



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kyengo & another v Watatu Development Limited (Civil Appeal  
E006 of 2023) [2024] KEELC 5810 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5810 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
CIVIL APPEAL E006 OF 2023**

**AE DENA, J**

**JULY 30, 2024**

**BETWEEN**

**MICHAEL KYENGO ..... 1<sup>ST</sup> APPELLANT**

**CAROLINE KYENGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WATATU DEVELOPMENT LIMITED ..... RESPONDENT**

**RULING**

1. The application the subject of this ruling is dated 23/01/24. It seeks the following verbatim orders; -
  1. SPENT
  2. That this Honourable court be pleased to enlarge time within which the Appeal was to be filed and be pleased to admit the Appeal out of time.
  3. That the court be pleased to grant an order of stay of execution of the Tribunal Ruling delivered on 11<sup>th</sup> October 2023 pending hearing and determination of the Appeal herein
  4. That prayer No. 3 be granted in the interim
  5. That the costs of this application be provided for.
2. The grounds for the application are that the Respondents filed a suit before the Business Premises Rent Tribunal (herein BPRT) seeking rent arrears and eviction orders. The Applicants filed a preliminary objection thereto stating there was no existing Landlord and Tenant relationship. The court suo moto dismissed the objection and made a final determination of the suit thus condemning the Applicants unheard. There is impending execution against the tenants in the sum of Kshs. 6,851,932/- and costs for premises they have never occupied since 31/09/2017. It is stated that the appeal was filed three (3)



days out of time as the applicants were never informed of the judgement date and the court is invited to consider it as filed within time.

- 3 The application is further supported by the affidavit of Michael Kimea Kyengo sworn on 23/01/24. Reiterating the grounds above it is averred that the orders sought were for arrears for Kshs 5,749,429.28/- and vacant possession of one shop at Diani Shopping Center. That the deponent entered into a lease agreement on 31/10/2011 for 6 years which lapsed on 31/9/17, and which was never renewed thus the Preliminary Objection herein. It is further stated the BPRT set down the matter for ruling on the Preliminary Objection on 4/10/23 but the court did not admit the applicants advocate and who later learnt that the tribunal was not sitting. The advocate learnt of the ruling on 9/11/23 after it was posted on the judiciary portal and having been read on 11/10/23.
- 4 It is further deponed that the applicants advocate paid for a copy of the court order and ruling on 10/11/23 however the same was never supplied. The appeal was nevertheless filed on 14/11/23. That the ruling has been obtained from the Respondents advocate and the Applicants were ready to prepare the Record of Appeal. That the Respondents have threatened to execute vide a letter dated 12/01/24. That the BPRT could not make a determination on the main suit when what was before it was a Preliminary Objection, before hearing the parties. That the applicant is greatly aggrieved by the decision thereof and states that the BPRT created a non-existent complaint since what was filed by the Respondent was a Complaint and not a complaint.
- 5 In support of the averments the applicant attached a copy of the Complaint, Letter of offer, the Preliminary Objection, Cause list for 4/10/23, Ruling, Case tracking information and Letter dated 12/01/24. The applicant prays for the appeal to be admitted out of time and order of stay of execution pending the hearing of the appeal.

## **Response**

- 6 The application is opposed by the Replying Affidavit sworn by Catherine M'Mungania filed on 9/2/24. The application is termed mischievous and devoid of merit and meant to deny the Respondent the chance to realize justice. It is denied that the Tribunal lacked jurisdiction for absence of landlord and tenant relationship. The court is referred to an inspection report undertaken during the proceedings at the BPRT demonstrating the applicants' tools of trade were still in the premises as at 14/4/23 despite non-payment of rent. That the inspection was conducted in the presence of the tenants and or their agents and no objection was raised. That the applicants continued to stay in the suit premises even after expiry of the lease on agreement that they would pay the rental arrears. That no notice to vacate the premises was issued to the land lord neither was vacant possession handed over and by conduct the lease was extended and which is supported by the BPRT ruling. That there is no evidence led to prove that the Applicant indeed vacated the premises.
- 7 It is also averred that the BPRT had jurisdiction to entertain the matter as the same was to levy distress for rent due and owing and recovery of vacant possession. That the applicant failed to appear in court on several occasions and cannot cry foul of the determination. That they had opportunity to respond to the original application seeking rent arrears which they failed to. That equity cannot allow the Applicant to derive advantage from their wrongful acts and omissions. That based on advise of the Respondents advocate the Tribunal is vested with powers to hear matters before it expeditiously. That allowing the application will serve injustice. That the application for stay has been filed out of time and reasonable no grounds have been furnished including sufficient grounds to warrant the orders. That equity only aids the vigilant.



