



Association of Evangelicals in Africa v Nairobi Elite Academy (Environment and Land Appeal E091 of 2024) [2024] KEELC 13911 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E091 OF 2024
MD MWANGI, J
DECEMBER 18, 2024**

BETWEEN
ASSOCIATION OF EVANGELICALS IN AFRICA APPELLANT
AND
NAIROBI ELITE ACADEMY RESPONDENT

RULING

In respect to the Appellant's Notice of Motion dated 12th July 2024 seeking a variety of orders

Background

1. The Appellant/Applicant initiated this appeal by way of the Memorandum of Appeal dated 3rd July 2024. The appeal is against the ruling of the Business Premises Rent Tribunal (BPRT) in E427/2024 delivered on 14th June 2024. The Appellant inter-alia, faults the BPRT for failing to uphold the Respondent's preliminary objection dated 6th May 2024 and failing to find that the Respondent's applications dated 3rd April 2024 and 13th May 2024 were both sub-judice and res-judicata by dint of a ruling made in MCELC E103/2024 before the Milimani Chief Magistrate Court.
2. Consequently, the Appellant prays that the Court sets aside the ruling of the BPRT delivered on 14th June 2024 and issues such consequential orders (including as to handover of possession) as may be necessary.
3. Alongside the appeal, the Appellant filed the Notice of Motion dated 12th July 2024, which essentially seeks three orders pending the hearing and determination of the appeal as follows;
 - a. Pending hearing and determination of the appeal, the Honourable Court be pleased to issue an Order of stay of Execution of the orders issued by the BPRT on 14th June 2024.



- b. Pending hearing and determination of the appeal, the Honourable Court be pleased to issue an Order allowing the Serving Orphans Worldwide to take possession and occupy the property known as L.R No. 11605/4.
 - c. Pending the hearing and determination of the appeal, the Honourable Court be pleased to issue an Order allowing the applicants' appointed auctioneers (Dalai Auctioneers) to move the Respondent's property to a suitable location to allow Serving Orphans Worldwide to conclude moving into the property.
4. The grounds upon which the application is premised on are on the face of it and in the supporting affidavit of Lilian Wambui Murang'a. The Appellant asserts that it is the proprietor of the suit property. It avers that the orders issued on 14th July 2024 by the BPRT are *res judicata* and sub-judice since the issue was already determined in a similar application made by the Respondent in MCELC E103/2024. The orders were made without regard to the Appellant's preliminary objection dated 6th May 2024 and have the effect of fettering the Appellant's ownership, possession and use of the suit property since the Respondent handed over the possession on 20th March 2024.
 5. It is the Appellant's case that the orders of the BPRT have the effect of interfering with the rights of the tenant to whom the Appellant had leased the suit property after the Respondent handed over possession of the suit property.

The impugned ruling

6. The impugned ruling by the BPRT was in respect to the various applications by the Appellant and the Respondent as well as the preliminary objection by the Appellant. The BPRT in its ruling framed six issues for determination, namely;
 - a. Whether this Tribunal has jurisdiction to determine this matter;
 - b. Whether the tenant's case is *sub-judice* and if so, what orders should issue;
 - c. Whether the tenant is entitled to the reliefs sought in the applications dated 3rd May 2024 and 13th May 2024;
 - d. whether the landlord is entitled to the relief sought in the application dated 7th May 2024;
 - e. whether the tenant owes any rent arrears to the landlord; and
 - f. who is liable to pay costs?
7. The BPRT found that it had the jurisdiction to entertain the matter. It further found that the matter was not sub-judice as alleged by the Appellant.
8. The BPRT too dismissed the contention by the Appellant that the Respondent was not in possession. It found that its rent Inspector confirmed that the Respondent was still in possession of the premises. It therefore found in favour of the Respondent.
9. I note that the BPRT too considered the Appellant's claim that it had leased the premises to another tenant. Its view was that such an alleged tenancy cannot hold water as the current tenancy is still in force and any other agreement entered into with a third party over the suit premises is null and void.
10. The Tribunal ruled that the Appellant was not entitled to the reliefs sought in its application of 7th May 2024 as its claim was founded on illegal acts which were intended to evict the tenant without following due process.



11. Ostensibly, the Tribunal allowed the Respondent to break into the suit premises which was allegedly locked by the Appellant; under the supervision of the OCS Kasarani. The Respondent's school was allowed to re-open and run and the OCS Kasarani was ordered to ensure the smooth running of the school and that peace and order were maintained.

Determination.

12. The appellate jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it as per Ringera J (as he then was) in *Machira & Company Advocates – vs- Arthur K. Magugu & Ano* (2012) eKLR.
13. The powers of an Appellate Court in a civil appeal are provided for under Section 78 of the *Civil Procedure Act*. Under subsection 2, the Appellate Court is empowered to perform as nearly as may be the same duties as are conferred and imposed under the Act on courts of original jurisdiction in respect of suits instituted therein.
14. The Appellant in its application invites this Court to issue orders that were not even sought before the BPRT. The prayer to allow Serving Orphans Worldwide to occupy and take possession of the suit property is not a prayer that was placed before the trial court/Tribunal. The Appellate jurisdiction of this court is limited jurisdiction. Its scope is limited by statute, in this case Section 78 of the *Civil Procedure Act*.
15. I agree with the Respondent's submissions that allowing the Appellant's application as framed is tantamount to allowing the appeal summarily. The same orders sought in the application are the same orders sought in the appeal. This leaves me with the prayer for stay of execution pending appeal.
16. The principles upon which an application for stay pending appeal may be allowed are well established. Substantial loss is what has to be prevented by preserving the status quo otherwise such loss would render the appeal nugatory (*Mukuma – vs- Abuoga* (1988) eKLR).
17. The Appellant has not demonstrated the substantial loss it stands to suffer if the order of stay of execution is not granted. I am not persuaded that the Appellant's application is merited.
18. The Court therefore disallows the application but with no orders as to cost.
19. Since the Court has already admitted the appeal, it will proceed to issue directions to facilitate its expedient hearing and disposal.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF DECEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Njenga h/b for Mr. Kimathi for the Appellant

N/A for the Respondent

Joan: Court Assistant

M.D. MWANGI



JUDGE

