



**Milele Homes Limited v Mambomoto Homes Limited (Environment and Land Appeal 6 of 2023) [2023] KEELC 16942 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16942 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 6 OF 2023  
LC KOMINGOI, J  
APRIL 27, 2023**

**BETWEEN**

**MILELE HOMES LIMITED ..... APPELLANT**

**AND**

**MAMBOMOTO HOMES LIMITED ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated September 12, 2022 brought under;  
(Order 42 Rule 6, of the *Civil Procedure Rules* and Selections 1A, 1B, 3, 3A, 63 (e) and 63 (e) of the *Civil Procedure Act* and all enabling provisions of the law).
2. It seeks orders;
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to stay execution, implementation and/or enforcement of the Orders issued on the July 6, 2022 pending the hearing and determination of this Appeal.
  4. That the Honourable be further pleased to issue an Order for Stay of any further proceedings in CM ELC Case NO E043 of 2022 – Kajiado pending the hearing and determination of the Appeal herein.
  5. That costs be provided for.
3. The grounds are on the face of the Application and are set out in paragraphs a to i.



4. The Application is supported by the affidavit of Evance Otieno, Property Manager of the Appellant/Applicant, sworn on September 12, 2022.
5. The Application is opposed. There is a Replying Affidavit sworn by Lucy Kamau a director of the Respondent, sworn on the October 12, 2022.
6. The Notice of Motion was canvassed by way of Written Submissions.

#### **The Appellant/Applicant Submissions .**

7. They are dated November 21, 2022 counsel submitted that the Trial Court which granted mandatory orders at the interlocutory stage and failing to consider that it had power to address an application seeking stay of the same, did show that the court was not willing to listen to any challenge to its own decision.
8. It is further submitted that the Respondent has not disclosed how if the orders sought were granted would be prejudicial to them as the Appellant only seeks to defend itself.  
He has relied on Order 42 rule 6(2) of the Procedure Rules, 2010 and the case of Catherine Njeri Maranga vs Serah Chege & Another (2017)eKLR.
9. The Appellant/Applicant stands to suffer irreparable loss as the Respondent has already filed an application for contempt to cite the Appellant and will be detrimental to the Appellant as it has not refused to comply but the Orders were incapable of compliance and only at the Appeal will the Appellant be able to prove that.
10. It is further submitted that the Appellant/Applicant is willing to furnish security that the court may find appropriate in order to guarantee the performance of the orders granted which may be binding up on them.
11. It is also submitted that this court has the discretion to grant the Orders of Stay of proceedings in the subordinate court. Further that the Application has been filed without undue delay.  
He has put forward the case of Peter Kariuki Mburu & another vs. Neema Shab (2021) eKLR where the Judge cited with approval, the case of ReGlobal Tours & Travel Ltd HCWC NO 43 of 2000.  
He prays that the application be allowed

#### **The Respondent's Submissions.**

12. They are dated November 21, 2022.  
They raise three issues for determination:
  - i. Whether the Appellant/Applicants case has met the threshold for grant of orders of stay of execution/implementation of the trial courts orders of July 6, 2022.
  - ii. Whether the Appellant/Applicant has established an exceptional case to warrant the grant of orders of stay of proceedings before the trial court.
  - iii. Whether the Applicant is entitled to any of the reliefs he has sought from this Honourable Court.
13. Counsel has submitted that the Applicant has not alleged that any substantial loss will result if the application is denied.



