



**Sheth Agencies Limited v Saifee Foundation & another (Tribunal Case
E818 of 2022) [2023] KEBPRT 1327 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1327 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E818 OF 2022
CN MUGAMBI, CHAIR
JULY 20, 2023**

BETWEEN

SHETH AGENCIES LIMITED TENANT

AND

SAIFEE FOUNDATION 1ST LANDLORD

FANTASY AUCTIONEERS 2ND LANDLORD

RULING

Introduction

1. The Tenant/Applicant's application dated 4.5.2023 prays for the following orders:-
 - a. That service of the application be dispensed with in the first instance and the same be certified urgent and heard ex parte in the first instance due to the urgent nature of the relief sought herein.
 - b. That pending the hearing and determination of this instant application, this Honourable court be pleased to issue an order of stay of execution of the ruling delivered on 6th April 2023.
 - c. That this Honourable court be pleased to grant such other and/or further orders and directions as it may deem fit and just.
 - d. That the costs of this Appeal (sic) be provided for.

The Tenant's Depositions

2. The affidavit of Hitendra Vakharia in support of the application may be summarized as follows:-



- a. That at all times, the tenant has disputed the distressed rent amount of Kshs. 5,064,000/= whose computation and accumulation is as a result of the 1st Respondent's dereliction of its duty to keep updated books of account.
- b. That on 6.4.2023, the tribunal delivered its ruling dismissing the tenant's application dated 4.10.2022 and 14.9.2022 with costs to the Respondent and further ordered the tenant to pay Kshs. 5,000,000/= within thirty days.
- c. That the Tribunal proceeded to mark the matter as closed without setting down the reference for hearing.
- d. That the actions of the Tribunal are a violation of the principles of natural justice.
- e. That the ruling of the Tribunal has left the tenant with no option but to file an appeal to avoid the law of the jungle taking precedent.
- f. That the tenant therefore seeks stay of execution pending the hearing of the Appeal.

The Respondent's Depositions

3. The replying affidavit sworn by Mr. Peter Omwenga Advocate on 5.6.2023 may be summarized as follows:-
 - a. That the Honourable court has no powers to stay its own orders and the tenant's application is an abuse of the court process.
 - b. That there is no provision for the commencement of proceedings at the Tribunal by way of a plaint as matters can only be canvassed by way of a complaint or a reference.
 - c. That the tenant is in rent arrears amounting to Kshs. 6,064,000/= and if the application was to be allowed, then the tenant ought to be ordered to deposit the said sum in a joint account pending the hearing and determination of this Appeal
 - d. That the Applicant has not complied with the court orders issued on 1/12/2022.
 - e. That there is no provision for appeals to the High Court in respect of decisions made from a complaint, hence the Applicant's appeal is incompetent and has nil chances of success.
 - f. That the Applicant is abusing the court process to avoid paying its monthly rent.
 - g. That the Respondents stand to be seriously prejudiced if the tenant does not deposit the disputed amount of rent in a joint interest earning account of both Advocates.

Analysis and Determination

4. The application by the tenant/Applicant as drafted has the main prayer that the court stays execution of the ruling delivered on 6.4.2023. It is not clear from the application what the Applicant wants the court to do after staying its orders or what should eventually happen to the stayed orders. A perusal of the affidavit in support of the application though, seems to suggest that the tenant/Applicant is seeking a stay of the orders emanating from the ruling of the Tribunal dated 6.4.2023 pending the hearing and determination of the Appeal, ELCA NO. E047 OF 2023. I will in the circumstances, treat the application as one seeking stay orders pending Appeal as the Respondent has substantially responded to the application in that light and will therefore suffer no prejudice.
5. From the affidavits filed by the parties, the following issues arise for determination;-



- a. Whether the Tribunal has the power to make orders of stay of execution of its own orders?
- b. Whether the tenant is entitled to the orders sought in its application.

Issue A

6. The Respondent has raised various issues in its replying affidavit which I need to mention before I proceed to determine this issue. Amongst the issues raised are whether the Tribunal can finalize a complaint without going to a full hearing, whether an appeal lies from a complaint, whether the tenant could approach the Tribunal by way of a plaint, whether the appeal is competent or not?

The Appellant on its part has stated that the Tribunal denied it the right to be heard. Of these issues, I wish to state that I am not sitting on appeal against my own ruling. These are matters best left for the determination of the court to which the appeal has been preferred and the Tribunal will only confine itself to the narrow limits I have set out as the issues to be determined.

7. And now, does the Tribunal have powers to stay the execution of its own orders pending the hearing and determination of an Appeal against its orders/rulings.
8. In JR Misc. Application No. 435 of 2012, Republic vs Business Premises Rent Tribunal & the Attorney General & Another, ex parte, Albert Ringera Karume, the Court while dealing with the jurisdiction of the Tribunal to issue orders of injunction delivered itself as follows:-

Paragraph 39: In terms of Article 169(1)(d) of *the Constitution*

1. The subordinate courts are-
 - a. The magistrate courts
 - b. The Kadhis courts
 - c. The courts martial and
 - d. Any other court or local Tribunal as may be established by an Act of Parliament other than the courts established as required by Article 162(2)
2. Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under Clause (1).

