



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mochoge v Bundi (Environment and Land Appeal E062 of 2023)  
[2024] KEELC 4749 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4749 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E062 OF 2023**

**J OMANGE, J**

**JUNE 10, 2024**

**BETWEEN**

**SEME MOCHOGE ..... APPELLANT**

**AND**

**DUNCAN BUNDUKI BUNDI ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Honourable Hillary Korir  
(Chairman) delivered on 19th day of December, 2023 in Nairobi Rent  
Restriction Tribunal Rent Restriction Tribunal Case No. E1423 of 2023)*

**RULING**

1. Vide Notice of Motion application dated 20<sup>th</sup> December 2023 the Applicant seeks the following orders:
  - a. That this honourable court be pleased to stay the decision of the Rent restriction tribunal pending hearing and determination of this application this interparties.
  - b. That this honourable court do stay the decision of the learned Tribunal chairman Hilary Korir issued on the 19<sup>th</sup> of December 2023 pending hearing and determination of this appeal.
  - c. That this honourable Tribunal be pleased to issue any other orders in their discretion (sic) to ensure the just and fair application of law to the parties
  - d. Costs of the application
2. In the application the Appellant/Landlord deposed that he had filed an application to the Rent Restriction Tribunal. That the application to levy distress for rent arrears was allowed on 10<sup>th</sup> November, 2023. That the Respondent/ Tenant filed an application dated 19<sup>th</sup> December 2023 which was heard ex parte seeking to set aside the orders of 10<sup>th</sup> November, 2023. That the Tribunal allowed the application setting aside the earlier orders and reinstating the Respondent in the premises.



3. That aggrieved by the decision of the Tribunal, the Appellant/ Landlord has filed this application on grounds that the learned chair erred in law by granting orders not prayed for and failed to consider the issue he had raised in his earlier application that he had signed a lease agreement with a new tenant who is already in occupation of the suit premises.
4. The Appellant states that he is apprehensive that the Respondent will proceed to execute the orders unless stay is granted which execution will render this appeal nugatory which appeal the appellant insists has a high chance of success.
5. In addition, the Appellant states that no prejudice will be occasioned to the Respondent if stay is given as he is willing to abide to whatever conditions the courts issues for the grant of the stay.
6. The Respondent opposed the application vide his replying affidavit dated 12<sup>th</sup> January 2024 in which he deponed that the Appellant obtained the orders of 10<sup>th</sup> November, 2023 through misrepresentation of facts to the court that he was the landlord to the suit property and the Respondent was a tenant which was not the case as the Respondent is the registered owner of the suit property having a certificate of ownership to that effect.
7. He further deponed that the Appellant had not served him with court orders requiring him to pay the alleged rent arrears and giving him the requisite notice. That the application was not served upon him and this is the reason why he did not defend the first application before the Tribunal.
8. He disputes that there is a new tenant in the premises as the alleged tenancy agreement is dated 15<sup>th</sup> November 2023 while the eviction was effected on 11<sup>th</sup> December 2023 arguing that it is impossible for a new tenant to come into possession while he is still in possession.
9. None of the parties complied with the court's direction to file submissions hence the court will determine the application on the basis of the filed documents.
10. The issue for determination is whether the appellant has satisfied the requirements as set forth in Order 42 Rule 6 for the grant of stay which provides;
  - “(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 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.”
11. The first hurdle an applicant must prove is that substantial loss is likely to be incurred if the application for stay is not allowed. Substantial loss has been defined in our jurisprudence.



In the case of *Francis K. Chabari & Another vs Mwarania Gaichura Kairubi [2022]* eKLR, the learned judge in reiterated *Geoffery Muriungi & another v John Rukunga M’imonyoso* to define substantial loss

“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”

12. The Appellant avers that he will suffer substantial loss if the Tribunal order he seeks to appeal against is not stayed. He argues that he has already installed a tenant in the suit premises. This is strenuously disputed by the Respondent who insists that this is not true. Having considered the account by both the Appellant and the Respondent I note that the fact of who is occupation is seriously contested. However even if the Appellant has already installed a tenant in the premises he will not suffer substantial loss as any loss suffered shall be quantifiable and hence can be paid once the appeal is determined should the Respondent lose the appeal.
13. Substantial loss has been described as the cornerstone of grant of stay in the High Court. I therefore find that in the absence of proof of the same, the application for stay must fail. Consequently, the application is dismissed. Costs to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ON 10<sup>TH</sup> DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.**

**J. OMANGE**

**JUDGE**

In the presence of:

Mr. Ahenga for the Applicant

Court Assistant -Steve

