



Githanga v Kinsa Overland Limited (Environment and Land Appeal E139 of 2024) [2024] KEELC 6892 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E139 OF 2024
MD MWANGI, J
OCTOBER 17, 2024**

BETWEEN

RAHAB WANGARI GITHANGA APPELLANT

AND

KINSA OVERLAND LIMITED RESPONDENT

(In respect to the Appellant's Notice of Motion dated 23rd seeking a stay of execution pending appeal)

RULING

Background

1. The Appellant's Notice of Motion application seeks for an order of stay of execution of the ruling and subsequent and consequential orders of the Business Premises Rent Tribunal (BPRT) in case No. E502/2024 delivered on 12th September 2024, pending the hearing and determination of the appeal against the said ruling. The Appellant, who was the Tenant/Respondent in the said case before the BPRT asserts that the BPRT proceeded to make the ruling ordering his immediate eviction from the suit premises with the assistance of the OCS Makongeni, in spite of his preliminary objection challenging the jurisdiction of the BPRT.
2. It is the Appellant/Applicant's case that the Tribunal did not consider and determine his Preliminary Objection in its impugned ruling. He insists that the Tribunal did not have the requisite jurisdiction to consider the matter filed before it.
3. The Applicant pleads that he stands to suffer irreparable loss unless stay is granted since he has been operating his business on the suit premises for the last 20 years. He further submits that he has an arguable appeal with high chances of success.



Issues for Determination.

4. The sole issue for determination is whether the Appellant's application merits issuance of orders of stay of the execution pending appeal.

Determination.

5. Order 42, Rule 6 (2) of the *Civil Procedure Rules* provides the circumstances under which stay of execution pending appeal may be granted. It provides that;

“No order of stay of execution shall be made under Sub- Rule 1 unless –

- a. the court is satisfied that a 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.
6. In the case of *RWW – vs- EKW* (2019) eKLR, the court held that the real purpose of an order of stay pending appeal is to preserve the substratum or the subject matter in dispute, so that,

“The rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.”

7. The court in the above-cited case, however, cautioned that the court must balance the rights of both sides. It stated that,

“However, in doing so, the court should weigh this right (of the Appellant) against the success of a litigant (Respondent) who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court, when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.” (Emphasis added).

8. Odunga J (as he then was), in the case of *Victory Construction – vs- BA*, (a minor suing through next friend – one PNM), 2019, eKLR, made a somewhat liberal observation geared towards advancement of justice and the overriding objective which I find appropriate in consideration of applications either for stay of execution or proceedings, when he stated that,

“What is expected of the court is to ensure that the aims and intendment of the overriding objective as stipulated in Section 1A as read with Section 1B of the *Civil Procedure Act* are attained. It is therefore important that the court takes into consideration the likely effect of granting the stay of proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before



the court do not render nugatory the ultimate end of justice. The court in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

9. Substantial loss is the cornerstone of the jurisdiction of stay pending appeal, as emphasized by the court in the case of *James Wangalwa & Ano versus Agnes Naliaka Cheseto*, (2012), eKLR. The court stated that,

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. In this case, there is no doubt that the Applicant has demonstrated that substantial loss would occur to him unless stay of execution is granted. He risks being evicted from the premises wherefrom he has been carrying on business in the last 20 years. His application too was filed before this court without unreasonable delay.
11. The Appellant/Applicant is deserving of the court's discretion. It is in the interest of justice too that an order of stay pending appeal issues.
12. I do not consider the provision of security necessary in the circumstances of this case. However, I will direct that the Appellant continues paying rent for the suit premises to the Respondent pending the outcome of this appeal.
13. The upshot is that the court finds merit in the Appellant's application and issues an order of execution of the ruling of the BPRT delivered 12th September 2024 and the consequential orders thereto pending the hearing and determination of this appeal. The Appellant shall continue paying rent in respect of the suit premises, the subject matter of this appeal pending hearing and determination of this appeal. The costs of this application shall be in the cause.

It is ordered.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mungai for the Appellant

Mr. Odhiambo Othim for the Respondent

Court Assistant: Yvette

