



REPUBLIC OF KENYA



Karango & another v Park Towers Limited (Miscellaneous Application E462 of 2023) [2023] KEHC 23242 (KLR) (Civ) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

MISCELLANEOUS APPLICATION E462 OF 2023

JN MULWA, J

OCTOBER 5, 2023

BETWEEN

EVANS KARANGO 1ST APPLICANT

MARION ICHARIA 2ND APPLICANT

AND

PARK TOWERS LIMITED RESPONDENT

RULING

1. There are two applications before the Court filed by the Applicants dated June 23, 2023 and July 5, 2023. I will start with the latter.
2. By the application dated July 5, 2023, the applicants sought various orders –
 1. Spent
 2. reinstatement of the Applicants back into the suit premises known as premises No 23 erected on L R No 209/8409 situated in Nairobi pending the hearing and determination of the Applicatio dated June 27, inter-partes on October 11, 2023.
 3. That this Honourable Court be pleased to order and/or direct that; “maintenance of status quo” as referred to in the orders given herein on June 27, 2023 to mean the Applicants will continue to remain in possession of the suit premises pending inter-partes hearing on October 11, 2023.
 4. That this Honourable Court be pleased to direct the Officer Commanding Station, Kamukunji Police Station to enforce the compliance of the orders issued herein.
 5. That costs of this application be provided for.



3. The application is grounded upon provisions of Order 22 Rule 22 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 (2) (d) of the Kenyan Constitution.

On the 27/6/2023, the Court (Hon Meoli J) granted to the applicants a temporary order to maintain status quo subject to the Applicants depositing into Court the sum of Kshs 400,00/- by close of business on July 30, 2023.

4. On the 13/7/2023 when parties appeared before me for interpartes hearing of the motion, the applicants Advocate Mr. Owang told the Court that the conditional stay orders had not been complied with, and indicated willingness by the applicants to comply with the said orders. He further told the Court that as at date of the Orders, status quo was that the Suit premises had only been locked by the Respondent, but had since been given to a new tenant, and was to seek orders for reinstatement, meaning, in my view that the Applicants were no longer in actual occupation and or possession of the Suit premises known as L.R. No. 209/8409 situated at Nairobi, being a Public Toilet.
5. As to interpretation of Status Quo as at the date the order was given, June 27, 2023, it was the Applicants Submission that the subject premises were only closed and not leased to a 3rd Party. It was a further submission that the subject premises are a Public toilet constructed by the Applicants.
6. For the Respondent represented by Mr Oyatta Advocate, by the Replying Affidavit, states that indeed there were conditional stay orders as per the orders of June 27, 2023 which the Applicants failed to comply and therefore the said orders lapsed and expired by close of business on the July 30, 2023, and therefore left the premises as they were as at June 27, 2023. It is further stated that the exparte orders of June 27, 2023 were served upon the Respondents on the 4/7/2023 upon which the Replying Affidavit was filed on the 10/7/2023.
7. It was urged that as there were no stay orders served, the Respondent relying on the Lower Court orders dated May 18, 2023, a new tenant was granted a lease, occupied the premises and therefore unable to remove the new tenant therefrom and reinstate the Applicants.

Additionally, by further submissions the Applicants have not paid the rent arrears in the sum of Kshs 1.6million as ordered by the Lower Court and there being no stay of execution orders in place, the Respondent was at liberty to lease out the premises to any other party, which it did.
8. In a rejoinder by the Applicants, it was submitted that as at July 13, 2023, which position was taken and agreed by the Respondents, the status quo as at July 13, 2023 was that the Respondent was in actual possession of the Suit premises and had leased the same to another party.
9. The above in my view therefore settles the Applicants prayers sought in their Notice of Motion dated July 5, 2023; in the following manner: -

1. Prayer No 1 – Spent
2. Prayer No. 2:

The Applicants having failed to comply with Court orders dated June 27, 2023 by close of business on July 30, 2023, and there being no extension of the said orders, they lapsed; and the Applicants having been locked out of the Suit premises as at June 27, 2023, that status quo remains. Thereafter, the Respondent leased out the Suit premises to a third party who took actual possession and therefore cannot be reinstated pending hearing and determination of the application dated June 23, 2023 interpartes.

3. Prayer 3:



The Applicants having been locked out as stated at prayer 2 above, the “Status quo” then was that they were no longer in possession or occupation of the premises, and therefore the orders sought therein cannot be available to the Applicants; there being new tenants in the Suit premises.

4. Prayer 4 – not applicable in the circumstances.
10. In my considered view, the above orders settles the Applicants application dated July 5, 2023.
11. Notice of Motion dated June 23, 2023.

The applicants seek a legion of orders that may be summarized and compressed into two.

1. Leave to appeal the trial Court's ruling delivered on May 18, 2023 in Milimani CMCC No E3125/2022.
2. Stay of execution of the trial Court’s ruling, restraining the Respondent by its agents, auctioneers and other agents from proceeding with execution proceedings to recover a sum of Kshs 1,320,000/- or any other sum payable to the Respondent in terms of the trial Court’s orders in Milimani CMCC No E3125/2022 pending hearing and determination of the application and the Appeal.
12. Prayers No 4,5,6 and 7 in the application have since been overtaken by events as the Applicants have since been evicted from the suit premises by the Respondent and the same leased out to new tenants who are in possession and occupation of the public toilet, the Suit premises.
13. In opposing the application, the Respondent, by its manager Bernard Odhiambo swore the Replying Affidavit on the 7/7/2023.