- 8 The Respondent prays that the application is dismissed and or in the alternative should the court be inclined to entertain the application the Appellants be compelled to deposit a security of costs of Kshs 6,851,932.

### **Submissions**

- 9 The application was canvassed by way of written submissions which parties filed and exchanged. The applicants' submissions are dated 18/4/24 and the Respondents 3/5/24. The court has considered the same.

### **Analysis and Determination**

- 10 I have considered the application, the response thereto and the submissions aforementioned. The issues that commend determination is whether the Appeal should be deemed as filed within time and whether the applicant has met the prerequisite for grant of stay of execution pending appeal.

- 11 The application is brought under the provisions of Section 1A, 1B, 3B and 79H of the Civil Procedure Act and Rule 42 (6) of the Civil Procedure Rules. Section 79H does not exist. However, section 79G of the Civil Procedure Act is on Time for filing appeals from subordinate court and provides that; -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

- 12 But before I commence a discussion on the substantive issues a preliminary point has been raised on the competency of these proceedings as commenced by way of Notice Motion. Relying on the case of Evans Kiptoo Vs. Reinhard Omwonyo Omwoyo (2021) where the court agreed with the dictum of Emukule J in Gerald M'Limbine Vs. Joseph Kangangi (2008) eKLR that the proviso to Section 79G requires an applicant to first file a substantive appeal and at the same time seek the courts leave for its admission out of time since a court cannot admit a non-existent appeal.

- 12 Chitembwe J (as he then was) faced with a similar objection in Charles N. Ngugi v ASL Credit Limited [2022] eKLR stated in relation to the same provision thus; -

‘From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In MUGO & OTHERS VS. WANJIRU & ANOR [1970] EA 482 the court stated as follows:-

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.” (Emphasis is mine).



13. The learned judge further held that

‘... nevertheless, I am inclined to allow the applicant leave to file his intended appeal noting that two (2) months is not inordinate. In my view whether one files the appeal first and seeks extension of time or files the application for extension of time contemporaneously with the Memorandum of appeal amounts to the same thing. The appeal cannot be heard until time is enlarged. These are just semantics which do not affect the core issue of extending time. Section 79G permits the extension of time to file an appeal. Once the delay is convincingly explained, then time ought to be enlarged’. (Emphasis is mine).

13 The power to enlarge time under Section 79G herein is discretionary. It is now established that discretion must be exercised judiciously. The Supreme court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No 16 of 2014 (2014) eKLR reiterated the court will consider whether the explanation given for any delay is reasonable and credible. That there must also exist extenuating circumstances to enable the court exercise its unfettered jurisdiction in favour of an applicant. Inordinate delay cannot thus attract favourable exercise of discretion.

14 Applying the above guidance to the facts of this case the court proceeds to analyse if the reasons advanced for the delay are reasonable and sincere. The explanation is that the impugned ruling was to be delivered on 4<sup>th</sup> October 2023 when the tribunal was not sitting. It was later posted on the Judicial portal on 9<sup>th</sup> November 2023 that the Ruling was delivered on 11<sup>th</sup> October 2023 and a day later on 10<sup>th</sup> November the Applicants counsel applied to be supplied with the proceedings and judgment by making the requisite payment. For me as long as the court did not seat on 4/10/23 when the ruling was scheduled to be delivered, parties were entitled to be notified of the next date when the ruling would be scheduled. No evidence was presented by the Respondent to show that such notice was issued and counsel for the Applicant failed to attend court. It is plausible then that Counsel was not aware of the scheduled date of 11/10/23 when the ruling was delivered.

15 Is there delay on the part of the appellant and can the same be termed as inordinate? I have noted from the file in respect of these proceedings the Applicant has filed together with the Notice of motion, Memorandum of Appeal dated 9/11/23 lodged at the Registry Kwale on 14/11/23 which I agree is three days out of time. I think the operating word here is ‘inordinate’. From the circumstances of this case, it is my view that a three days delay cannot be rendered inordinate.

