



**Tourist Le Paradise Boutique Limited v Holiday Resort Limited (Civil Appeal E040 of 2024) [2024] KEELC 13933 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13933 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL APPEAL E040 OF 2024  
LL NAIKUNI, J  
DECEMBER 20, 2024**

**BETWEEN**  
**TOURIST LE PARADISE BOUTIQUE LIMITED ..... APPELLANT**  
**AND**  
**HOLIDAY RESORT LIMITED ..... RESPONDENT**

**RULING**

**I. Introduction**

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion applications dated 8<sup>th</sup> and 14<sup>th</sup> November, 2024 by “Tourist le Paradise Boutique Limited”, the Appellant/Applicant herein.
2. Upon service of the application to the Respondents, they filed responses through several Replying Affidavits dated 29<sup>th</sup> November, 2024, 3<sup>rd</sup> December, 2024 and 5<sup>th</sup> December, 2024 respectively. The Honourable Court will be dealing with these applications simultaneously though in a distinct and separate way.

**II. The Notice of Motion application dated 8<sup>th</sup> November, 2024**

3. This application was brought under the dint of Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap. 21) Laws of Kenya; Order 42 Rule 6 of the *Civil Procedure Rules* and other Applicable Provisions of the law.
4. The Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.



- c. That pending hearing and determination of this Appeal, this Honorable Court be pleased to issue an order for stay of execution of the orders issued and the Judgement of Business Premises Tribunal delivered on the 31<sup>st</sup> of October 2024 in BPRT Case Number E120 Of 2024 BPRT Case Number E120 Of 2024 *Tourist Le Paradise Boutique Limited v Holiday Resorts Limited* and the Respondent and/or its representatives and/or its proxies be ordered ensure that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune Paradise holiday resort and Neptune Village holiday resort and is allowed ingress and egress thereto without any hindrance.
  - d. That costs of this Application be granted to the Appellant.
5. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 16 Paragraphed Supporting Affidavit of – Murtaza Abidhussein Haiderali, a Director of the Appellant herein sworn and dated the same day with the application. The Applicant averred that:-
- a. The Appellant was and is still a Tenant while the Respondent is the Landlord in respect of Business premises situated on situated at Hotels known as Neptune Village beach resort and Neptune Paradise beach resort (herein after referred to as “the subject premises.”).
  - b. The Respondent issued the Appellant with a notice of termination of tenancy dated the 29<sup>th</sup> of February 2024, which the Appellant opposed hence culminating into the case which is the subject of this Appeal –“BPRT case number E - 120 of 2024 - *Tourist le Paradise Boutique Limited v Holiday Resorts Limited*”. Annexed in the affidavit copies of the Notice which is hereby marked as “A” and the reference marked as “B”.
  - c. The Business Premises Rent Tribunal, vide its judgement delivered on the 31<sup>st</sup> of October 2024, ordered inter alia that the Appellant immediately gives vacant possession of the Subject premises to the Respondent failure of which the Respondent shall be at liberty to take vacant possession thereof. Annexed in the affidavit a copy of the judgement which is hereby marked as “C” and the order marked as “D.”
  - d. The Appellant was aggrieved with the said judgment and therefore exercised its right of appeal by preferring the instant appeal based on the grounds contained in the memorandum appeal which discloses an arguable appeal.
  - e. The Respondent, without notice and without having obtain any warrants for execution as per the provisions of Section 14 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, (Cap. 301), had sent Auctioneers who have on the 8<sup>th</sup> November, 2024 stormed into the premises situated at Neptune Village hotel and purported to start to evict the Appellants. Annexed in the affidavit photographs showing the same which are marked as “E.”
  - f. Despite the Appellant’s Advocate having informed the Respondents that any intended eviction without following due process is illegal vide a letter of 8<sup>th</sup> November 2024, the Appellant has ignored the same and proceeded to start to remove the Appellant’s belongings from the said shop. Annexed in the affidavit a copy of the letter which was marked as “F.”
  - g. It was therefore necessary that as a matter of urgency, that this Honorable Court proceeded to grant the orders for stay of execution that the Appellant never continued to with its illegal actions which was clearly geared towards stealing a march and rendering this appeal nugatory.



