under the management of a Wakf Commission; that the tribunal erred in law and fact in finding that the respondent is a landlord, yet there are five siblings of the deceased and other third parties who may claim some rights to the suit property; that the tribunal failed to consider the appellants’ evidence on the respondent’s entitlement to receive rent. The grounds on the memorandum of appeal appear to mainly revolve around the issues of representation of the deceased landlord, and father to the respondent’s estate. None of the parties has attached a death certificate of the said deceased to enable the court verify the death, his name and date of death.
- c. I have perused the record, both manual and on the Case Tracking System, and noted that that application was filed with only one attachment, being the memorandum of appeal dated the 26th October 2023 on 30th October 2023. That on 31st October 2023, the appellants filed copies of the BPRT ruling delivered on 15th July 2022, letters dated 1st October 2020, 24th September 2020, 7th October 2020, 13th January 2021, 20th September 2021, 30th March 2022, 3rd February



2022, 30th August 2022, 2nd November 2021, 18th November 2020, 19th January 2021 & 15th February 2023 between the parties' legal counsel, and five cheques. That what followed was the filling of the appellants' further affidavit sworn on the 11th March 2024, and submissions of even date, both filed on the 14th March 2024. There is no copy of the ruling or judgement, delivered by the tribunal on the 6th October 2023, or a decree thereof that has been attached, to the application. To consider whether or not, to issue the stay of execution order sought, the court would need to confirm the existence and contents of the alleged ruling or judgement delivered on the 6th October 2023, and cannot do so without a copy thereof being availed through the application or affidavits filed subsequent thereto.

- d. The substratum of the instant application, appear to be an appeal from the BPRT decision delivered on the 15th July 2022 in BPRT No. 261 of 2020. The BPRT ruling delivered on the 15th July 2022, that is annexed to the application, is however, not the subject matter of the instant application, even though it has been mentioned in the prayers on the memorandum of appeal which are as follows:
- i. "This appeal be allowed with costs.
 - ii. The judgement issued on the 6th October 2023 and ruling issued on 15th July 2022 and all consequential orders and decree in Mombasa BPRT No. 261 of 2020 be lifted.
 - iii. A declaration that the appellants met the required standards for review as required by law.
 - iv. The respondent be ordered to pay costs of this appeal."

The appellants may need to consider whether the ruling delivered on the 15th July 2022 is subject matter of this appeal, and address the issue of whether or not they were within time, of course while remembering that parties are bound by their pleadings. A prayer that does not flow from the pleadings cannot in law, be granted.

- e. Had the ruling of 15th July 2022 been the subject matter of the application, and had the court been convinced that the appeal was filed within time, the court would have proceeded to consider whether the appellants have met the threshold for issuance of an order of stay of execution sought. In the case of *James Wangalwa & Another versus Agnes Naliaka Cheseto* [2012] eKLR, the court held that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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."



In the case of *RWW versus EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

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.”

The court would also have considered that the appellants have indicated in their affidavits that they are septuagenarians, who have relied on their business at the suit property for the last 37 years, thereby creating goodwill and customer base. The court would also have considered among others the respondent’s acquiescence of a conditional stay upon deposit of the alleged arrears of Kshs.456,000 and Kshs.351,000 for the first and second appellant respectively, and the appellants’ counter offer of bank guarantees of Kshs.348,000 and Kshs.282,000 respectively. That if the court would have been satisfied that the appellants had met the threshold required, a conditional stay would have served the justice of the case. That as parties are bound by their pleadings, the court cannot consider any prayers not flowing from the appellants’ pleadings, and which were not sought in the application. The instant application is evidently about the ruling/judgement of 6th October 2023 that has not been annexed.

- f. On the appellants’ claim that an auctioneer has been instructed to execute the said judgment of 15th July 2022, the court takes judicial notice that execution is a process and not an event, to be carried out by just instructing auctioneers. The purported letter for execution dated 15th February 2023, and its contents are clear to the effect that it is for levying of distress, which is not subject matter of the stay being sought in the instant case. The appellants’ notice of motion dated the 26th October 2023 and filed on the 30th October 2023 is therefore without merit.
 - g. The general rule on costs under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya is that it follows the event unless where there is a good reason to depart from the rule. I find no basis of finding otherwise and the appellants will pay respondent’s costs in the application.
6. The orders that this court commends in view of the conclusions above are as follows:
 - a. That the notice of motion dated 26th October 2023 is without merit and is hereby dismissed.
 - b. That the appellants to pay the respondent’s costs.

It is s ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:



Appellants : Mr. Rotuk

Respondent : No Appearance.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

