



REPUBLIC OF KENYA



KENYA LAW
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**Dahir v Wafula & another (Environment and Land Appeal
E002 of 2022) [2023] KEELC 15707 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 15707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

BN OLAO, J

JANUARY 24, 2023

BETWEEN

NAGEYE MOHAMUD DAHIR APPELLANT

AND

RECHO NABUCHA WAFULA 1ST RESPONDENT

PATRICK WEKESA WAFULA 2ND RESPONDENT

*(Being an application for stay of execution of the Order and Ruling
of the Business Premises Rent Tribunal at Kakamega delivered by
Hon Andrew Muma on 7th January 2022 in Case No E036 of 2021)*

RULING

1. The land parcel No Bungoma Municipality/368 (the suit premises) was the subject of litigation in The Business Premises Rent Tribunal Case No E036 of 2021 at Kakamega between Nageye Mohamud Dahir (the Applicant) against Recho Nabucha Wafula (as Landlord) and Patrick Wekesa Wafula (as caretaker). For purposes of this ruling, the respondents as Patrick Wekesa Wafula (1st Respondent and Recho Nabucha Wafula (2nd Respondent).
2. The Applicant filed at the Tribunal a reference dated September 13, 2021 seeking an order to break into the suit premises. In a ruling delivered on January 7, 2022, Hon Muma dismissed the application with costs and also made the following orders:

“The landlord shall immediately take possession of the premises and hand over the same to the new Tenant and or any other Tenant they so wish. If the Tenants herein fail to remove their padlock in 3 days, the Landlord is at liberty to break in with the help of OCS Bungoma Police and take possession.”



The Applicant was aggrieved by that ruling and promptly filed an appeal to this Court on January 13, 2022 seeking to have that ruling set aside.

3. Simultaneously with that appeal, the Applicant filed a Chamber Summons application premised under the provisions of the Judicature Act and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following remedies:

1. Spent
2. Spent
3. Spent
4. That this Honourable Court be pleased to grant orders of stay of execution of the Business Premises Rent Tribunal ruling dated January 7, 2022 and order dated January 10, 2022 pending the hearing and determination of the appeal.
5. Spent
6. That this Honourable Court be pleased to award possession of property Bungoma/ Municipality/368 back to the Applicant pending the determination of the appeal.
7. Costs of the application be provided and be borne by the Respondents.

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit dated January 12, 2022.

4. The gist of the application is that the Applicant entered into a lease agreement in respect to the suit premises with the 1st Respondent who held himself out as an agent of the 2nd Respondent. At this stage, I must point out that in the proceedings before the Tribunal, Recho Nabucha Wafula is the 1st Respondent/Land lady while Patrick Wekesa Wafula is the 2nd Respondent/care-taker. In the appeal Patrick Wekesa Wafula is cited as the 1st Respondent while Recho Nabucha Wafula is the 2nd Respondent and that is how I shall refer to the Respondents because that is how they are cited in the Memorandum of Appeal as well as in the Applicant's supporting affidavit. Relying on the representation by the 1st Respondent, the Applicant spent up to Kshs 3,607,990 being goodwill in acquiring the suit premises following a tenancy agreement with the Respondents. However, in September 2021, the Respondents attempted to evict him. That the ruling sought to be appealed is vague and the 3 days window allowed to him to vacate would lapse on January 12, 2022 at which point the Respondents were to assume possession of the suit premises. That in the ruling, the Tribunal Chairperson failed to comment on the fraudulent actions of the 1st Respondent. Further, the Tribunal Chairperson failed to determine the issue of rent months, the Tribunal's jurisdiction and the fact that the Respondents sneaked in new evidence through submissions. The Chairperson of the Tribunal also failed to take into account the misrepresentations by the 1st Respondent which were meant to induce the Applicant to contract and eventually pay the deposit for rent. That the appeal has reasonable chances of success and the Respondents will not be prejudiced if the orders sought are granted.

5. Annexed to the supporting affidavit are the following documents:

1. Signed but un-dated tenancy agreement between the 1st Respondent as landlord and the Applicant as tenant for a 9 year lease of the suit premises.
2. Copies of emails.
3. Architectural designs.