- h. The Appellant was apprehensive that should this Honorable Court not issue a protective measure in terms of a stay of execution, then the Respondent would proceed to the other shop at Neptune paradise hotel resort and also forcefully evict the Appellant ultra vires.
- i. It would also be in the interest of justice that the Respondent be allowed to evict the Appellant without following due process hence the Respondent ought to be ordered to ensure that the Appellant was in possession of the Subject premises.
- j. It would be great injustice on the Appellant should it be affected by the consequences of the Honorable Tribunal's Judgement despite this appeal which challenges that Judgement and is likely to succeed.
- k. Should the Respondent take any further action pursuant to the Judgement of the Tribunal, the Appellant shall suffer substantial loss as its business at the Subject premises would be closed.
- l. The Appellant has an arguable appeal and has not delayed in making the subject Application for execution.
- m. In the foregoing, it is in the interests of justice that the subject Application be allowed.

### III. The Notice of Motion application dated 14<sup>th</sup> November, 2024

- 6. This application was brought under the dint of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya,; Section 5 of the Judicature Act, Section 9 of the Environment and Land Court Act and other Applicable provisions of law.
- 7. The Applicant sought for the following orders: -
  - a. Spent.
  - b. That pending the hearing and determination of this Application, this Honorable Court does order the OCS Diani Police station to ensure that the orders of the Court issued on the 11<sup>th</sup> of November 2024 are duly complied with.
  - c. That Vikram Korla, Moses Muchina and Jackson Kifoto being respectively the Operations Director, Financial controller and Manager of the Respondent be cited to be guilty of contempt of the orders of the Court issued on the 11<sup>th</sup> of November 2024 on behalf of the Respondent; and they be committed to civil jail for a term of Six (6) months and/or until they purge the contempt by ensuring that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune paradise holiday resort and Neptune Village holiday resort and is allowed ingress and egress thereto without any hindrance.
  - d. That costs of this Application be granted to the Appellant.
- 8. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 10 paragraphed Supporting Affidavit of – Murtaza Abidhusein Haiderali, a Director of the Appellant herein sworn and dated the same day with the application. The Applicant averred that:
  - a. This Honorable Court on the 11<sup>th</sup> of November 2024 issued orders whose terms inter alia included an order that:

“ .....There be an order for stay of execution of the orders issued and the Judgement of the Business Premises Tribunal delivered on the 31st of October 2024 in BPRT



Case Number E120 Of 2024BPRT Case Number E120 Of 2024 Tourist Le Paradise Boutique Limited v Holiday Resorts Limited and the Respondent and/or its representatives and/or its proxies be ordered ensure that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune paradise holiday resort and Neptune Village holiday resort and is allowed ingress and egress thereto without any hindrance.”

- b. The said order was duly extracted and served upon the Advocates for the Respondent and Respondent on the 12<sup>th</sup> of November 2024. Annexed in the affidavit a copy of the duly received and stamped order which is hereby marked as “A.”
- c. He physically went to the offices of the Respondent on the same day and gave the said orders to one Mr. Jackson Kifoto who was a manager of the Respondent, so that he could be allowed access into the subject premises as per the said orders.
- d. The said Jackson Kifoto who indicated that he had directions from the Operations Director namely Vikram Korla and Moses Muchina the Financial controller of the Respondent not to comply with the terms of the said orders asked him to leave the Respondent's premises.
- e. On the 12<sup>th</sup> of November 2024, the Appellant's Advocates wrote an e-mail dated the 12<sup>th</sup> of November 2024 to Vikram Korla and Moses Muchina again serving the order and warning that should the said orders not be complied with, then the Appellant shall move to have them cited for contempt of the said orders. Annexed hereto is a copy of the e-mail which is hereby marked as “B.”
- f. The defiance of the said orders are greatly prejudicial to the Appellant whose business is at standstill, despite the instant appeal and subsisting orders for stay of execution.
- g. It was crucial that prior to the determination of the entire Application substantively, the Court ought to issue orders for police assistance for purpose of reinforcing the orders issued by itself.
- h. It was in the great interest of justice that the subject Application be allowed for purposes of safeguarding the honor of the court and upholding the principles of the rule of law as the said Contemnors are in willful disobedience of the orders of the Court.