16 This court agrees and is persuaded by the above dictum of Chitembwe J (supra). As long as the law permits that time may be enlarged, this is what is paramount. Moreover, the court is enjoined to render substantive justice. This court therefore makes a finding that the application is properly before this court.

17 Based on the foregoing discussion this court makes a finding that the Applicant has met the threshold for enlargement of time.

18 Has the applicant met the prerequisite for grant of orders of stay of execution pending appeal? The provisions of Order 42 rule 6(2) of the Civil Procedure Rules is on stay of execution and stipulate; -

“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.

- 19 Arising from the law the main criteria is that an applicant must demonstrate to the court that they will suffer substantial loss in the absence of an order for stay execution - see the Court of Appeal pronouncement in *Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018* that ‘Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. It is submitted by the Respondent that there is no evidence that they diligently offset the outstanding arrears and handed over vacant possession upon termination of the tenancy agreement. It is contended that the court should not assist a party who deliberately seeks to obstruct justice and that it will cause the Respondent injustice.
- 21 The decree herein is monetary. The court has not been shown by the Applicant that should the Respondent be paid and the appeal succeeds the Respondent would not be able to make good the money. In any case it is not disputed that the of suit premises belong to the Respondent and therefore the issue of means may not arise. I’m persuaded that the Applicants have not demonstrated the substantial loss they will suffer should the orders of stay not be granted.
- 22 But having made the above finding, I would still be inclined to consider the application from a perspective of the right to be heard. I choose this to avoid the danger of this court getting into the merits of the Tribunals decision. Prima facie the Defendant was not heard by the Tribunal on the substantive merits of the case. Indeed, this court appreciates the need to balance the interest of both the parties but this being largely a monetary decree since the Applicant denies occupation, to me a balance can be achieved by way of security. I will therefore proceed to buttress this point and in doing so I will address the requirement for security for the due performance the decree or order.
- 23 The court in the decided case of *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu CIVIL APPEAL NO. E030 OF 2021* EKLK in spite of finding that substantial loss had not been demonstrated the learned judge upon an analysis of the rationale and objectives for the requirement for security nevertheless proceeded to grant an order on the basis of security for costs. The judge stated as follows; -

Security of costs.

23. The applicant ought to satisfy the condition of security. In the persuasive decision of the court observed: -

“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 a 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 decree in order to enjoy the fruits of his judgment in case the appeal falls. 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 judgment involves a money decree. The court would order for the release of 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.”

24. Similarly in *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:- “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 the 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.”
  25. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, in their submissions, the applicants stated that they are willing to offer security if called upon by this Honourable Court to do so. The respondent on the other hand prays that if stay is granted, the court should order the applicants to deposit the decretal sum in a joint interest earning account in the names of both parties.
  26. ....
  27. It is my considered view that on a balance of interests, since the applicants are willing to deposit the decretal sum and the respondent is amenable to the same being deposited. I am convinced that the fair balance would be for the applicants to deposit the decretal amount as this court may deem fit. ‘Emphasis added’.
- 24 Applying the above to the present application it is noteworthy that the Applicant has not offered any security. But on the other hand, it has been submitted on behalf of the Respondent that should the court be inclined to grant the orders of stay then the decretal sum plus costs be deposited with the Respondents advocates as stakeholder or in a joint account held by the advocates of the parties.
- 25 The upshot of the foregoing is that this court finds that the Applicants are entitled to pursue their appeal. The court hereby allows the application dated 23/01/24 in the following terms: -
1. Leave is granted to the applicant to file appeal out of time against the Ruling delivered in NAIROBI BPRT/E270/2022
  2. The applicant to file and serve his Memorandum of Appeal and Record of Appeal within fourteen (14) days hereof.
  3. Execution of the Judgment/decreed in NAIROBI BPRT/E270/2022 is hereby stayed pending the hearing and determination of the appeal.
  4. The applicant to deposit with the court a Bank Guarantee for the sum of Kshs.6,951,932 within sixty (45) days hereof.
  5. In default of complying with order number four (4), the orders staying execution shall lapse and the respondent shall be at liberty to execute.



6. That the applicant will meet the costs of this application
7. Orders accordingly

**RULING DATED SIGNED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JULY 2024.**

.....

**A.E DENA**

**JUDGE.**

Mr. Kenzi for Applicants

Mr. Otieno holding Brief for Mr. Obonyo for Respondent

Mr. Daniel Disii - Court Assistant

