



Mwirabua t/a Richdad Enterprises v Magomano Trading Company Limited (Environment and Land Appeal E063 of 2024) [2024] KEELC 7064 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E063 OF 2024**

**JO MBOYA, J
OCTOBER 24, 2024**

BETWEEN

**KAMUNDEH KIMATHI MWIRABUA T/A RICHIDAD
ENTERPRISES APPELLANT**

AND

MAGOMANO TRADING COMPANY LIMITED RESPONDENT

RULING

Introduction And Background:

1. The Appellant/Applicant herein filed proceedings before the Business Premises Rent Tribunal and wherein the Appellant/Applicant sought various reliefs as against the Respondent/Landlord. Subsequently, the proceedings before the Tribunal were disposed of vide Ruling rendered on the 19th of April 2024.
2. Pursuant to the Ruling under reference, the Tribunal proceeded to and directed that the Appellant/applicant does pay rent arrears in the sum of Kshs.1,478,120/= only plus costs assessed at Kshs.50,000/= only.
3. Arising from the Ruling by the Tribunal, the Appellant/Applicant felt aggrieved and thus filed the instant appeal. Furthermore, the Appellant/Applicant also filed the application dated the 8th of May 2024 and wherein same seeks the following reliefs:-
 - a. That Application herein be certified as urgent and heard ex-parte in the first instance.
 - b. That the Honourable court be pleased to issue orders staying the execution of the Ruling delivered by the Business Premises Rent Tribunal on 19th April 2024, pending the hearing and determination of the appeal herein.
 - c. That the costs of this Application be in the cause.



4. The application dated the 8th of May 2024 is anchored on various grounds which have been enumerated in the body thereof. In addition the application is supported by the affidavit of the Appellant/Applicant sworn on even date, namely, the 8th of May 2024.
5. Upon being served with the application the Respondent filed Grounds of opposition dated the 2nd of October 2024 and a replying affidavit sworn by one James Muriithi on even date. Besides, the deponent of the replying affidavit has also annexed two [2] sets of documents including a copy of the Ruling of the Tribunal.
6. The application by the Applicant herein was initially placed before the Principal Judge, Environment and Land Court [Hon. Oscar Angote, Judge] who proceeded to and certified the application as urgent. Furthermore, the Principal Judge thereafter granted an order of stay of execution, albeit on condition that the Appellant/applicant was to deposit in court the sum of Kshs.1,500,000/= only within seven (7) days.
7. Be that as it may, the Appellant/Applicant failed to comply with the conditions attached to the interim orders. In any event, the Appellant/applicant proceeded to and filed yet another application dated the 15th of May 2024 and wherein same sought for variation of the condition attached to the interim order of stay.
8. Notwithstanding the foregoing, the application dated the 8th of May 2024 was thereafter remitted to this court for hearing and disposal. In this regard, the application came up for hearing on the 11th of July 2024, whereupon the Advocates for the parties covenanted to canvass the application by way of written submissions.
9. Pursuant to the directions, the Appellant/Applicant filed written submissions and wherein same [Applicant] adopted the grounds contained at the foot of the application and reiterated the contents of the supporting affidavit. On the other hand the Respondent also filed written submission dated the 10th of October 2024.
10. For coherence, both sets of written submission form part of the record of the court.

Parties' Submissions:

Applicant's Submissions:

11. The Applicant herein filed written submission and in respect of which, same [Applicant] has adopted the grounds contained at the foot of the application as well as the contents of the supporting affidavit. In addition, the Applicant has highlighted and canvassed three [3] salient issues for consideration by the court.
12. Firstly, learned counsel for the Applicant has submitted that the Tribunal rendered a Ruling on the 19th of April 2024 and wherein the Tribunal ordered and directed the Applicant to pay the sum of Kshs.1,478,120/= only on account of rent arrears plus Kshs.50,000/= only on account of costs. Besides, it has been contended that upon the delivery of the said Ruling, the Applicant felt aggrieved and/or dissatisfied, culminating into the filing of the current appeal.
13. Furthermore, learned counsel for the Applicant has submitted that the Respondent herein is likely to commence execution proceedings towards recovering the decretal sum. In this regard, learned counsel for the Applicant has submitted that the execution by the Respondent, if allowed to proceed, shall occasion substantial loss to the Applicant.



