



Jekan Company Limited v Hagos t/a Essey Café & another (Environment and Land Appeal E019 of 2024) [2024] KEELC 4118 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E019 OF 2024**

MD MWANGI, J

MAY 7, 2024

BETWEEN

JEKAN COMPANY LIMITED APPELLANT

AND

DAWIT HAGOS T/A ESSEY CAFÉ 1ST RESPONDENT

ARKPOINT PROPERTIES LIMITED 2ND RESPONDENT

(In respect of the Notice of Motion application dated 20th February, 2024, seeking an order of stay of execution of the ruling in CMELC No. E180 of 2017 pending appeal)

RULING

Background:

1. The Appellant's application is brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 79G of the [Civil Procedure Act](#). The Appellant prays for an order of stay of execution staying the Ruling of the Court, delivered by Hon. Lucy Njora (SPM) in Milimani CMELC E180 of 2017 – Dawit Hagos T/A Essey Cafe -vs- Jekan Company Ltd & Arkpoint Properties Ltd delivered on 23rd January, 2024, pending hearing and determination of the Appeal.
2. The application is based on the grounds on the face of it and the supporting affidavit of JAMES MWANGI KAMUNGE sworn on 20th February, 2024. The Appellant avers that its appeal will be rendered nugatory if the order of stay is not granted and that it will suffer irreparable loss.
3. It is the Appellant's case that it has an arguable appeal with high chances of success that raises serious questions of both law and fact. The Appellant states that it has moved diligently and expeditiously in bringing this application after the delivery of the ruling appealed from. Further, that no prejudice will be suffered by the Respondents as they will have their day in Court in any event.



Reply by the Respondent

4. The 1st Respondent replied to the Appellant's application by way of a replying affidavit deposed by DAWIT HAGOS on 5th March, 2024. In the lengthy affidavit, the deponent deposed that the Appellant is not deserving of the orders sought, as it has come to Court with unclean hands. The deponent alleges that in the case before the Subordinate Court, the 1st Respondent had been granted status quo orders allowing it to continue operating its restaurant pending hearing and determination of an interim application but the Appellant in defiance locked the 1st Respondent out of the suit premises, thereby constructively evicting it. The Appellant disobeyed the court orders of the trial court and has continued to hold the movable properties of the 1st Respondent that were in the restaurant.
5. The deponent argues that the 1st Respondent should be allowed to enjoy the fruits of its judgement by executing the lawfully obtained decree. The deponent also prays for an order that the Appellant releases the 1st Respondent's properties that were in the restaurant at the time that it was constructively evicted from the suit premises by the Appellant.
6. The Appellant filed a rejoinder by way of a further affidavit and denied the allegations by the 1st Respondent. In specific reference to the alleged status quo orders, the Appellant argues that the same had expired by the time that the 1st Respondent alleges that they were disobeyed. It therefore denies having disobeyed any Court orders as alleged or at all.

Court's directions

7. The Court's directions were that the application herein be canvassed by way of written submissions. Only the Appellant complied by filing its submissions dated 25th Marc, 2024. The Court has had the opportunity to read and consider the said submissions and the accompanying list of authorities.

Issues for determination

8. I agree with the Appellant/Applicant's identified issues for determination, namely:
 - a. Whether the Appellant/Applicant has satisfied the conditions pre-requisite for the granting of the prayers sought, and
 - b. Whether the prayers sought including costs should be granted.

Analysis and Determination

9. Order 42 rule 6 of the Civil Procedure Rules makes provisions for stay of execution pending appeal. It provides that:

“No order of 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 orders as may ultimately be binding on him has been given by the Applicant.”



10. The Court in the case of RWW –vs- EKW [2019] eKLR, stated that the purposes of stay pending appeal is to preserve the substratum or the subject matter in dispute.....

“so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

11. In the case of Machira T/A Machira & Co. Advocates -vs- East African Standard (No.2) [2002] KLR 63, the Court held that:

To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court

12. The Appeal before the Court is an appeal against a money decree. The 1st Respondent was awarded a sum of Kshs 4,000,000/= by the Subordinate Court made up of special damages of Kshs 2,000,000/= and general damages of a similar amount.

13. Discussing the condition of substantial loss in the case of James Wangalwa & Another -vs- Agnes Naliaka Cheseto [2012] eKLR, the Court stated that:

“The Applicant must 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.”

14. The Court emphasized that:

“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.”

15. In the Court’s opinion, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself, does not amount to substantial loss. I agree with the opinion of the court.

16. In this case, considering all the circumstances and in a bid to balance the interests of the Appellant with those of the 1st Respondent, I will grant a conditional order of stay of execution of the decree of the



subordinate court pending the hearing and determination of the appeal. I direct that the Appellant pays a sum of Kshs. 1,500,000/- to the 1st Respondent in the next thirty (30) days from the date of this ruling being part-payment of the decretal amount, pending the hearing and determination of the appeal, failing which the orders of stay of execution will automatically lapse.

17. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Oloo for the 1st Respondent

Mr. Mwangi for the Appellant/Applicant

N/A for the 2nd Respondent

Yvette: Court Assistant

