



REPUBLIC OF KENYA



**Bamburi Supermarkets Ltd v Rupa & 3 others (Environment & Land
Case 165 of 2021) [2024] KEELC 5044 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5044 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 165 OF 2021

SM KIBUNJA, J

JULY 3, 2024

BETWEEN

BAMBURI SUPERMARKETS LTD PLAINTIFF

AND

RUPA GUPTA ALIAS RUPA BULIBULI BOSSE 1ST DEFENDANT

JABESS ODUOR 2ND DEFENDANT

**KENYA KAZI SECURITY SERVICES LTD (K.K SECURITY
LTD) 3RD DEFENDANT**

KHALID SALIM T/A KHALID SALIM & CO. ADVOCATES ... 4TH DEFENDANT

RULING

1. The 1st defendant moved the court vide the notice of motion dated 9th March 2023 seeking for inter alia stay of this suit pending the hearing and determination of Mombasa High Court Commercial Case No. E70 of 2021, Rupa Gupta alias Rupa BuliBuli Bose v Daman Gupta & 4 others. The application is premised on the ten (10) grounds on its face and supported by the affidavit of Rupa Gupta, 1st defendant, sworn on 9th March 2023 inter alia deposing that the plaintiff obtained temporary injunction orders in this suit on 7th December 2021, and vide the ruling of 9th November 2022, the 1st defendant was ordered to comply with the earlier orders in 14 days in default pay a fine or be committed to 3 months imprisonment; that prior to the filing of this suit, there was Mombasa High Court Commercial Case E70 of 2021, between the 1st defendant, plaintiff and its three (3) directors; that before the delivery of the ruling of 9th November 2022, there was a pending ruling in the High Court suit, concerning contempt of court orders by the plaintiff's directors, that was delivered on 30th November 2022, finding the 2nd and 3rd defendants to be in contempt of court orders issued on 30th July 2021; that the crux of the Commercial Case E70 OF 2021 is about shareholding of the plaintiff, and once the same is determined, the issue of who ought to run, manage and or operate Gupta



Complex, which stands on L.R No. 3413/I/MN, suit property, would have been resolved; that this suit should be stayed pending effectual determination of the issue of shareholding, and directorship of the Plaintiff herein, so as to avoid conflicting decisions from courts of equal status; that unless this suit is stayed, the 1st defendant stands to suffer as she is likely to be found to have failed to comply with the orders of 9th November 2022.

2. The plaintiff opposed the application through the replying affidavit of Varun Gupta, director, sworn on 28th November 2023, inter alia deposing that the court's ruling of 7th December 2021 directed that the rental income collected and received from the tenants in the suit property from 31st July 2021 be deposited in an escrow account held by parties advocates; that the account holders to run, manage and operate the said account, on the day to day operations and settlement of overheads until the suit is determined; that the 1st defendant do provide the court with a detailed and comprehensive account of all rental income collected and received from 31st July 2021, within 30 days from the date of the afore mentioned ruling; that the 1st defendant disregarded the said ruling and continued to collect rent without involving the plaintiff and failed to make deposits as earlier ordered; that the plaintiff sought to have the 1st defendant committed to civil jail for disobedience of the said ruling and the court delivered a ruling on 9th November 2022, directing 1st defendant to comply with the orders of 7th December 2021 within 14 days, or be liable to pay Kshs. 500,000 or be committed to civil jail for three (3) months; that the instant application is made in bad faith and meant to circumvent this court's orders of 9th November 2022.
3. The court issued directions on filing and exchanging submissions on the 29th November 2023 and 5th February 2024. That the learned counsel for the 1st defendant filed their submissions dated the 8th February 2024, that the court has considered.
4. The following are the issues for determination by the court:
 - i. Whether the 1st defendant has met the threshold for the stay of proceeding order to issue.
 - ii. What orders to issue.
 - iii. Who bears the costs?
5. The court has carefully considered the grounds on the notice of motion and affidavit evidence, submissions by the learned counsel for the 1st defendant, superior courts decisions cited thereon and come to the following determinations:
 - a. The 1st defendant's application is two pronged, in that it seeks for stay of;
 - i. execution of the ruling of 9th November 2022, and
 - ii. the proceedings in this suit pending the outcome of Mombasa HCCC No. E70 OF 2021.