14. Secondly, learned counsel for the Applicant has submitted that if the decretal sum is paid out to and in favour of the Respondent, then the Applicant herein shall not be able to recover the monies from the Respondent. Consequently, learned counsel for the Applicant has posited that the loss that is likely to arise or accrue is substantial and thus warranting an order of stay.
15. Thirdly, learned counsel for the Applicant has submitted that the Applicant herein is ready and willing to abide by and/or comply with any conditions as pertains to security that the court may deem just and expedient to order.
16. Arising from the foregoing submissions, learned counsel for the Applicant has thus implored the court to find and hold that the application beforehand, which essentially seek[s] stay of execution, is meritorious and thus ought to be allowed.

Respondent's Submissions:

17. The respondent filed written submission dated the 10th of October 2024 and wherein the Respondent has adopted the averments contained in the body of the replying affidavit and thereafter highlighted three [3] salient issues for consideration and determination by the court.
18. First and foremost, learned counsel for the Respondent has submitted that the Applicant herein entered into a tenancy agreement with the Respondent and thereafter same took possession of the demised premises. Furthermore, it was contended that upon taking possession of the demised premises, the Applicant herein only paid rent for one [1] month and thereafter lapsed into default.
19. On the other hand, learned counsel for the Respondent has submitted that even though the Applicant lapsed into default, the Applicant herein continued to take rents from various sub-tenants, who had been brought onto the demised premises by the Applicant.
20. Arising from the foregoing, it has been submitted that the applicant herein accrued and accumulated rent arrears amounting to more than Kshs.1,900,000/= only. However, learned counsel for the Respondent has submitted that when the Respondent sought to recover the rent arrears, the Applicant proceeded to the Tribunal seeking to prevent the levying of distress as against himself.
21. Nevertheless, it has been submitted that the Applicant herein remains in rent arrears and thus the Applicant has not approached the court with clean hands. In this regard, learned counsel for the Respondent has submitted that having come to court with unclean hands, the Applicant is not entitled to partake of and/or benefit from the equitable discretion of the court.
22. Secondly, learned counsel for the Respondent has submitted that the orders of the Tribunal directed the Applicant to pay the sum of Kshs.1,478,120/= only on account of rent arrears and cost of Kshs.50,000/= only. In this regard, it has been contended that the Ruling of the Tribunal directed payment of monies and hence in the event the Applicant succeeds in the appeal, the Respondent would be able to refund the monies or such portion, as may be directed by the court.
23. In the premises, learned counsel for the Respondent has submitted that the Applicant herein has neither established nor demonstrated that same [Applicant] shall be disposed to suffer any substantial loss. To the contrary, it has been contended that the loss if any, that the Applicant may suffer is one that is quantifiable and compensable in monetary terms.
24. Thirdly, learned counsel for the Respondent has submitted that upon filing the application dated the 8th of May 2024, the court granted an interim stay of execution albeit on terms. In this regard, it has been posited that the Applicant was ordered to deposit the sum of Kshs.1,500,000/= only in court within seven (7) days.



25. Notwithstanding the terms of the order, it has been submitted that the Applicant herein failed and/or neglected to comply. Instructively, learned counsel for the Respondent has contended that the Applicant has failed to comply with the terms of the court order to date. In this respect, the Respondent has posited that the Applicant is therefore undeserving of any further accommodation.
26. To buttress the submissions that the Applicant has neither established nor demonstrated that same shall suffer substantial loss, learned counsel for the Respondent has cited and referenced the decision in the case of James Wangalwa Vs Agnes Cheseto Naliaka [2012] eKLR.
27. In a nutshell, learned counsel for the Respondent has contended that the application by the Applicant does not meet the threshold to warrant the grant of the orders of stay of execution pending appeal or at all. In this regard, the Respondent has invited the court to find and hold that the application is devoid of merits.

Issues For Determination:

28. Having reviewed the application dated the 8th of May 2024 and the response thereto and upon taking into account the written submission filed on behalf of the respective parties, the following issue(s) crystalize[emerge] and are thus worthy of determination:-
 - a. Whether the Applicant herein has demonstrated that substantial loss shall accrue and/or arise unless the orders sought are granted.
 - b. Whether the Applicant is entitled to the orders of stay of execution or otherwise.