The Court has carefully considered the affidavits for, and in opposition to the application, and oral arguments by the parties advocates in support of their moral positions.

Leave to appeal out of time

14. The impugned ruling by the trial magistrate was delivered on the 18/5/2023 in Milimani CMCC No. E3125/2022.

Statutorily, the appeal against the said ruling ought to have been filed within 30 days, thus by the 18/6/2023 – see Section 79(G) of the *Civil Procedure Act*.

The application for leave is dated June 23, 2023, 5 days thereafter. Reasons stated for the delay are that the Applicants were not given prior notice of delivery as it was to be delivered on notice; and became aware when the Respondent’s Auctioneers instituted execution proceedings, in terms of the ruling.

15. The Respondents have not opposed this prayer in that Replying Affidavit.

Extension to time to file appeal out of time is not automatic. The principles governing the grant of denial of leave are well settled.

An applicant must demonstrate good and sufficient cause for the delay.

16. In *Mutiso –vs- Mwangi* (1997) KLR 630, the Court rendered that:

It is now settled that the decision whether to extend time for appeal is essentially discretionally. It is also well settled that generally the matters which this court takes into account in deciding whether or not to grant extension of time are:



1. The length of delay.
2. Reasons for the delay.
3. Chances of success if leave is granted.
4. Degree of prejudice to the Respondent if the application is granted.

Upon consideration of the above conditions, I am satisfied that the delay of 5 days is not unreasonable and the explanation thereof is satisfactory.

17. As to the prejudice that the extension may cause to the respondent there is no doubt that the unpaid rent arrears in the sum of Kshs 1,320,000/- as found by the trial Court continues to accrue and non-payment will cause further suffering and loss to the Respondents.

Without venturing into the merits of the intended appeal, the decree, and should the appeal be successful and there being tenants in the Suit premises, there may be no difficulty in repaying back the decretal sum if paid out to the Respondent.

See also *Nicholas Kiptoo Korir Arap Salat vs. IEBC & 7 others* (2014) eKLR where the Supreme Court set down the principles for extension of time, incorporating the same in *Mutiso vs. Mwangi* (Supra).

18. Upon consideration of the Draft Memorandum of Appeal the court finds triable issues and therefore there are chances that the appeal might be successful.

The right of appeal must be balanced against the right of the decree holder to enjoy its fruits of Judgment. There must therefore be a persuasive and just cause for depriving the Decree holder that right, as ably rendered in the case *Mohammed Salim T/a Choice Butchery vs- Nasserpuvia Memon jamat* (2013) Eklr.

19. For the above reasons, I am persuaded that the applicants have discharged the burden by laying sufficient grounds to the satisfaction of the Court for grant of leave to file appeal out of time. Leave is therefore granted for filing appeal out of time on conditions stated on paragraph 25 of this ruling.

Stay of Execution pending Appeal

20. Under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, an applicant has to satisfy the Court that:
- (a) That substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and
 - (b) Such security as the Court orders for the due performance of such decree of order as my ultimately be binding on him has been given by the Applicant.
21. These conditions were set out in the case *Halal & another vs. Thornton & Timpiu* (19630 eKRL, (1990) eKRL, and followed in numerous Superior Courts decisions. It is therefore clear that an order of stay pending appeal is not automatic; must be within the confines of the law, and the Court must apply its mind to the peculiar circumstance of each case and the law- ELC Appeal No. 8 of 2021 *Peter Nakupang Lowar Vs. Nautu Lowar* (2022) eKRL.
22. The Purpose for stay of execution pending appeal is to preserve the subject matter in dispute so that the Appellant's rights of appeal are safeguarded should the appeal be successful, is not rendered nugatory. The interests of both parties must be safeguarded to ensure that none of them suffers prejudice that may not be compensated by an award of damages – *RWW -vs- KEW* (2019) eKRL.



23. The applicants have not submitted that if the decretal sum is paid out to the Respondent, it would be difficult to repay back should the appeal successful; thus rendering the said appeal nugatory.
24. The Court has taken note that the Applicants have not offered any security for the due performance of the decree as a pre-condition for grant of an order of stay of execution. The judgment sum subject of the intended appeal is Kshs. 1,320,000/- being outstanding arrears of rent to the Respondent. The Decretal sum has not been provided to the Court.
25. For the above reasons, and in compliance with requirements set out under Order 42 of the Civil Procedure Rules (CPR) and upon consideration of the grounds of appeal set out in the draft Memorandum of Appeal, the following orders, and conditions appearing here below are issued:
 1. The applicants are granted leave to lodge an appeal out of time: The Memorandum of Appeal shall be filed and served within 7 days of this ruling;
 2. The Record of Appeal shall be filed within 60 days of this ruling.
 3. A Conditional Order of stay of execution of the decree of the trial Court pending Appeal is hereby issued Subject to the Applicants depositing 50% of the decretal sum into a joint interest earning account in the parties Advocates names within 45 days of this ruling; and
 4. The balance being 50% of the decretal sum to be paid out to the Respondent through its Advocates within 30 days of this Ruling.
 5. In default of orders 3 and 4 above, the Stay orders shall automatically lapse.
 6. The Applicants shall Pay Costs of the two applications to the Respondent.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 5TH DAY OF OCTOBER 2023.

JANET MULWA

JUDGE

