



**Okatch v Birgen (Civil Appeal E032 of 2024)
[2024] KEELC 14196 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 14196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CIVIL APPEAL E032 OF 2024
JM ONYANGO, J
OCTOBER 31, 2024**

BETWEEN

JULIUS ODHIAMBO OKATCH APPLICANT

AND

WILSON KIPTOO BIRGEN RESPONDENT

RULING

1. The Application coming for consideration in this Ruling is the Appellant/Applicant's Notice of Motion dated 15th July, 2024 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That there be temporary orders of stay of proceedings in respect to Eldoret BPRT Cause No. E079 of 2023 pending hearing and determination of the Appeal herein.
 - d. The Respondent do pay costs of this Application.
2. The Application is premised on the grounds on the face of it and supported by the Applicant's Affidavit of even date, where he deponed that he was a tenant in the Respondent's premises on land parcel No. Eldoret Municipality Block 2/32 (Langas). Vide an Application dated 9th January, 2024 the Respondent sought orders for distress over a disputed amount of Kshs.160,000/- relating to the said premises. He opposed the said Application on among other grounds, that he had already paid the disputed arrears and the Applicant was not entitled to be paid any rent by him. He averred that he had at the time vacated the premises and handed over vacant possession of the rented premises.
3. The Applicant then filed a preliminary objection touching on the jurisdiction of the Tribunal, but the same was dismissed vide a ruling delivered on 14th June, 2024, which ruling is the subject of this Appeal.



The BPRT Cause was then listed for mention on 18th July, 2024 to confirm filing of submissions and statement of accounts and to take a ruling date.

4. The Applicant deponed that he has through his advocate requested for a copy of the ruling but none has been supplied. That unless the proceedings are stayed, the Tribunal will proceed and issue further orders rendering this Appeal nugatory and these proceedings a nullity. Further, that since the Appeal is grounded on the issue of jurisdiction, if the proceedings in the Tribunal are allowed to go on and the Appeal herein succeeds, the Tribunal would have proceeded on a nullity.
5. He further contends that it is necessary to stay the proceedings in the Tribunal pending the outcome of the Appeal. He argued that his Appeal raises triable issues and that the Application had been made timeously and in good faith. He also averred that no prejudice will be occasioned to the Respondent.
6. The Respondent opposed the Application through his Replying Affidavit sworn 5th August, 2024. It was his deposition that there was no justification for seeking a stay of proceedings. He deponed that the Tribunal investigated the matter and even visited the premises in both the Parties' presence and that of their respective Counsel; and confirmed that the Applicant is still a tenant on the premises and still operates his business therefrom to date. That the Tribunal has jurisdiction to determine whether there is a tenancy relationship or not. He indicated that the Preliminary Objection was dismissed after the site visit which revealed that the Applicant was still on the premises.
7. It is the Respondent's case that this court cannot determine in this Appeal the issue of the tenancy hence the need for the proceedings before the Tribunal to go on, evidence tendered and a decision made. Further, that the issue of the whether the Applicant is on the premises is one of fact and cannot be the basis of a PO. He urged that he will be prejudiced if the Applicant does not pay rent on account of the stay of proceedings. He further proposed that the rent accrued between March, 2023 and 31st August, 2024 less Kshs.60,000/- be deposited into an account to be operated by the Parties' Counsel.

Applicant's Submissions

8. The Application was canvassed by way of written submissions. The Applicant's Submissions are dated 2nd October, 2024. Counsel submitted that the principles for stay of execution and those for stay of proceedings are the same and were laid out in *Butt vs The Rent Restriction Tribunal* (CA Civil Application No. NAI 16 of 1979). Counsel submitted that stay of proceedings pending Appeal is granted to avoid rendering the Appeal nugatory should it succeed (*Ndoli Hyness Henry & Others vs County Government of Vihiga*). Counsel also relied on the case of *Edwin Harold Dayan Dande & Others vs Director of Public Prosecutions & 2 Others* where it was held that an order of stay will be granted where: the Appeal/intended Appeal is arguable and not frivolous; that the Appeal/intended Appeal will be rendered nugatory unless the order is granted; and, that it is in the public interest that the order of stay be granted.
9. Counsel added other considerations to wit; whether the Application is made without unreasonable delay, whether the Applicant had demonstrated that he would suffer substantial loss if stay is not granted and the provision of security. In support of this argument he relied on *Mocha Hotel Ltd vs Kwanza Estates Ltd* (Kisii ELRC No. 14 of 2022). He argued that the Application was made without unreasonable delay (*Nteto Ole Karia vs Musua Ole Keshe, Narok ELCLA No. E006 of 2023*). On security, he relied on the *Mocha Hotel Ltd Case* (Supra) for the argument that there is no place for provision of security for the due performance of the decree in an application for stay of proceedings. Counsel argued that if the order is not granted, the Tribunal may make orders for the payment of money in form of rent, thus the Applicant is likely to suffer substantial loss.