Paragraph 40: It is therefore clear that the jurisdiction of the subordinate courts can be limited by an act of parliament. To that extent, it is incorrect as contended by the Interested party that the tribunal necessarily has the same powers as the magistrates' court. However, where the powers of the tribunal have not been limited by a statute, it is my view that there is nothing to prevent the tribunal from exercising the powers conferred on the subordinate courts such as the magistrates courts. Section 63(c) of the *Civil Procedure Act* provides:-

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed

- c. Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.

Paragraph 41: the court under Section 2 of the said Act is expressed to mean "the High Court or a subordinate court acting in the exercise of its civil jurisdiction".

These provisions when read together, clearly supports the view that under the current constitutional dispensation in the absence of express limitation of the jurisdiction of the



tribunal, the Business Rent Tribunal is clothed with the jurisdiction to grant temporary injunction.

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Paragraph 43: It is therefore my view and I so hold that, until Parliament enacts legislation limiting or restricting the powers of the Tribunal, the tribunal has the powers to grant orders prescribed under Section 63(c) of the Civil Procedure Act, including orders of temporary injunction.

9. The Civil Procedure under order 42 Rule 6(1) provides;-

“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 for sufficient cause order stay of execution 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 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.

10. The Kigera case (supra) has already established that Tribunals are subordinate courts and further that the word court in the Civil Procedure Act has been defined to include subordinate courts and the High Court. By parity of reasoning the tribunal herein is therefore a court under the Civil Procedure Act and the reference to the “Court” in order 42 Rule 6(1) therefore is a reference to the Tribunal too. In this regard, the Tribunal then has then has the power to order stay of execution of its own orders.

11. The Kigera case (supra) has also established that under the current Constitutional dispensation, in the absence of express limitation of the jurisdiction of the tribunal, the Business & Rent Tribunal is clothed with the jurisdiction to grant temporary injunction. Similarly, in the instant case, I have not seen or found any express limitation to the Tribunal limiting it, or barring it from exercising the powers “Courts” exercise under order 46 Rule 1.

12. I am therefore of the view and I do hold on this issue that the Business Premises Rent Tribunal has jurisdiction to issue orders of stay of execution of its own orders pending appeal.

Issue B

13. The orders that the tenant seeks to have stayed pending the hearing of its appeal emanate from the Tribunal’s ruling of 6.4.2023 wherein the tenant’s application dated 14.9.2022 and 4.10.2022 were dismissed and the tenant ordered to pay/clear rent arrears amounting to Kshs. 5,064,000/= within thirty days of the ruling failing which the landlord would be at liberty to levy distress for the same.

14. Order 44 Rule 6(2) of the Civil Procedure provides as follows;-

(2) no order for stay of execution shall be made under subrule (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.



15. Has the Applicant demonstrated that substantial loss may result unless the orders of stay of execution are made?

I have perused the Applicant's affidavit in support of its application and the affidavit in my view seems to address itself to the merits of the Appeal filed by the tenant/Applicant and not the loss the tenant is likely to suffer if the orders sought are not granted. It is not for the Tribunal to imagine the losses that the tenant would suffer. It is not enough to merely state that the Applicant was ordered to pay Kshs. 5,064,000/=. The Applicant is under a duty to demonstrate the damages it would suffer if the order for stay is not granted.

16. In the case of; Kenya Shell Ltd vs Kibiria [1986] KLR 440, the court at page 416 stated as follows:-

“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 a rare case where an appeal would be rendered nugatory by some other event.

Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.

Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

And further at page 417, the court stated;

“it is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted. By granting stay would mean that the status quo should remain as it were before judgment. What assurance can there be of the Appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

17. I am not satisfied that the Applicant has demonstrated the loss it will suffer if the orders are not granted. There has been no suggestion that the Respondents would be unable to refund the sum awarded if the Applicant eventually succeeds in its appeal.
18. The Applicant has not offered any security for the due performance of such decree or order as may ultimately be binding upon him. I have however noted that the Respondent in its affidavit has suggested that the Applicant deposits Kshs. 6,064,000/= in a joint interest earning account in the names of the counsel for the parties pending the hearing and determination of the appeal by the Applicant/Tenant. This proposition sounds reasonable as the loss the tenant may suffer will be cushioned by the assured safety of the deposit in the joint names of counsel.

Disposition

18. I will in the circumstances issue an order of stay of execution of the orders emanating from the ruling of 6.4.2023 on the condition that the tenant will deposit the sum of Kshs. 5,064,000/= being the amount in the ruling, in a joint interest earning account in the names of the counsel for the parties within the next thirty days in default of which the orders of stay will automatically lapse.
19. The tenant will have the costs of this application.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 20TH JULY 2023.



HON. CYPRIAN MUGAMBI

CHAIR PERSON

7.2023

In the presence of:-

Mr. Maulid holding brief for Kithi for the Tenant/Appellant

Mr. Saringi for the landlord

