Picollo Mondo Enterprises Limited v Pes (Environment and Land Appeal E004 of 2024) [2024] KEELC 6204 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6204 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E004 OF 2024

NA MATHEKA, J

SEPTEMBER 25, 2024

BETWEEN

PICOLLO MONDO ENTERPRISES LIMITED .... APPELLANT

AND

PASQUALE PES .... RESPONDENT

RULING

1. The application is dated 9th May 2024 and is brought under Order 22 Rule 25, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 of Laws of Kenya 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 exparte in the first instance for purposes of granting orders hereunder.
    2. That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to grant a temporary stay of execution of the Ruling dated of 9th April 2024, and any consequential Orders therefrom.
    3. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to grant a temporary stay of execution of the Ruling delivered on 9th April 2024 and all consequential orders arising therefrom.
    4. That costs of this application be provided for.
2. It is based on the annexed affidavit of Yusuf Mohamed Ebrahim and on the grounds that the Applicant is dissatisfied with the Ruling of the Honorable Member of the Business Premises and Rent Tribunal delivered on the 9th April 2024. That Applicant has prepared and filed an Appeal against the aforesaid Ruling before this Court. That the Applicant runs and operates a Restaurant along Kilifi Creek known

as Nautilus Restaurant at a premise that is owned by the Respondent on a tenancy basis paying monthly rent as when it falls due to the Respondent. That while dealing with an application to review the decision to have the Reference proceed by way of documents only as opposed to viva voce evidence considering that the issues were highly contentious, in its Ruling dated 9th April 2024 dismissed the motion seeking for hearing of the Reference by viva voce evidence but then proceed, within the said Ruling, to determine the Reference whereby he allowed the Landlord Notice to Terminate the tenancy.

3. That the Reference was highly contentious and as such, the issues therein could only be comprehensively determined through oral evidence of the parties and could not by properly determined by way of document only as the Respondent sought to terminate the tenancy on grounds that he allegedly required to demolish the demised premises. That the Reference has now been determined without the active participation of the tenant who only sought to review the court directions and have the matter determined not by documents but then the tribunal proceeded to also determine the reference in the Ruling reserved for the application. That the Tenant has been condemned unheard, having not been granted an opportunity to ventilate its claim as required by law as the directions were issued not by consent but after an ex parte application by the landlord. That if a stay of execution of the Ruling is not granted, Landlord/Respondent will proceed to have the orders executed against the Applicant and have her evicted from her business premises thereby occasioning substantial loss to the Applicant leading to the complete closure of her business. That if the stay is not granted and in the very likely event that the Respondent proceeds to execute the Ruling, the appeal will be rendered nugatory and will be a mere academic exercise.

4. The Respondent stated that they entered into a Tenant and Landlord agreement on the July 2017 with the Appellant in respect to the suit premises being Land N. 12003/5 which was to be occupied by the Tenant for a hotel and catering establishment. The subject Agreement was for a period of 5 years 3 months and lapsed on 30th September 2022. That since the lapse of the tenancy agreement on 30th September 2022 the Appellant has remained in occupation of the subject premises and dragged him through continuous litigation; this being BPRT No. E230 of BPRT No. 004 OE 2023 and instant suit ELC Appeal E.004 of 2024. That BPRT No. E230 of 2022 was concluded in 2022 with the with the Tribunal directing that he shall be at liberty to issue a proper notice of termination notice and use lawful means to recover any tent arrears under Cap. 301 Laws of Kenya. That over the past couple of years, the Appellant has on various occasions written to him requesting repairs to be undertaken on the suit premises. That upon various inspections on the suit premises and verbal cautions, the health and safer, officials from the County Government of Kilifi issued a written notice to the Tenant, dated the 7th February 2023 and which notice was served upon him as the Landlord to the effect that within 14 days from the service of the notice he ought to abate the and prevent recurrence of the same hence necessitating the need for termination notice and vacant possession.

5. That despite caution and directions by the health and safety officials from the County Government of Kilifi, the Appellant has denied the him vacant possession to remedy and abate the nuisance and prevent recurrence of the same as directed on 7th February 2023. That despite the Appellant reluctance in attending court and to prosecute its reference necessitating Advocates on record to do all the follow up in registries to obey court dates, most of which the Appellant and their Advocates did not attend the matter BPRT No. E.004 of 2023 was heard and a determination made before Hon. Patricia May. That the Business Premises Rent Tribunal after having the benefit of conduct of the parties during the proceedings and their respective pleadings on record established in Page 3 paragraph 7 of the Ruling considering the age of the matter and the fact that the Appellant herein had contributed to the delay the hearing of the reference. That the Tribunal on page 5-6 paragraph 15 the Ruling delivered on April 2024, after hearing the subject reference was convinced that the subject notice issued was proper and that renovations were necessary on the suit premises.

6. I have read and considered the application and the submissions herein. The appropriate provision for stay pending appeal can be found in order 42 (6) (1) of the civil procedure rules which states 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."

7. Sub rule 2 says as follows:

> 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."

8. 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) vs 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."

9. Substantial loss was described in Jason Ngumba Kagu & 2 Others vs Intra Africa Assurance Co. Limited (2014) eKLR where it was held that:

> The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory", the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether

by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

10. In *Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* the court observed that;

> …For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss…”

11. The Appellant stated that they have been condemned unheard, having not been granted an opportunity to ventilate its claim as required by law as the directions were issued not by consent but after an ex parte application by the landlord. That if a stay of execution of the Ruling is not granted, Landlord/Respondent will proceed to have the orders executed against the Applicant and have her evicted from her business premises thereby occasioning substantial loss to the Applicant leading to the complete closure of her business. The Respondent in their replying affidavit stated that pursuant to provisions of Section 4(2) of the Landlord Tenant (shops, hotels and catering establishments) Act, Chapter 301 and owing to the continuous health and safety directions of the County Government of Kilifi, he issued to the tenant a notice terminating the tenancy dated 22nd December 2022. It is clear that the premises had become a danger to the public and I find that substantial loss would be to the public and not the Appellant.

12. Warsame, J (as he then was) held as follows in Samvir Trustee Limited case as follows:

> …The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. …At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

13. The arguments by counsel for the appellant are unsatisfactory in the court’s opinion, however as the learned judge above said “…yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement…” and I find that the main reason for the appeal is that the reference was highly contentious and as such, the issues therein could only be comprehensively determined through oral evidence of the parties and could not by properly determined by way of document only as the Respondent sought to terminate the tenancy on grounds that he allegedly required to demolish the demised premises. I have perused the said ruling where the

Chair of the tribunal found that the termination notice was according to section 7 of the Act which affirm the right of the landlord to undertake renovations and/or repairs to their property and that the notice was proper. The Appellants have not given any evidence to controvert the contention that there was need of repairs and insists that they needed to give viva voce evidence. I do not see an arguable appeal. I find that the applicant has not fulfilled the above grounds mentioned to enable me grant the stay. I find the application dated 9th May 2024 is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE