



**Kabuku Investment Limited v Kap Enterprises Limited (Tribunal Case
9 of 2017) [2024] KEBPRT 785 (KLR) (Civ) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 785 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE 9 OF 2017
CN MUGAMBI, CHAIR
MAY 23, 2024**

BETWEEN

KABUKU INVESTMENT LIMITED TENANT

AND

KAP ENTERPRISES LIMITED LANDLORD

RULING

1. The Tenant's Application dated 8.04.2024 seeks an order that the court be pleased to issue an order of stay of execution, implementation and/or operation of the orders emanating from the Ruling issued on 16.12.2022 and 14.12.2023 pending the hearing and determination of the Appeal in ELC Appeal No. 004 of 2023.

The Applicant's depositions

2. The Affidavit of the Applicant in support of the Application may be summarized as follows:-
 - a. That the Applicant has been in occupation of the Land Reference No. 209/136/321 along Kirinyaga road, Nairobi (hereinafter "the suit premises") for a period of at least ten (10) years paying a monthly rent of Kshs. 150,000/=.
 - b. That the Respondent shocked the Tenant by issuing the Tenant with a three days notice to vacate the suit premises contrary to the provisions of Cap 301 of the Laws of Kenya.
 - c. That the Tenant challenged the said notice at the Tribunal but the Tribunal dismissed the Reference on the basis that it had no jurisdiction to hear and determine the Reference herein.
 - d. That the party and party bill of costs in this matter has already been taxed at Kshs. 112,505/= vide a ruling dated 14.12.2023.



- e. That the Tenant has filed an Appeal against the Ruling of 16.12.2023 and the orders emanating therefrom.
- f. That the Counsel for the Respondent herein has already demanded for payment of the taxed costs.
- g. That the enforcement of the order on the taxed costs will prejudice the Tenant as its Appeal is still pending.
- h. That the Tenant's right to a fair hearing is being curtailed against the principles of natural justice.
- i. That it is premature to impose financial obligations on the Tenant while it has an arguable Appeal pending.

The Respondent's depositions

3. The Respondent's replying affidavit sworn by Mr. Samuel Gichuru Gikonyo may be summarized as follows;-
 - a. That the Tribunal delivered its Ruling in this matter on 16.12.2022 dismissing the Tenant's Reference on the grounds that the Tribunal had no jurisdiction.
 - b. That the Reference was dismissed with costs as a consequence of which the Respondent filed its bill of costs which was on 14.12.2023 taxed at Kshs. 112,505/=.
 - c. That in the Applicant's Memorandum of Appeal dated 13.1.2024, the Tenant does not challenge the order as to costs.
 - d. That the Tenant's Reference was dismissed and hence the order issued was a negative order incapable of execution and the order of stay of execution sought cannot therefore be granted.
 - e. That the Tenant has not challenged the outcome of the taxation which is the subject of the Ruling issued by the Deputy Registrar on 14.12.2023.
 - f. That the Tenant has been indolent in bringing this Application and in prosecuting the Appeal and has further not demonstrated that it will suffer substantial loss if the orders sought are not granted.
 - g. That the Tenant/Applicant has not provided any security for costs and neither has it demonstrated any willingness to provide such security.
 - h. That the Applicant having admitted to being in dire financial constraints, an order of stay of execution would greatly prejudice the landlord/Respondent.
 - i. That without prejudice, the taxed costs ought to be deposited in an escrow account in the joint names of Counsels for the parties.

Analysis and determination

4. The only issue that arises for determination in this Application is whether the Applicant is entitled to the orders sought in the Application.



5. It is common ground that the Tribunal on 16.12.2022 dismissed the Tenant's Reference in the following words:-

"In the circumstances, the Tenant's Reference and all Applications in this matter are dismissed for want of "jurisdiction with costs."