Though the 1st defendant has sought for stay of execution of the ruling of 9th November 2022, there is no evidence tendered on the purpose of the stay order. There is neither a pending application for review nor an appeal in respect of the ruling of 9th November 2022. She has also not stated what action she intends to take once stay is granted.

- b. The application is predicated on the provisions of sections 3, 13 (7), 19 (1) and (2) of the [Environment and Land Court Act](#) No. 19 of 2011, sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), Chapter 21 of Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules. The court has taken judicial notice that none of the above provisions deal with stay of execution.



Under the Civil Procedure Rules, stay of execution may be considered for example, in the following three instances:

- i. Stay of execution pending appeal under Order 42 Rule 6;
- ii. Stay of execution pending determination of a suit in another court between decree holder and judgment debtor under Order 22 Rule 25; and
- iii. Stay of execution upon notice of objection to attachment under Order 22 Rule 52.

The 1st defendant's application for stay of the ruling dated 9th November 2022 does not fall under any of the above three categories and is therefore without basis.

- c. On the second prayer for stay of this suit pending determination of Mombasa HCCC No. E70 of 2021, the counsel for the 1st defendant argues that the dominant issue is the shareholding, and once it is resolved, the issue of management and operation of Gupta Complex, which is the suit property herein, would be resolved. The only material or factual evidence provided to this court that relates to the High Court suit is a ruling. In that ruling, the court inter alia observed that the 1st defendant is a wife to the late Premlal Ramnath alias Premlal Ramnath Gupta; that the 1st defendant claims that her late husband was a director and shareholder of the plaintiff, and that she filed the commercial suit to protect the suit property from being disposed off. However, the court made a finding that the dominant issue was the removal of the late Premlal Gupta as a shareholder of the 4th defendant and hence a High Court matter.
- d. In the plaint filed by the plaintiff on 19th August 2021 in this instant suit, the plaintiff claims that the 1st defendant has been masquerading as the owner of the suit property, and has thus engaged the 2nd defendant to collect rent from the tenants of the suit property; that the 2nd defendant are not directors or shareholders of the plaintiff company, and therefore have no rights whatsoever to run, operate, manage, access, use occupy and collect rents. It is trite that the dominant issue here is that the 1st defendant collects rent from the suit property, when she is not the registered owner. The court has noted that the issue of possible conflict between the High Court and this court is a matter that this court had already addressed itself to, under paragraph 43 of the ruling of 7th December 2021, where it was held as follows:

“.....therefore, its noted that the subject matters and issues are substantially distinct. These are matters to be heard and rightfully determined before the High Court and Environment and Land Court. There is no conflict as they are very distinct and separate subject matters.”

That ruling has not been successfully reviewed and or appealed against to date and remains the position of this court.

- e. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR the court held:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

The power to issue stay of proceeding orders has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly



no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case. I therefore find 1st defendant's contention that this suit be stayed to await the determination of the commercial dispute of shareholding in the plaintiff goes against the entire principles of land ownership under sections 25 and 26 of the Land Registration Act, No. 3 of 2012 and Article 40 of the Constitution of Kenya 2010.

- f. That the parties herein are reminded that this court has already ruled the suit before it is within its jurisdiction, and in view of the High court ruling of 30th November 2022 in HCCC No. E70 of 2021 that it has jurisdiction in the issues therein, that question is therefore a non-issue. The 1st defendant's application for stay of proceedings is therefore without merit.
 - g. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the costs follow the event unless where for good reasons the court orders otherwise. I find no good cause to depart from that edict.
6. In view of the above conclusions, and in furtherance of the overriding objectives in section 1B and 3A of the Civil Procedure Act, Cap 21, the court find and order as follows: -
- a. That the 1st defendant's notice of motion dated 9th March 2023 is without merit and is dismissed.
 - b. The 1st defendant to pay the plaintiff's costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 3RD DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

in the presence of:

Plaintiff : Mr. Ochami for Wameyo

Defendants : Mr. Kirui for 1st Defendant Mr. Wafula for 3rd Defendant.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