#### **IV. The Responses**

9. The Respondent responded to the Notice of Motion application through several Replying Affidavits which, for ease of reference I shall summarize as below. Alpheus Dok, the Group Financial Controller of the Respondent herein responded to the Notice of Motion application dated 8<sup>th</sup> November, 2024 through a 17 paragraphed Replying Affidavit as follows:
  - i. It was true that on 31st October, 2024 the Business Premises Tribunal ordered the Applicant to immediately give vacant possession of the premises to the Respondent failing which the Respondent shall be at liberty to take vacant possession thereof
  - ii. The aforesaid order was made in the presence of the Appellant's Advocates and therefore the Appellant was duly aware of the same and was required to comply forthwith unless there was an order staying execution thereof.
  - iii. The Respondent duly obtained the order given by the Tribunal and served the same upon the Appellant on 5<sup>th</sup> November, 2024 requiring them to comply with the order.



- iv. The Appellant did not comply with the order of the Tribunal and on 8<sup>th</sup> November, 2024, the Respondent sought to take vacant possession of the premises and although the Appellant was initially hesitant to remove its belongings from the said shops, upon the insistence of the Respondent, the Appellant removed all its items and belongings from both Neptune Village Hotel and Neptune Paradise Resort, in the presence of the police in compliance with order of the Tribunal, by 2pm on the said date and carted them away.
  - v. The Respondent took over vacant possession and occupation of the premises by 2pm on 8<sup>th</sup> November, 2024 as the Appellant was already out of the premises.
  - vi. The Respondent's act of taking back vacant possession of the premises was not illegal as alleged but in compliance with the order of the Tribunal which was in subsistence and had not been stayed or set aside.
  - vii. The Appellant was guilty non-disclosure of material facts having failed to disclose to the Court that it had vacated the premises by the time the application and the appeal herein were filed.
  - viii. The Respondent gave the Appellant sufficient time to comply with the order of the Tribunal or if aggrieved, file an appeal and seek for an order of stay, but the Appellant failed to do so and only filed this application after it had vacated the premises.
  - ix. When the stay order herein was served on 12<sup>th</sup> November, 2024, the Appellant was no longer in possession of the premises and the order of stay herein was issued based on the assumption that the Appellant was still in possession of the premises and the Appellant's failure to disclose to the Court that it was no longer in possession of the premises disentitles it to the equitable remedies sought.
  - x. Upon getting vacant possession, the Respondent commenced alterations to both premises and with a view to utilizing them for the hotel business as earlier intended.
  - xi. The alterations and renovations were ongoing and the status of the shop at Neptune Village Hotel was that it could not be inhabited for any business. Annexed in the affidavit and marked "AD1" photographs of the said shop as at 11<sup>th</sup> November, 2024.
  - xii. The status of the shop at Neptune Paradise Hotel is that it is equally uninhabitable for any business because of the ongoing renovations. Annexed herewith and marked "AD2" photographs of the said shop as at 11<sup>th</sup> November, 2024.
  - xiii. The application and the order obtained herein have been overtaken by events as the tenancy relationship was completely severed on 8<sup>th</sup> November 2024 when the Appellant vacated the premises and the Respondent took over vacant possession thereof.
  - xiv. The application therefore lacks merit and should be dismissed with costs
10. Jackson Kifoto, the Resident Manager of the Respondent herein swore a 9<sup>th</sup> paragraph Replying affidavit in response to the affidavit of Murtaza Abdihusein Haiderali sworn on 14<sup>th</sup> November, 2024 in support of the application of even date where he averred that:-
- a. He was neither served with the order dated 11<sup>th</sup> November, 2024 nor the application dated 14<sup>th</sup> November, 2024 but nevertheless deny breaching any court order.
  - b. At no time did he indicate to Murtaza or any one from the Appellant's company that he had received directions from the Operations Director or the Financial Controller not to comply with any court order as alleged or at all.



