



**Telposta Pension Scheme Registered Trustees v InterCountries
Importers & Exporters Ltd & 3 others (Environment and Land Appeal
E008 of 2024) [2024] KEELC 1182 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E008 OF 2024**

JA MOGENI, J

MARCH 6, 2024

BETWEEN

TELPOSTA PENSION SCHEME REGISTERED TRUSTEES APPELLANT

AND

**INTERCOUNTRIES IMPORTERS & EXPORTERS LTD 1ST RESPONDENT
LE-MOLOK LIMITED 2ND RESPONDENT
TOTAL SECURITY LIMITED 3RD RESPONDENT
CAR MAX LIMITED 4TH RESPONDENT**

*(Chairman of the Business Premises Rent Tribunal issued on 19/12/2023
and all further proceedings of the Tribunal in BPRT Cause No. 902 of 2016
(consolidated with BPRT No. 903 of 2016 and BPRT Cause No. 901 of 2023)*

RULING

1. Coming up before me for determination is the Appellant's Application dated 25/01/2024 filed under the provisions of Order 42 Rule 6 (1) & Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#) and Sections 1A,1B, 3A & 63 (e) of the [Civil Procedure Act](#). The Appellant/Applicant seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to issue a stay of the orders of the Chairman of the Business Premises Rent Tribunal issued on 19/12/2023 and all further proceedings of the Tribunal in BPRT Cause No. 902 of 2016 (consolidated with BPRT No. 903 of 2016 and BPRT Cause No. 901 of 2023 *Total Security Surveillance Limited -vs- Telposta Pension Scheme*



Registered Trustees & Another) pending the hearing and determination of the Appeal filed herewith.

- d. That the costs of this application be provided for.
2. The grounds are on the face of the application and are listed as in paragraph (a)-(p). The Application is further supported by the Affidavit and Supplementary Affidavit both sworn by Peter K. Rotich, the Administrator/Trust Secretary of the Appellant on 25/01/2024 and 30/01/2024 respectively.
3. In a nutshell, the Applicant asserts ownership of LR No. 209/13238, currently in possession. They have leased it to the 2nd and 3rd Respondents, who hold valid tenancy agreements since 2013. The suit property is subject to a dispute pending judgment at the Court of Appeal (Civil Appeal No. 293 of 2016). The tenants filed references at the Business Premises Rent Tribunal (BPRT) in 2016 to protect their interests due to eviction threats from the 1st Respondent. Despite a court injunction, the 1st Respondent initiated another reference (BPRT No. 903 of 2023) leading to eviction orders, later challenged by the Applicant and tenants, resulting in a stay order. Earlier, tenants sought a stay of proceedings at the Tribunal pending the Appeal's determination (Civil Appeal No. 293 of 2016). The Tribunal initially granted this, but the 1st Respondent later successfully applied to lift the stay, reinstating the references for hearing. The tenants fear eviction without a fair hearing, emphasizing their valid tenancy agreements and consistent rent payments.
4. The Application is opposed. It is contested by the 1st Respondent who filed a Replying Affidavit sworn by Naushad Abid, the Chief Executive Officer of the 1st Respondent on 16/02/2024.
5. The 1st Respondent challenges the Applicant's claims regarding a judgment in Nairobi ELC Case No. 1400 of 2004, where the 1st Respondent was declared the lawful owner of the suit property. The Court of Appeal did not issue a stay of execution against this judgment in Civil Appeal No. 293 of 2016. Additionally, the 1st Respondent argues against consolidating the appeals, emphasizing that they involve distinct disputes and parties, one concerning property ownership and the other leasehold interests. The 1st Respondent asserts their rightful ownership and opposes the Appellant's attempt to halt eviction sanctioned by the initial judgment. They claim the Applicant's actions are delaying execution of the judgment and argue against granting the Applicant's motion, citing principles of equity.
6. On 19/02/2024, the Court gave directions that the application be canvassed through written submissions and a Ruling date was reserved. The Appellant/Applicant and the 1st Respondent duly submitted and I have considered them. The Appellant filed written submissions 23/02/2024 and the 1st Respondent filed written submissions dated 27th February 2024.

Issues for determination

7. Having carefully read and considered both applications, the rival affidavits and the submissions thereto, I find that the following issue stands out for determination; whether the Appellant has made a case for the grant of an order of stay of execution.

Analysis and determination

Whether the Appellant has made a case for the grant of an order for Stay of execution.

8. An application for stay invokes the discretionary powers of this Court under Order 42 Rule 6(1) of the [Civil Procedure Rules](#) that empowers the Court to stay execution, either of its judgement or that of



a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states 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.”

9. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.
10. I have already set out the three elements required in Order 42 Rule 6. I opt to start with the issue of delay. The Ruling in the lower court was delivered on 19/12/2023 and the application for stay was filed on 26/01/2024. A period of thirty-eight (38) days or so cannot be said to have been inordinate. This Court is thus satisfied that the present application was filed without unreasonable delay.
11. The Court of Appeal in the case of *Butt vs Rent Restriction* Tribunal Civil App No. NAI 6 of 1979, Madan, Miller and Porter JJA, while considering an application of this nature, had this to say: -
 - i. “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 an appeal.
 - ii. 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 that appeal court reverse the judge’s discretion.
 - iii. 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.
 - iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
12. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. In the case of *Machira T/A Machira & Co. Advocates vs East Africa Standard* [2002] eKLR Kuloba J. as he then was held that an applicant’s ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful, it will be rendered nugatory.
13. The Applicant deponed that the Ruling of the Tribunal made on 19/12/2023 had the effect of setting aside the earlier orders of stay of proceedings and hence the Tenants References were actively reinstated for hearing and determination. The References are now active and were allocated a date in Court on 26/01/2024 for directions on hearing of the Tenants’ Reference. That the reasons the tenants had sought a stay of the References was solely to pave way for the determination of the Appeal so that they can have the issue of the tenancies addressed by the Tribunal with finality. The Applicant contended



that the tenants having recently faced a threatened eviction through foul play by the 1st Respondent, they are apprehensive that with the lifting of the stay of proceedings at the Tribunal, the same will happen again at any given time thus exposing them to danger of eviction and loss of their rights and occupation over the premises particularly once the References are heard and determined.

14. Conversely, it is the Respondent's contention that the averments in paragraph 3-5 of the Applicant's supporting affidavit are false because the 1st Respondent is the lawful owner following a lawfully entered judgment in Nairobi ELC Suit No. 1400 of 2014 that has not been overturned by any appellate court. That in response to paragraph 5 of the supporting affidavit, the Appellant is equally admitting to an illegal occupation of the land that was awarded to the 1st Respondent by a judgment issued by a court of competent jurisdiction and is trying to obtain orders from the Business Premises Rent Tribunal to stop an eviction sanctioned by this Honourable Court. The 1st Respondent deponed that it would be highly prejudicial for this Honourable Court to reinstate the stay of proceeding order, preventing the hearing of the References in BPRT Cause No. 902 of 2016 (consolidated with BPRT Nos. 903 of 2016 and BPRT Nos. 901 of 2023 because that would be tantamount to this Honourable Court sitting on an appeal in a judgment that was issued by this Honourable Court.
15. At this instant, it is not for the Court to speculate on the outcome of the issue of ownership by the Court of Appeal. As it stands, the 1st Respondent has been declared as the owner of the suit property in Nairobi ELC Suit No. 1400 of 2014. That judgment has not been overturned by the appellate court. The Applicant bears the burden of proving that by refusal to grant stay of execution they stand to suffer substantial loss. This Court is therefore not convinced that the Applicant has demonstrated the substantial loss that may result to them should the order of stay be denied.
16. An applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. I find that Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. In the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
17. Under the provisions of Order 42 rule 6 (1) (2) of the *Civil Procedure Rules*, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of *Equity Bank Ltd -vs- Taiga Adams Company Ltd* [2006] eKLR it was held that: -

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant



an order of stay...” which principle was also emphasized in *Carter & Sons Ltd -vs- Deposit Protection Fund Board & 3 Others.*”

18. In the instant matter, the Applicant has not offered any security or an undertaking that they are ready and willing to pay the same if ordered by this Honourable Court.
19. Additionally, on the issue of stay of all further proceedings of the Tribunal, I note that it is not in dispute that the matter was adjudicated upon in the Tribunal and that the same was reviewed and/or set aside by the Ruling of the Tribunal delivered on 19/12/2023 which is the subject of the appeal herein. Thus, it is my considered view that the same is res judicata as the issue of stay of proceedings was heard and finally determined by the Tribunal and this Court cannot entertain it.
20. In the end, the Applicant has failed to satisfy this Court on the conditions for the grant of the orders sought. Consequently, the Notice of Motion dated 25/01/2024 must fail and the same is hereby dismissed with costs.
- 21 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH 2024

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Mathenge for the Appellant/Applicant

Mr. Kisigwa with Ms Faith Cherop holding brief for Mr. Mosota for the 1st Respondent

Mr. Dachi for the 2nd and 3rd Respondents

None appearance for the 4th Respondent

Caroline Sagina: Court Assistant

