



Isika v Skylark Impex Limited & another (Environment & Land Case E050 of 2023) [2023] KEELC 21524 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E050 OF 2023
J OMANGE, J
NOVEMBER 9, 2023**

BETWEEN

MICHAEL MWENDWA ISIKA APPLICANT

AND

PROLAND REALTORS LIMITED 1ST RESPONDENT

SKYLARK IMPEX LIMITED 2ND RESPONDENT

RULING

1. In the Notice of Motion application dated the 15th May 2023 the Applicant sought the following orders:
 - a. Spent.
 - b. That the honourable court be pleased to order for stay of execution of the judgement delivered by the honourable rent restriction tribunal ordering the monies deposited in the joint account between the parties herein to be released into the Landlord account pending hearing and determination of the application and appeal.
 - c. That the honourable court be pleased to make an order that the monies deposited in the joint account be deemed as sufficient security for the appeal and subsequently order that status quo between the parties be maintained pending hearing and determination of the application and appeal.
 - d. Costs of the application.
2. The Application was supported by an Affidavit sworn by the Applicant in which he deponed that he had a tenancy agreement with the Respondents in respect of house no B5 Skylar apartments. He stated that he had at all material times paid rent as it became due. He deponed that due to loss of employment he gave a one month's notice to vacate to the respondents and that at the expiry of the notice he was



prevented from vacating with allegations of rent arrears in sum of Ksh 539,500/= necessitating the suit at the rent tribunal.

3. The Applicant deponed that he at times had paid rent to the Respondent's agent one Mr Alex Kitavi in accordance to the tenancy agreement which allowed for remittance to either the landlord or agent.
4. He deponed that at trial he was asked to deposit security in terms of the rent arrears which was held in a joint account. He further stated that what is in dispute is not that he paid rent rather the mode of payment which was not one captured under the tenancy agreement.
5. The Tribunal ruled in favour of the Respondent hence the application herein for stay of execution pending the hearing and determination of the Appeal.
6. The 1st and 2nd Respondents vide the replying affidavit dated 22nd June 2023 oppose the application on the grounds that the orders sought were not tenable as they had already been overtaken by events. Further they state that the application is not merited as it did not meet the requirements set out in order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010 on stay of execution.
7. The Respondents in their submissions reiterated the contents of their Replying Affidavit that execution had already taken place. That they had rightfully implemented the court order and are currently enjoying the fruits of the Judgment hence the application should not be entertained. They placed reliance on the case of [Nadeem A Kana v Lucy Wambui Mwangi](#) (2021) eKLR in which the court stated that it would not adjudicate on any application which had been overtaken by events as any success would be rendered pyrrhic. They also quoted the case of [Julianna Mbuya Njiru v Pitbon Njiru Ngiri and 2 others](#) (2020) eKLR
8. They further submitted that the provisions of order 42 rule 6(2) had not been met by the Applicant as he had not demonstrated how he will suffer substantial loss which is the core principle in granting stay of execution orders as in the case of [Shell Ltd Kibiru and another](#) (1986) KLR 410 platt JA wherein the learned Judge stated substantial loss in its various forms is the cornerstone of both jurisdictions in granting stay.

It was also submitted that the applicant ought to prove that he can provide security for costs for due performance of the decree which he had not as indicated in the current application Lastly it was submitted that the appeal was not one likely to succeed as no valid grounds had been given for the intended appeal.

9. The Applicant in response to the Replying affidavit filed submissions and a further affidavit. The submissions raised three issues whether the withdrawal of funds from the account was done in malice. On this the Applicant stated that it was questionable why the funds were not released in the landlords account as per the court's order but rather in a personal account and the promptness of the withdrawal. He submitted that the application was not heard on the day intended due a missing file, which mishap the Respondents took advantage of, to withdraw the funds. The last issue submitted on was that the application was merited in that he had proved that he will suffer substantial loss and will be prejudiced by depositing more monies to act as security in the appeal yet the decretal sums withdrawn by the respondents would have been used as security. The applicant relied on the case of [Ena investment Limited v Benard Ochau Moses and 2 others](#) which the court stated there is the need to balance interest of both parties in an application for stay pending appeal.



10. Having looked at the pleadings of both parties, the only substantial issue for determination before this court is;

Whether stay of execution pending appeal should be granted or the application seeking the same has been overtaken by events

The intent of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. This notwithstanding, the court is bound to weigh this right against the success of a litigant who should not be deprived of the fruits of his Judgment. The court also looks at whether prejudice will be occasioned to either party and monetary compensation cannot be adequate.

11. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal. The court grants stay of execution on sufficient cause being shown; substantial loss would occur; the application is made without unreasonable delay and on provision of such security as the Court may impose. The powers to grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent as highlighted in the case of *M/s portreitz maternity -v- James Karanga Kabia* Civil Appeal No. 63 of 1997 where the court stated;

That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.

12. It is not in contention that the decree has already been executed and that the orders being sought for in the current application are obsolete. At the time the funds were released to the Respondent there were no orders for stay. The fact that the Judgment of the lower court has been executed does not on its own amount to substantial loss as was stated in the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* Misc application No 42 of 2011 [2012] eKLR (Gikonyo J stated that:

“No doubt, in law, 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

13. I therefore find that the application for stay has been overtaken by events and issuing any orders for stay would be in vain. Consequently, the application dated 15th May 2023 is dismissed. Costs are to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF NOVEMBER 2023.

JUDY OMANGE

JUDGE

In the presence of:-

Mr. Opiyo for Appellant/Applicant