4. Break-down of expenses incurred by the Applicant.
 5. Security Contract between the Applicant and Brushwide Security Services.
 6. Requests for the payment of goodwill.
 7. Ruling of the Tribunal dated January 7, 2022.
 8. Order of the Tribunal dated January 10, 2022.
 9. Email from Hammerton Maloba Advocates addressed to the Applicant for the refund of Kshs 493,000.
6. The application is opposed and Recho Nabucha Wafula the 2nd respondent filed a replying affidavit dated July 18, 2022 in which she deponed, inter alia, that she is the proprietor of the suit premises on which are three (3) shops and on September 8, 2021 she entered into a tenancy agreement with one Lucy Wanjiro Karanja for one of the shops. That on September 17, 2021, the Applicant accompanied by police officers from Bungoma Police Station forcefully removed the tenant from the shop and threatened other tenants with similar action if they did not pay him rent in execution of an ex-parte order of the Tribunal. That two other tenants started paying rent to the Applicant to avoid being evicted. The Tribunal later handed over the suit premises to the 2nd Respondent after hearing the parties and ordered the Applicant to remove his padlock within three (3) days and in default, the 2nd Respondent would be at liberty to break in with the help of the Police. On January 11, 2022, the 2nd Respondent proceeded to the suit premises in company of the Police and the Applicant quietly handed over the shop back to Lucy Wanjiro Karanja. Therefore, when the Applicant moved to this Court on January 13, 2022, he was aware that he had handed over the suit premises to the 2nd Respondent but chose to mislead the court. The orders issued by the Tribunal on January 7, 2022 were executed on January 11, 2022 when the 2nd Respondent took over possession of the suit premises before the stay orders were served on her on January 17, 2022. That it is not true that the Applicant has invested money in the suit premises but instead, he has denied the 2nd Respondent rental income of Kshs 400,000 for the four (4) months when he was in illegal occupation of the suit premises. That although the Applicant had expressed interest in leasing part of the suit premises, the 2nd Respondent never entered into any lease agreement with him either personally or otherwise. The Applicant is therefore not deserving of the orders sought.
7. Annexed to the replying affidavit are the following documents:
1. Lease agreement between the 2nd Respondent and Lucy Wanjiro Karanja dated October 1, 2021.
 2. Rent receipts.
8. The 1st Respondent did not file any response to the application.
9. When the application was placed before me on January 14, 2022, I granted prayers 1, 2 and 3 and directed that the application be canvassed by way of written submissions to be filed on or before February 16, 2022 when the matter would be mentioned to confirm compliance. However, by that date, and in spite of my directions that the parties keep time lines, the Applicant had not served the Respondents with the application or submission. It was not until July 5, 2022 that Mr Maloba counsel for the 2nd Respondent informed the Court that he had only been served a week earlier. It was not until July 26, 2022 that all parties had filed their submissions whereupon the Deputy Registrar advised the parties that ruling would be delivered on notice.



10. Before I delve into that application, I need to point out that on January 21, 2022, the Applicant filed a Notice of Motion dated January 19, 2022. The same was placed before Ombwayo J in Kisumu ELC on January 24, 2022 who directed that the same be served within three (3) days and the Respondents to file a reply within three (3) days together with submissions. That appears not to have been done and on February 23, 2022 when I noticed the application dated January 19, 2022 and the orders of Ombwayo J issued on January 24, 2022, I directed that the parties do clarify the position on that application. That was not done and both parties have only filed submissions in respect to the application dated January 12, 2022. I can only conclude that the application dated January 19, 2022 may have been abandoned or overtaken by events.
11. I have considered the Notice of Motion dated January 12, 2022, the rival affidavits and annexures as well as the submissions by the firm of Ms Llp Advocates for the Applicant and Hammerton Maloba Advocates for the 2nd Respondent.
12. By his Notice of Motion the subject of this ruling, the Applicant seeks the following substantive remedies:
 1. An order of stay of execution of the ruling of the Tribunal dated January 7, 2022 and the subsequent order issued on January 10, 2022 pending the hearing and determination of the appeal herein.
 2. An order granting possession of the suit premises to the Applicant pending the determination of the appeal herein.

I shall first consider prayer No (2). As is now clear from paragraph 16 of the 2nd Respondent's replying affidavit, and which was not rebutted, she was handed back the suit premises on January 17, 2022. That was pursuant to the orders of the Tribunal issued on January 7, 2022. Those orders are the subject of the pending appeal which is yet to be canvassed. Indeed the main prayer sought in paragraph 23(b) the Memorandum of Appeal is that:

“The ruling and orders of the Business Premises Rent Tribunal at Kakamega by the Honourable Justice (sic) Andrew Muma delivered on January 7, 2022 in Business Premises Rent Tribunal case No 36 of 2021 be set aside and/or vacated in its entirety.”