- c. The Appellant removed all its belongings and goods and vacated the premises on 8<sup>th</sup> November, 2024 and was no longer in possession of the same on 11<sup>th</sup> November, 2024 when he alleged he served him with a court order.
  - d. Accordingly, he had not disobeyed or willfully disobeyed any court order as alleged by the Appellant or at all.
  - e. The application herein was therefore frivolous and should be dismissed with costs.
11. Moses Muchina, the Financial Controller of the Respondent herein swore a 9<sup>th</sup> paragraph Replying affidavit in response to the affidavit of Murtaza Abdihussein Haiderali sworn on 14<sup>th</sup> November, 2024 in support of the application of even date where he averred that:
- a. He denied breaching any court order as alleged by the Mr. Murtaza or at all and the allegations to that effect are false.
  - b. At no time did he give directions to Mr. Jackson Kifoto not to comply with any court order as alleged or at all and the averments in paragraph 5 of Mr. Murtaza's affidavit were untrue.
  - c. He was aware of his own knowledge that the Appellant removed all its belongings and goods and vacated the premises on 8<sup>th</sup> November, 2024 and was no longer in possession of the same on 11<sup>th</sup> November, 2024 when he alleged he served the Respondent with a court order.
  - d. Accordingly, he had not disobeyed or willfully disobeyed any court order as alleged by the Appellant or at all.
  - e. The application herein was therefore frivolous and should be dismissed with costs.
12. Vickram Korla, the Regional Director of Operations of the Respondent herein swore a 13<sup>th</sup> paragraph Replying affidavit in response to the affidavit of Murtaza Abdihussein Haiderali sworn on 14<sup>th</sup> November, 2024 in support of the application of even date where he averred that:-
- a. The Appellant had sought that himself together with others be cited for a contempt for allegedly breaching this court's order dated 11<sup>th</sup> November, 2024, and he strenuously deny breaching any court order or at all.
  - b. On 31<sup>st</sup> October, 2024, the Business Premises Rent Tribunal ordered the Appellant to vacate the Respondent's premises forthwith. Annexed in the affidavit and marked "VK1" a copy of the said order.
  - c. The Appellant removed all its belongings and goods and vacated the premises on 8<sup>th</sup> November, 2024, in the presence of the police as ordered by the Tribunal, and the Respondent took over vacant possession of the premises on the said date.
  - d. While seeking for an order of stay of the Tribunal's order of 31<sup>st</sup> October, 2024, the Appellant did not disclose to the Court that it had already vacated the premises on 8<sup>th</sup> November, 2024 and was no longer in possession thereof.
  - e. It was therefore evident that the stay order obtained herein had been overtaken by events by the time it was served on 12<sup>th</sup> November, 2024 and the Appellant is guilty non-disclosure of this material fact.



- f. The stay order was therefore incapable of enforcement and the allegation that himself, or any of the Respondent’s officers, breached the order is untrue, the Appellant being fully aware that it had already vacated the premises and the tenancy relationship completely severed.
- g. The Respondent was in the process of altering the premises and in respect of the shop at Neptune Village Hotel and renovations have been ongoing since 11<sup>th</sup> November, 2024 and the shop was uninhabitable. Annexed in the affidavit and marked “VK2” were photographs of the said shop.
- h. In respect of the shop at Neptune Paradise Hotel, the same was equally uninhabitable in view of the ongoing renovations since 11<sup>th</sup> November, 2024. Annexed in the affidavit and marked “VK - 3” were photographs of the said shop.
- i. Accordingly, he had not disobeyed or willfully disobeyed any court as alleged by the Appellant or at all.
- j. The Application herein was therefore frivolous and should be dismissed with costs.

