



**Tarameera Limited & 2 others v Kantaria & 4 others (Environment & Land
Case 1325 of 2015) [2023] KEELC 18721 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1325 OF 2015**

J OMANGE, J

JULY 6, 2023

BETWEEN

TARAMEERA LIMITED 1ST PLAINTIFF

MRADULA SURESH KANTARIAL 2ND PLAINTIFF

MEERA KANTARIA 3RD PLAINTIFF

AND

MRADULA SURESH KANTARIA 1ST DEFENDANT

MEERA KANTARIA 2ND DEFENDANT

TARAMEERA LIMITED 3RD DEFENDANT

SURESH KANTARIA 4TH DEFENDANT

KEVAL KANTARIA 5TH DEFENDANT

RULING

1. This is a hard-fought dispute between a plaintiff company which has a director who is an ex- husband and father to the 1st and 2nd Defendant respectively. After hearing the parties the court in a Judgement written and delivered on November 24, 2022 by Hon Lady Justice Komingoi made the following orders;
 - a. That a declaration is hereby issued that the 1st Defendant has trespassed on the suit property LR NO 9104/133 as from July 15, 1997.
 - b. Mesne Profits of Kshs 14,280,000.
 - c. That the Defendants are hereby directed to give vacant possession of the house LR NO 9104/133 within one hundred and twenty days from the date of



Judgement failure to which the plaintiff is to be at liberty to use lawful means to evict them.

- d. Each party to bear their own cost.
2. The 1st and 2nd Defendants application dated December 20, 2023 prays for stay of execution pending the hearing and determination of the intended appeal at the Court of Appeal.
3. In the affidavit in support of the application the 1st Defendant applicant avers that they have always resided in the suit property. She depones that she is unable to secure alternative accommodation as the plaintiff has failed to provide maintenance as ordered by the Court of Appeal.
4. On the other hand, the plaintiff vehemently opposes the application primarily on the grounds that the Court of Appeal had determined that the ownership of the suit property is vested in the Plaintiff hence the issue should not be raised again in the same court.
5. I have considered the affidavits filed by both parties and the submissions by both counsel. The issue the court has to determine is whether the applicants should be granted stay as requested.
6. The principles that should guide a court in an application of this nature are clearly spelled out in Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
 - 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.
7. In *Visbram Ravji Halai vs Thornton & Turpin Civil Application No Nai 15 of 1990 [1990] KLR 365*, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
8. On sufficient cause it does not fall upon this court to assess the merits of the appeal. The appellants are entitled in exercise of their right to access court to prosecute their appeal in the next level of court. I also note that apart from the issue of ownership which the Respondent contends has been resolved in an earlier decision, the applicant is entitled to have its appeal on the issue of mesne profits considered and a determination made. If an order of stay is not granted the situation that was described in the case of *Kenya Airports Authority vs Mitu-Bell Welfare Society & Another (2014) eKLR*, might come to pass. In this case the court held that:

' The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases.' Tabro



9. In *Silverstein –vs- Chesoni [2002]1 KLR 867* the Court held 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 a loss would render the appeal nugatory.'

10. Regarding the requirement to establish substantial loss it is not in dispute that the applicants have resided in the suit property since 1998. No doubt they will suffer substantial loss if stay is not granted.

11. The applicants have asked the court not ask them to furnish any security. 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.

12. Order 42 Rule 6(2) above is clear that security must be provided. This is only protection that a Decree Holder has that at the end of the delay occasioned by the grant of the stay of execution he/she will be able to obtain at least the costs if nothing else. However, the security should not be such that it acts as an impediment to pursuing appeals.

13. Section 1A and 1B of the *Civil Procedure Act* places on the courts a responsibility to give effect to the overriding objectives which include; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. This calls upon the court to not only consider whether the well settled principles of grant of stay have been met, but to delve deeper to determine what the ends of justice would require in each circumstance.

14. The overriding objectives of the *Civil Procedure Act* especially as it relates to the just determination of proceedings require the court to ensure that the ends of justice are met for both parties. This was clearly spelt out in the case of *Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR*, thus:

' The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.'

15. Taking into the account the foregoing and balancing the rights of both parties I make the following orders:-

16. The application is allowed in the following terms:-

a. Stay of Execution pending the intended appeal is granted pending the hearing and determination of the appeal.

b. The Applicant to furnish a Bankers bond for Kshs 500,000 from an institution of repute or deposit the amount in court within 60 days of this ruling.

c. That the appeal should be filed within 120 days.

d. That in default of (b) and (c) the prayer for stay shall lapse and the Respondent shall be at liberty to execute.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Koech for the Defendants/Applicants

Mr. Ndungu for Dr. Kamau Kuria for the Respondent

Steve - Court Assistant