10. Counsel reiterated that the Appeal is on jurisdiction, on which any court finds its strength and footing. That once it is challenged, the issue must be dealt with first before the matter can be canvassed. Counsel urged that should the court find that the Tribunal has no jurisdiction any proceedings or orders issued will be a nullity rendering them a waste of judicial time and resources. Counsel submitted that the Applicant has met all the conditions necessary for the court to exercise its jurisdiction in his favour and prayed that this court halts the proceedings in Eldoret BPRT E079 of 2023 pending determination of the issue of the Tribunal's jurisdiction in this Appeal.

Respondent's Submissions

11. Counsel for the Respondent mainly submitted on the facts that led to the dismissal of the Preliminary Objection in the Tribunal and maintained that the applicant was fraudulent in his actions. It was his submission that the applicant was still in occupation of the leased premises and that the orders sought in this application, if granted, would sanction his continued occupation of the premises without payment of rent and delay the determination of the matter.
12. It was his assertion that the appeal filed seeks to have this court ascertain whether or not there exists a landlord - tenant relationship between the parties when in fact the Tribunal case, touching on the same issue is yet to be heard and finally determined.
13. He further submitted that the applicant had not satisfactorily met the required threshold for the grant of orders of stay of proceedings as outlined in the case of Kenya Wildlife Services vs James Mutei [2019] eKLR and in Global Tours & Travel Limited and maintained that no evidence had been adduced by the applicant to warrant the exercise of the court's discretion in allowing the application in his favor. That there has been no demonstration by the applicant that the appeal would be rendered nugatory. He urged the court to dismiss the application.

Analysis and Determination

14. I have carefully considered the Notice of Motion Application dated 15th July 2024, the Replying Affidavit dated 5th August 2024 and rival submissions and, in my view, the sole issue arising for determination is whether the Applicant has met the conditions for stay of proceedings pending appeal.
15. The Applicants seeks an order for stay of proceedings in respect to Eldoret BPRT Cause No. E079 of 2023; it is his claim that he filed a Notice of Preliminary Objection in the BPRT, challenging the jurisdiction of the Tribunal to determine the claim filed before it. The Preliminary Objection was dismissed and aggrieved by the said decision, he has since lodged an appeal to challenge the said decision. It is his contention that unless the orders sought herein are granted, the appeal stands to be rendered a nugatory and a waste of judicial time especially since the same touched on the issue of jurisdiction.
16. The Respondent on his part contends that the application did not provide a justification for the stay of proceedings; he averred that this court could not determine the issue of the tenancy since the same was still pending final determination in the trial court hence the need for the proceedings before the Tribunal to proceed on merit.
17. In the case of William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR, a 5-judge Bench of the High Court, while addressing the issue of stay of proceedings, laid down the following six principles that should govern the grant of an order for stay of proceedings:-
 - a. First, there must be an appeal pending before the higher Court;



- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
18. I will therefore proceed to determine whether the applicant has met each of the outlined principle to the required standard and establish whether this court can exercise its discretion in his favor by allowing the application.
19. The first and second grounds are not in dispute; the applicant filed a Memorandum of Appeal dated 26th June, 2024 seeking to set aside the decision of the BPR Tribunal issued on the 14/6/2024.
20. Grounds six has also been sufficiently proved; the ruling and order of the BPRT was issued on 14th June, 2024, the memorandum of appeal was filed on 26/6/2024 while the instant application was filed on 15th July, 2024, within a month after the decision was issued. I find the period of 30 days to be reasonable and without delay.
21. What however appears to be in contention are principles three, four and five as laid out in the aforementioned case. Whether the applicant has demonstrated that the appeal would be rendered nugatory unless the orders sought are granted and whether there exist exceptional circumstances which make the orders of stay of proceedings warranted as opposed to having the case heard to conclusion.
22. I have critically looked at the Memorandum of Appeal; and while this court is mindful not to delve into the merits thereof at this interlocutory stage, I must state that the same majorly touched on the issue of the existence of landlord-tenant relationship. It is imperative to point out that the instant appeal arose from the dismissal of a Preliminary Objection which was challenging the jurisdiction of the BPRT in determining the claim before it. There has however not been any sufficient demonstration and reasonable explanation on the issue of jurisdiction. From the material before me, the alleged issue which allegedly ousted the jurisdiction of the Tribunal still touches on the tenancy relationship.
23. The claim before the Tribunal is still pending final determination; thus, this court cannot seek to interrogate issues of landlord-tenant relationship at the appellate stage, when the same has not been determined by the trial court.
24. Further, the Applicant has not established the existence of any exceptional circumstances which make stay of proceedings warranted. He has not given a nexus on the issue of jurisdiction, in both the application and the Memorandum of Appeal, and the prejudice likely to be suffered unless the



proceedings are stayed. As stated hereinbefore, the Memorandum of Appeal is marred with issues touching on the tenancy relationship and whether the same exists or not. These in my opinion, are not exceptional circumstances particularly when the matter has not yet been determined by the trial court.

25. In view of the foregoing, it is my considered finding that the applicant has not met all the requirements for stay of proceedings to warrant the grant of the orders sought.
26. In the premises, it is the finding of this court that the Application dated 15th July, 2024 is not merited and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF OCTOBER, 2024.

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J. M. ONYANGO

JUDGE

In the presence of;

1. Mr. Momanyi for the Respondent
2. No appearance for the Appellant/Applicant

Court Assistant: Brian