## V. Submissions

- 13. On 9<sup>th</sup> December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion applications dated 8<sup>th</sup> November, 2024 and 14<sup>th</sup> November, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Court had not been in position to access the submissions, if at all they were filed, by any of the parties herein. Subsequently, the ruling was deferred 19<sup>th</sup> December, 2024 on its own merit accordingly.

## VI. Analysis & Determination.

- 14. I have carefully read and considered the pleadings herein by the 1<sup>st</sup> Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
- 15. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has framed four (4) salient issues for its determination. These are:-
  - a. What are the legal principles to be considered to warrant the granting of stay of execution.
  - b. Whether the Notice of Motion application dated 8<sup>th</sup> November, 2024 seeking to stay execution of the orders issued and the judgement of Business Premises Tribunal delivered on the 31<sup>st</sup> of October 2024 in BPRT Case Number E120 Of 2024 BPRT Case Number E120 Of 2024 *Tourist Le Paradise Boutique Limited v Holiday Resorts Limited* and the Respondent and/or its representatives and/or its proxies be ordered ensure that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune paradise holiday resort and Neptune Village holiday resort and is allowed ingress and egress thereto without any hindrance is merited?
  - c. Whether the Notice of Motion application dated 14<sup>th</sup> November, 2024 seeking citation of Vikram Korla, Moses Muchina and Jackson Kifoto being respectively the Operations Director, Financial controller and Manager of the Respondent for contempt of the orders of the Court issued on the 11<sup>th</sup> of November 2024 is merited?
  - d. Who will bear the Costs of Notice of Motion applications dated 8<sup>th</sup> November, 2024 and 14<sup>th</sup> November, 2024.



**Issue No. a). What are the legal principles to be considered to warrant the granting of stay of execution.**

16. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement of Business Premises Tribunal delivered on the 31<sup>st</sup> October 2024 in BPRT Case Number E120 Of 2024 BPRT Case Number E120 Of 2024 Tourist Le Paradise Boutique Limited v Holiday Resorts Limited. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), 2010 which stipulates 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.

(2) 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.

17. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of “[Butt v Rent Restriction Tribunal](#) {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:

- “1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
- 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
18. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, cap. 21 or in the interpretation of any of its provisions.
19. The provision of Section 1A (2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are:- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
20. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the *Civil Procedure Rules* to which:
- a. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
  - b. The application is brought without undue delay and
  - c. 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.
21. I find issues for determination arising therein namely:
- a. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
  - b. What orders this Court should make?
22. The purpose of stay of execution is to preserve the substratum of the case. In the case of “*Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
23. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.



24. As for the applicant having to suffer substantial loss, in the case of “*Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

25. The Court of Appeal in the case of “*Mukuma v Abuoga* (1988) KLR 645” where their Lordships stated that;

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

26. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “*Absalom Dora -v - Turbo Transporters* (2013) (eKLR)”}.

27. As F. Gikonyo J stated in the case of:- “*Geoffery Muriungi & another v John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased)* [2016] eKLR” and which wisdom I am persuaded with: -

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

**ISSUE No. b). Whether the Notice of Motion application dated 8<sup>th</sup> November, 2024 seeking to stay execution of the orders issued and the judgement of Business Premises Tribunal delivered on the 31<sup>st</sup> of October 2024 in BPRT Case Number E120 Of 2024 BPRT Case Number E120 Of 2024 Tourist Le Paradise Boutique Limited v Holiday Resorts Limited and the Respondent and/or its representatives and/or its proxies be ordered ensure that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune paradise holiday resort and Neptune Village holiday resort and is allowed ingress and egress thereto without any hindrance is merited**

28. From the proceedings, the Applicant herein filed an application dated 8<sup>th</sup> November, 2024 seeking orders to stay the Judgement of Business Premises Tribunal delivered on the 31<sup>st</sup> of October 2024 in the case of “BPRT case number E120 of 2024 BPRT case number E120 of 2024 - Tourist le Paradise Boutique Limited v Holiday Resorts Limited”. According to the applicant, the Business Premises Rent Tribunal, vide its Judgement delivered on the 31<sup>st</sup> of October 2024, ordered inter alia that the Appellant immediately gives vacant possession of the Subject premises to the Respondent failure of which the Respondent shall be at liberty to take vacant possession thereof.



29. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
30. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants. The court has already deliberated on this aspect and taken into consideration of it from the case of:- “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed. However, I do take note that the same prayer for stay has been overtaken by events as the Appellant no longer has tenancy in the suit premises.
31. On the second issue to determine is whether the application for stay of execution was made without inordinate delay. From the record, the Judgment being appealed against was delivered by BPRT on 31<sup>st</sup> October, 2024 and the application herein was filed on 8<sup>th</sup> November, 2024 through a Memorandum of Appeal. This application was filed after about 8 days after the Judgment. Clearly, in this Honourable Court’s assessment, the application was expeditiously without any undue delay.
32. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has deposed that it is willing to provide any security that the Court may reasonably require the Defendant to provide. The Appellant has not offered any form of security as prescribed by the provision of Order 42 Rule 6.
33. For this reason, despite of failure to comply with the third condition on security, based on the principles of natural Justice and the provision of Sections 3 & 13 of the Environment & Land Act, No. 19 of 2011; Section 101 of the Land Registration Act, No. 3 of 2012 and Section 150 of the Land Act, No. 6 of 2012, I find the Notice of Motion Application dated 8<sup>th</sup> November, 2024 to have merit. Further, I seek refuge from the case of:- “Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates” the Court held that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
34. I will still proceed to examine the second issue on the Notice of Motion application dated 14<sup>th</sup> November, 2024 as if the Appeal filed was in order.

**Issue No. c). Whether the Notice of Motion application dated 14<sup>th</sup> November, 2024 seeking citation of Vikram Korla, Moses Muchina and Jackson Kifoto being respectively the Operations**



**Director, Financial controller and Manager of the Respondent for contempt of the orders of the Court issued on the 11<sup>th</sup> of November 2024 is merited.**

35. Under this sub - title the Honourable Court shall examine the law on contempt of court and whether the agents of the Respondent are in contempt of the court orders issued on 11<sup>th</sup> November, 2024. Contempt of court is that conduct or action that defies or disrespects authority of court. *Black's Law Dictionary* 9th Edition, defines contempt as:

The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

36. Properly put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt. The applicants also cited provisions of the *Contempt of Court Act* No. 46 of 2016. That Act was however declared constitutionally invalid and nullified in 2018, (See "*Kenya Human Rights Commission v Attorney General & 2 Others* [2018] eKLR").
37. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.
38. The Application before court seeks to have the officials of the Respondent cited for contempt of this court orders of 11<sup>th</sup> November, 2024 and to be committed him to civil jail and or fined as the court may deem for. Dealing with the question of contempt in "*Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828", Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:-

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void." (emphasis)

39. In the case of "*T. N. Gadavarman Thiru Mulpad v Ashok Khot And Anor* [2006] 5 SCC", the Supreme Court of India also emphasized on the dangers of disobeying Court orders, thus:

"Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with."



40. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in the case of “*Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227”, that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

41. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order. The Applicant has deposed that the Honorable Court on the 11<sup>th</sup> of November 2024 issued orders whose terms inter alia included an order that:

“.....There be an order for stay of execution of the orders issued and the judgement of the Business Premises Tribunal delivered on the 31<sup>st</sup> of October 2024 in BPRT Case Number E120 Of 2024BPRT Case Number E120 Of 2024 *Tourist Le Paradise Boutique Limited v Holiday Resorts Limited* and the Respondent and/or its representatives and/or its proxies be ordered ensure that the Appellant is in possession of the premises occupied by the Appellant situated at Neptune paradise holiday resort and Neptune Village holiday resort and is allowed ingress and egress thereto without any hindrance.”