6. Can the Tribunal make an order for stay of execution of the above order?

In the case of; Western College of Arts & Applied Sciences v EP Oronga & 3 Others [1976] eKLR, quoted in the Respondent's submissions, the court held as follows:-

"But what is there to be executed under the Judgment, the subject of the intended Appeal? The High court has merely dismissed the suit with costs. An execution can only be in respect of costs... The High court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High court. Judgment for this court in any application for stay to enforce or to refrain by injunction."

7. See also the case of; Gifted Hands School Limited v Mogul & Another [2022] KEELC 2770 (KIR) where the court of Appeal stated as follows:-

"The Applicants claim was dismissed by the Employment & Labour Relations Court (ELRC). What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court's judgment pending the hearing and determination of the intended Appeal sought by the Applicant cannot therefore be granted."

8. I do agree with the observation and the reasoning in the above superior court directions. It is clear that the order issued by the Tribunal on 16.12.2022 being one for the dismissal of the Tenant's Reference, there is nothing to be stayed as far as that order is concerned.

9. The only execution that can be carried out in the case is that on costs.

10. Under order 42 Rule 6(2) of the Civil Procedure Rules, 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.

11. Has the Applicant demonstrated that it will suffer substantial loss if the orders of stay of the Ruling of 14.12.2023 are not granted?

The Applicant in his affidavit has deponed that the Respondent's Counsel has already demanded for payment of the taxed costs. The payment of the costs and/or the execution for the said costs are all lawful processes and the Tenant cannot fault them absent an order from the High court or any other lawful order staying the execution of the same.

The Tenants main argument in this regard seems to be that it would be premature to impose any financial obligations upon it while its Appeal is pending. I do not think this is necessarily so as the mere existence of an Appeal does not amount to a stay of execution and neither does it operate as a bar to the enjoyment of the fruits of judgment by a successful party in a suit.



The Applicant must therefore 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.

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 (see the case of; James Wangalwa & Another v Agnes Naliaka Cheseto [20120 eKLR.

12. The Applicant has not established any factors beyond the fear of the execution for costs. It has failed to demonstrate that it will suffer any substantial loss if the orders sought are not granted.
13. The Tenant lumps together the ruling of 16.12.2022 and the ruling of 14.12.2023 for purposes of showing that this instant Application dated 8.4.2024 was made without unreasonable delay. Whereas the Tenant attempts to explain the delay in its submissions, the Affidavit in support of its Application has not made any attempts at explaining the delay. It is trite law that submissions are not evidence and a party cannot purport to introduce evidentiary matters by way of submissions.

Further, it is my view that the relevant ruling for the purposes of determining whether or not the Applicant has come to court without unreasonable delay is the ruling of 16.12.2022. This is the ruling that granted costs of the suit to the Respondents. The ruling of 14.12.2023 was a normal consequence of the orders emanating from the ruling of 16.12.2022.

Having said so, it is my further view that the period between 16.12.2022 and 8.4.2024 when the instant Application was made constitutes an unreasonable delay in bringing the said Application.

14. Clearly, the Respondent was jolted from its slumber by the Respondents' demand for the payment of the taxed costs and does not seem to have actively pursued any steps in appealing before then.
15. The Respondent while admitting in its submissions that it is ready and willing to offer security on whatever terms the court may impose, also submits in the same breath that the Applicant/Tenant should be accorded similar protection so that in the event the Appeal succeeds, the Tenant would be able to recover the money. This, the Tenant suggests can be by way of an order for stay of execution in these proceedings. This argument by the Tenant seems to ignore the fact that the Respondent is entitled to the fruits of his judgment and further that the security for costs required under Order 42(6) (2) is to be given by the party seeking the orders of stay.

The law does not require that the judgment debtor who has appealed be cushioned against future costs in the event he succeeds on Appeal.

16. Consequently, I do not find any merits in the Tenants Application dated 8.4.2024 and the same is dismissed with costs to the Respondent/Landlord.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MAY, 2024

HON. CYPRIAN MUGAMBI

CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Ms. Muga for the landlord/Respondent and Ms. Wangari holding brief for Mr. Gachie for the Applicant/Tenant