Analysis And Determination:

Whether the Applicant herein has demonstrated that substantial loss shall accrue and/or arise unless the orders sought are granted.

29. The Applicant herein has approached the court vide the application dated the 8th of May 2024 and wherein the Applicant is seeking for an order of stay of execution pending the hearing and determination of the instant appeal. To the extent that the application beforehand seeks an order of stay of execution, it was incumbent upon the Applicant to establish and/or demonstrate that same [Applicant] shall be disposed to suffer substantial loss.
30. Put differently, whenever an Applicant seeks to procure an order of stay of execution, it is the obligation of the Applicant to place before the court plausible and cogent material to demonstrate that the Applicant shall be disposed to suffer substantial loss. Suffice to posit that substantial loss is the cornerstone upon which an order for stay of execution is premised.
31. To this end, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR where the court stated as hereunder:-

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.



32. Additionally, it is worthy to underscore that substantial loss must be such loss that has debilitating consequences and/or effects on the Applicant. For example, the consequences may be such that the actions, if not averted, may render an Applicant to close shop or better still, subject the Applicant to a loss that is not compensable in monetary terms.
33. Notwithstanding the foregoing, it is not lost on this court that execution of court process is a lawful process and thus the mere fact that an Applicant is exposed to execution, does not ipso facto constitute substantial loss. Instructively where an Applicant is exposed to execution, it behooves the Applicant to demonstrate that the execution that is complained of is likely to generate consequences that will occasion substantial loss.
34. Arising from the foregoing, it is therefore the finding of the court that the mere fact that the Applicant is exposed to execution for purposes of realizing the decretal sum that was ordered by the Tribunal, cannot without more, be said to expose to Applicant to substantial loss. For good measure, execution of court decrees is a process that is duly provided for and regulated under the law. [See the provisions of Order 22 of the Civil Procedure Rules].
35. To buttress the position that execution proceedings are lawful proceedings and thus same cannot be contended to expose an Applicant to substantial loss, it suffices to reference the decision in the case of James Wangalwa Vs Agnes Cheseto Naliaka [2012] eKLR where the court stated as hereunder;
11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
- The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
- “...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
36. Having taken into account the established/ hackneyed position of the law that underpins the grant of an order of stay of execution pending appeal, it is now apposite to revert to the instant matter and to consider whether the Applicant has demonstrated that same [Applicant] shall suffer substantial loss, unless the orders are granted.
37. To start with, it is not lost on the court that the Ruling of the Tribunal, which forms the basis of the appeal touched on and concerned payment of rents that were found to be in arrears. In this respect, there is no gainsaying that the Ruling of the Tribunal spoke to and concerned monetary payments.
38. To the extent that the order or decree of the Tribunal related to monetary payments, there is no gainsaying that the loss, if any, that may arise from the payment of the decretal sum, is one that is



quantifiable and ascertainable. In this regard, the court is not convinced that there is any aspect of that payment that will occasion substantial loss as known to law.

39. Secondly, there is no gainsaying that the Respondent herein is the registered owner of the property, a portion of which was demised to the Applicant. By virtue of being the owner of the designated property, no doubt the Respondent is an entity with a known asset base, including the suit property.
40. Owing to the fact that the Respondent herein was the landlord of the Applicant and taking into account that same are the owners of the property in question, it is common ground that the Respondent is therefore capable of repaying the monies in question, assuming that the appeal succeeds.
41. Even though the Applicant herein had contended that the Respondent may not be able to refund the decretal sum amounting to Kshs.1,528,120/= only, the Applicant herein did not venture forward and hence provide evidence, to vindicate the source of that belief. Suffice to posit that the Applicant was chargeable with the obligation of substantiating any allegations. [See the holding in the case of Dr. Samson Gwer and 5 Others versus KEMRI [2020]Eklr, paragraphs 49,50 and 51 thereof]
42. Having found and held that the decree relates to money and coupled with the fact that the Respondent is the undoubted owner of the suit property, a portion of which was leased to the Applicant, I am afraid that the Applicant herein has not demonstrated that same shall suffer substantial loss.
43. To the contrary, the loss if any that the Applicant may suffer, is one that is quantifiable and thereafter payable, taking into account that the Respondent, by virtue of owning the demised premises, certainly has the requisite assess base.
44. In a nutshell, my answer to issue number one [1] is three fold. Firstly, the mere fact that execution is imminent, does not without more denote that the Applicant shall be exposed to suffer substantial loss. For good measure, execution proceedings are governed and regulated under the law. In this regard, same are therefore lawful.
45. Secondly, the Applicant herein was called upon to place before the court plausible material to demonstrated the substantial loss that same is exposed to suffer. However, other than throwing on the face of the court an averment that the Applicant may not be able to recover the monies from the Respondent, the Applicant has not proved the likelihood of substantial loss arising. Suffice it to point out that it is one thing to allege and another to prove the allegation[s].
46. Thirdly, substantial loss is the cornerstone to the grant of an order of stay of execution. Consequently, where an Applicant is unable to demonstrate the likelihood of substantial loss arising, then the court ought not to grant the orders of stay of execution, unless there does arise a question of public interest, which is not the case herein.