42. The said order was duly extracted and served upon the Advocates for the Respondent and Respondent on the 12<sup>th</sup> of November 2024. He physically went to the offices of the Respondent on the same day and gave the said orders to one Mr. Jackson Kifoto who was a manager of the Respondent, so that he could be allowed access into the subject premises as per the said orders. The said Jackson Kifoto who indicated that he had directions from the Operations Director namely Vikram Korla and Moses Muchina the Financial controller of the Respondent not to comply with the terms of the said orders asked him to leave the Respondent’s premises.

43. In this regard, the Supreme Court of India held in “*Indian Airports Employees Union v Ranjan Catterjee & Another* [AIR 1999 SC 880: 1999(2) SCC:537”, that in order to amount to “civil contempt” disobedience must be willful. If disobedience is based on the interpretation of court’s order, notification and other relevant documents, it does not amount to willful disobedience. As was again



stated by the Supreme Court of India in “[Mahinderjit Singh Bitta v Union of India & Others](#) 1 A NO. 10 of 2010” (13<sup>th</sup> October, 2011):

“In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.

44. The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it.
45. The Cromwell J, writing for the Supreme of Canada in [Carey v Laiken](#), 2015 SCC 17 (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:
- i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
  - ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
  - iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis)
46. In the present application, it has not been sufficiently demonstrated that the Respondent deliberately disobeyed court orders or at all. Contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stands to lose his or her liberty. It should not, therefore, be taken lightly. Taking into account the circumstances of this case and the material placed before court, I am not satisfied that the Appellant/ Applicant has proved their case to the required standard.
47. Therefore the Notice of Motion application dated 14<sup>th</sup> November, 2024 be and is hereby declined and dismissed in its entirety.

**Issue No. c). Who will bear the Costs of Notice of Motion applications dated 8<sup>th</sup> November, 2024 and 14<sup>th</sup> November, 2024.**

48. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “[Jasbir Rai Singh v Tarchalan Singh](#) (2014) eKLR” and [Cecilia Karuru Ngayo – v – Barclays Bank of Kenya Limited](#), (2014) eKLR”.



49. In the case of “*Hussein Mubumed Sirat v Attorney General & Another* [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in awarding the Respondents the costs of the Notice of Motion applications dated 8<sup>th</sup> November, 2024 and 14<sup>th</sup> November, 2024.

## VII. Conclusion & Disposition

50. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and balance of convenience.

51. Ultimately in view of the foregoing detailed and expansive analysis to the two applications, this court arrives at the following decision and makes the following orders:-

- a. That the Notice of Motion application dated 8<sup>th</sup> November, 2024 be and is hereby allowed subject to the fulfilment of the below Pre - Conditions.
- b. That the Applicant to deposit to the Court an equivalent of Six (6) months payable monthly rent for the business Premises as stipulated in the terms and conditions of the subsisting and current Land - Lord Tenancy Agreement/Lease between the Applicant and the Respondent as security of costs for the due performance of the decree within the next twenty one (21) days from the date of the delivery of this Ruling hereof.
- c. That failure to adhere with the above (b) condition the Notice of Motion Application dated 8<sup>th</sup> November, 2024 to stand automatically dismissed without any further reference to this Court whatsoever.
- d. That the Notice of Motion application dated 14<sup>th</sup> November, 2024 be and is hereby found to lack merit and the same stands dismissed in its entirety.
- e. That the Applicant granted leave of 30 days to compile and serve the Records of Appeal.
- f. That for expediency sake the matter to be mentioned on 12<sup>th</sup> February, 2025 for taking direction on the admission of the appeal and its disposal pursuant to the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
- g. That costs of the Notice of Motion Application dated 14<sup>th</sup> November, 2024 to be awarded to the Respondent.

It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 20<sup>TH</sup> DAY OF DECEMBER 2024.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.



- b. M/s. Natasha Advocate holding brief Mr. Hassan Advocate for the Appellant/Applicant.
- c. Mr. Mwakireti Advocate for the Respondent.