I have in the preceding paragraph of this ruling reproduced in extenso the ruling of the Tribunal dated January 7, 2021 and which basically directed that the Respondent immediately takes over possession of the suit premises and which has now been done. Therefore to grant prayer No 2 of this application will amount to vacating the orders of the Tribunal and that will leave nothing to be determined in the appeal itself. That prayer is not available at this stage. It will have to await the final orders in the appeal itself. I must therefore dismiss it.

13. Prayer No 1 seeks an order for stay of execution of the ruling dated January 7, 2022 as well as the order dated January 10, 2022. Again, as the 2nd Respondent has already averred in paragraph 16 of her replying affidavit:

16: “That as a consequence of the foregoing, the order issued by the honourable tribunal on 7/1/2022 were executed on 11/1/2022 when I took over possession of the suit premises and handed the same to my tenants before the stay orders were served upon us on 17/1/2022.”

The stay orders which the 2nd Respondent is referring to can only be the ex-parte orders issued by this Court on January 14, 2022 which, as is now clear, had already been over-taken by events. An



application such as this one presupposes that the judgment, ruling or order sought to be stayed is yet to be executed. A court cannot stay what has already been executed. The term stay is defined in *Black's Law Dictionary* 10th Edition as follows:

“The postponement or halting of a proceeding, judgment or the like. An order to suspend all or part of a judicial proceeding or judgment resulting from that proceeding. Also termed a stay of execution; suspension of judgment.”

The ruling and orders of the Tribunal having been executed on January 11, 2022 when the Applicant, as deponed in paragraph 14 of the 2nd Respondent's replying affidavit, “quietly handed over the shop back to the said Lucy Wanjiro Karanja since the applicant had vacated the suit premises by the preceding day,” it means that there is really nothing left of the ruling and orders of the tribunal capable of being stayed.

And courts, as is well known, do not act in vain. This court will also be guided by the Court of Appeal's decision in *Co-operative Bank Of Kenya Ltd -v- Banking Insurance & Finance Union (kenya)* 2015 eKLR where it was held, per Ole Kantai JA, that:

“An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in the decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a ‘positive order’ – either an order that has not been complied with or has partly been complied with.”
Emphasis mine.

As is commonly said, the Applicant, by approaching this Court through his application dated January 12, 2022 was infact closing the stable after the horse had already bolted. The order for stay of execution of the ruling and order of the Tribunal is clearly not available because the substratum thereof has already dissipated.

14. Ordinarily, an application seeking order for stay of execution pending appeal would have to meet the threshold set at in Order 42 Tule 6(1) and (2) of the *Civil Procedure Rules*. The Applicant would have to satisfy the following conditions;

- a. Show sufficient cause
- b. Demonstrate that unless the order is granted, the he may suffer substantial loss.
- c. Make the application without unreasonable delay.
- d. Offer security

However, as is now clear from the preceding paragraphs of this ruling, there is nothing arising out of the tribunal's ruling dated January 7, 2022 and the subsequent order dated January 10, 2022 remaining to be executed. Therefore, there is nothing capable of being stayed. The Applicant will have to await the prosecution of his appeal and persuade the Court to vacate and/or set aside the Tribunal's ruling and orders. Indeed his counsel appears to have jumped the gun because in his submissions, he has identified the following issues for determination in this application i.e;

1. Whether there existed a valid binding and enforceable contract.
2. Whether the Applicant is entitled to notice of termination of the lease.
3. Whether the Applicant is entitled to compensation for abrupt termination of the lease.



These are issues that should properly be canvassed in the appeal itself but not in an application for stay of execution pending appeal.

15. The up-shot of all the above is that the Applicant's Notice of Motion dated January 12, 2022 is devoid of merit. It is dismissed with costs to the 2nd Respondent.

BOAZ N. OLAO

JUDGE

24TH JANUARY 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 24TH DAY OF JANUARY 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES AND WITH NOTICE TO THEM.

BOAZ N. OLAO

JUDGE

24TH JANUARY 2023

Explanatory Notes:

This ruling was due to be delivered at Bungoma Elc on 13th October 2022 a date that had been fixed prior to my transfer to Busia Elc on 3rd October 2022. The delay in delivering the same is regretted but was un-avoidable in the circumstances.

BOAZ N. OLAO

JUDGE

24TH JANUARY 2023