- He has put forward the case of *Silversten vs Chesoni* (2002)1KLR 867.
14. It is submitted that execution, compliance and/or implementation of Court Orders is a lawful process. The fact that the Applicant may be held in contempt for disobeying the trial court's orders alone cannot in itself, amount to substantial loss neither can it be relied upon as a ground to warrant stay of execution/implementation of the said orders.
- He has put forward the cases of *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012)eKLR; *Machira t/a Machira & Co Advocates vs East African Standard* (No 2) (2002)KLR; *Antoine Ndiaye vs African Virtual University* (2015) eKLR where Gikonyo J cited the holding in *Andrew Kuria Njuguna vs Rose Kuria* (Nairobi Civil Case No 224 of 2001, (Unreported).
15. It is submitted that the Applicant has failed to establish substantial loss and the Application ought to fail.
16. The Applicant has not specifically stated that it is able and willing to furnish any reasonable security for the due performance of the orders of July 6, 2022. Should this appeal fail.
- He has put forward the case of *Elijah B Wamburi & 2 Others vs Joshua Wilson Muthioma & 6 others* (2020) eKLR.
17. Counsel has also submitted that stays of proceedings is a grave and fundamental interference with the Respondent's right to conduct litigation before the trial court.
- He has put forward the Case of *Kenya Wildlife Service vs James Mutembei* (2019) eKLR.
- The Applicant has not established any exceptional circumstances to persuade this Court to sparingly exercise its discretion in their favour.
18. It is also submitted that the Applicant has not met the threshold envisaged in order 42 Rule 6(2) of the *Civil Procedure Rules*. He prays that the application be dismissed with costs.
19. I have considered the Notice of Motion and the affidavit in support. I have also considered the response thereto, the written submissions, and the authorities cited.
- The issues for determination are;
- i. Whether the Appellant's/Applicant's application meets the threshold for grant of Orders for Stay of execution pending appeal.
  - ii. Is the Appellant/Applicant entitled to the Orders sought?
  - iii. Who should bear costs of this application?
20. The Principles guiding the grant of Stay of execution pending appeal are well settled.
- Order 42 Rule 6(2) of the *Civil Procedure Rules* provide that
- (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

21. It is clear from the Court record that the matter giving rise to the appeal commenced in the lower Court at Kajiado through a plaint dated April 28, 2022. The reliefs sought in the plaint include general damages, an injunction against the Defendant to stop them from dealing with the goods and fixtures carried away from the plaintiff's business premises and an order to compel the Defendant to release all the goods and fixtures taken away from plaintiff's business premises situated on property Known as Kajiado/Kaputiei – North/1007.

The parties herein were in a Landlord/tenant relationship that resulted in unpaid rent causing the Appellant to levy distress.

22. It is clear from Order 42 Rule 6(2) of the *Civil Procedure Rule* that for an Order of Stay of execution to be granted, specific conditions must be met by the Applicant.
23. I have considered the Notice of Motion herein and I find that it has been brought without unreasonable delay.
24. It is the Appellant/Applicant's case that it stand to suffer substantial loss if these Orders are not granted. The reason being the Respondent has already filed an application for contempt to cite the Appellant.
25. It's also the Appellant's/Applicant's contention that the Learned Trial Magistrate granted mandatory orders at the interlocutory stage without giving the Appellant an opportunity to challenge the same.
26. I have gone through the plaint in the lower court dated April 28, 2022. One of the prayers was to compel the defendant (Appellant herein) to release all the goods and fixtures taken away from the plaintiff's business premises known as Kajiado/Kaputiei – North/1007.
27. The Learned Trial Magistrate on the July 6, 2022 ordered the release of the goods by the defendant (Appellant) without any conditions. Without delving into the Appeal itself, I note that the director of the Respondent admitted that it was rent arrears.
28. This amounts to an arguable appeal which will be rendered nugatory if these Orders are not granted.

In the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal stated thus;

- “ 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 or 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 the 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 it's discretion whether to grant and 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”.



29. The Appellant/Applicant has stated that it is ready and willing to be bound by any conditions given by this court as regards furnishing security for the due performance of the orders of July 6, 2022.

30. In conclusion, I find merit in this application and I grant the following Orders:

a. That there be a stay of execution, implementation and /or enforcement of the Orders of July 6, 2022 pending hearing and determination of this Appeal.

b. That there be stay of any further proceedings in CM ELC Case No E043 of 2022, Kajiado pending the hearing and determination of this Appeal.

On condition that the Appellant/Applicant do deposit Kshs 200,000/= being security for costs in a joint interest earning Account in the names of counsel for the Appellant and for the Respondent within thirty (30) days from the date of this Ruling In default these Orders shall automatically lapse.

c. That the costs of this application do abide the outcome of the Appeal

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF APRIL 2023 AT KAJIADO.**

**L. KOMINGOI**

**JUDGE.**

**In the Presence of :**

Mr. Gachie for the Appellant.

Mr. Ongudi for the Respondent.

**Court Assistant – Mutisya.**