Whether the Applicant is entitled to the orders of stay of execution or otherwise

47. The Applicant herein is the one who approached the court under certificate of urgency seeking for orders of stay of execution of the Ruling/decision of the Tribunal. Upon approaching the court, the Applicant herein intimated to the court that same [Applicant] shall be amenable to comply with and/or abide by such conditions as the court may deem just and expedient to order.
48. Arising from the proclamation and/or statement by the Applicant, the learned Principal Judge of the Environment and Land Court proceeded to and granted the Applicant interim orders of stay of execution, albeit on terms. In particular, the court directed that the Applicant does deposit the disputed monies in court pending further orders.



49. However, despite having undertaken to comply with such conditions as the court may deem expedient, it is not lost on this court that the Applicant failed and/or neglected to comply with the orders that were granted by the court on the 13th of May 2024.
50. Other than the foregoing, there is yet another perspective that does arise. For good measure, the perspective touches on and concerns the nature of the claim which was before the Tribunal. Instructively, the dispute touches on and concerns failure by the Applicant to pay rents.
51. Despite the fact that the Applicant was said to be rent arrears, the Applicant has neither offered to make tender. In my humble view, the antecedent conduct of the Applicant herein flowing from failure to [sic] pay rents and coupled with the non-compliance with the orders of the Principal Judge, does not augur well for an Applicant who is seeking to partake of the equitable discretion of the court.
52. Suffice to underscore that whosoever seeks to partake of equity, the Applicant herein not excepted, must himself approach the court with clean hands. Sadly, in respect of the instant matter, the Applicant herein does not appear to be approaching the court with clean hands and in good faith.
53. On the contrary, the golden thread that belies the conduct of the Applicant herein, suggests that the Applicant is merely intent on procuring the protection of the court with a view to run away from a contractual obligation, namely, payment of rents. In this regard, I am afraid that a court of law cannot offer succor to the Applicant.
54. Flowing from the foregoing analysis, and taking into account that an order of stay of execution is an equitable remedy, I unable to dignify the Applicant with a favourable finding. In short, the Applicant herein is not deserving of the orders of stay of execution, either as sought or at all.

Final Disposition:

55. Having considered the thematic issues [which were highlighted in the body of the Ruling], it must be have become crystal clear that the Applicant herein has neither established nor proved the requisite ingredients underpinning the grant an order of stay of execution. [See Order 42 Rule 6(2) of the Civil Procedure Rules, 2010].
56. Furthermore, there is no gainsaying that court orders are never issued on the basis of sympathy or empathy. The economic situation may have been such that the Applicant was unable to meet his contractual obligations, but such scenario does not by itself premise a basis to warrant the intervention of the court.
57. In the premises, the final orders that commend themselves to court are as hereunder:-
 - i. The application dated 8th May 2024, is devoid of merits and same be and is hereby dismissed.
 - ii. Costs of the Application shall abide the outcome of the appeal.
 - iii. The application dated 15th of May 2024, which was dependent on the outcome of the application dated 8th May 2024, be and is similarly dismissed.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024 .

OGUTTU MBOYA

JUDGE

In the presence of:



Benson – court Assistant

Mr. Edward Asitiba for the Appellant/Applicant.

Mr. Ng'ang'a for the Respondent.

