



Ahmed v Janpath Holdings Limited (Environment and Land Appeal E005 of 2024) [2024] KEELC 5426 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E005 OF 2024**

NA MATHEKA, J

JULY 24, 2024

BETWEEN

ABDI IBRAHIM AHMED APPELLANT

AND

JANPATH HOLDINGS LIMITED RESPONDENT

*(Ruling delivered on 17th May 2024 Delivered by
Hon A. Muma in BPRT Cage No. E 034 of 2024)*

RULING

1. The application is dated 29th May 2024 and is brought under Order 22 Rule 25 Order 2 Rule and Procedure Rules the Civil Procedure. Section IA, IB and 3A of the Civil Procedure Act Cap 21 laws seeking the following orders;
 1. That on the grounds set forth in the Certificate of Urgency, this Application be certified urgent and due to the circumstances of this case, service of the same be dispensed with and it be heard *ex parte* in the first instance for purposes of granting orders hereunder.
 2. That pending the hearing and determination of this application interparties, this Honourable Court be pleased to grant a temporary stay of the Ruling delivered on 17th May 2024 Delivered by Hon A. Muma in BPRT Cage No. E 034 of 2024 between Holdings Limited v Abdi Ibrahim Ahmed, and any consequential Orders or Decree therefrom.
 3. That the Execution of the Ruling issued on 17th May 2024 by Hon A. Muma in BPRT Case No. E 034 of 2024 between Janpath Holdings Limited v Abdi Ibrahim Ahmed, and all consequential orders and/or Decree arising therefrom be stayed pending the hearing and determination of the Appeal.
 4. Costs of this application be provided for.



2. It is based on the annexed affidavit of Abdi Ibrahim Ahmed and on the grounds that although no notice had been issued to the landlord and despite having itself written letters to the tenant of 7th August 2023 and 28th November 2023 the Landlord/Respondent filed a Reference at the Business Premises Rent against the Tenant contrary to the procedure provided for under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. That upon filing of the Reference and the Notice of both of 19th January 2024, the Appellant/Tenant raised a Point of Preliminary Objection where he challenged the legality of the notices by the landlord through letters aforementioned for being defective on grounds that they both failed to conform to the *Landlord and Tenant (Shops, Hotels and Establishments) Act*. The tenant also challenged the Landlord's Reference filed for being premature, the same having been filed prior to the notices or any of the notice contemplated under the Act having been issued by the either the tenant and or the landlord. That in the Ruling delivered on 17th May 2024, the Honourable Member of the Tribunal when dealing with the issue as to whether the Landlords Notice of termination were valid, agreed with the tenant that indeed the said notices were not compliant with the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. That despite having rightfully having held that the landlords notices were as submitted by the tenant, the Honourable Member of the Tribunal proceeded to fault the tenant for not having complied with an otherwise defective notice and thus issued the orders. That the tenant is strongly aggrieved by the said decision of the Honourable Member and has preferred an Appeal to this Honourable Court challenging the said decision. That the Tenant has already filed a Memorandum of Appeal dated 28th May 2024 and filed on the same date wherein he prays for among other orders, the reversal of the entire decision of the Honourable Member of the as well as the upholding of his Preliminary Objection which will have the consequences of dismissing the Reference in its entirety for not being compliant with the mandatory provisions of Cap 301.
3. This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* as follows;

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“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.”
4. The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:



1. Substantial loss may result to the applicant unless the order is made.
 2. The application has been made without unreasonable delay, and
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
5. The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus;

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

6. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

7. In the case of *Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

8. We are further guided by the court’s decision in *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”



9. On perusal of the court record I find that the tribunal delivered its ruling on the 17th May 2024. That the Appellant being aggrieved and dissatisfied with the ruling filed an appeal herein vide a Memorandum of Appeal on the Court record. This application for stay was filed in court on the 29th May 2024. The Applicant has not been indolent and is not guilty of laches. the Appellant/Tenant raised a Point of Preliminary Objection where he challenged the legality of the notices by the landlord through letters aforementioned for being defective on grounds that they both failed to conform to the *Landlord and Tenant (Shops, Hotels and Establishments) Act*. I find that he Ruling delivered on 17th May 2024, the Honourable Member of the Tribunal when dealing with the issue as to whether the Landlords Notice of termination were valid, agreed with the tenant that indeed the said notices were not compliant with the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
10. The tenant is carrying on a warehousing business the premises and I find that if a stay of execution of the Judgment is not granted, Landlord/Respondent may proceed to have the orders executed against the Applicant thereby occasioning substantial loss to the Applicant and will lead to the Applicant's being evicted. The appeal will also be rendered nugatory and will be a mere academic exercise and the Appellant stands to suffer irreparable damage if the orders sought herein are not granted. I find that the applicant has fulfilled the above grounds mentioned to enable me grant the stay. I find the application dated 29th May 2024 is merited and I order that the status quo be maintained pending the hearing and determination of the appeal. Costs of this application to be in the cause.
11. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

