



**Tasur v Naisi (Environment and Land Appeal 14 of 2021)  
[2024] KEELC 293 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 293 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL 14 OF 2021**

**EM WASHE, J  
JANUARY 18, 2024**

**BETWEEN**

**SOLOMON OLOIBALA TASUR ..... APPELLANT**

**AND**

**WILSON NKODEDIA NAISI ..... RESPONDENT**

**RULING**

1. The appellant (hereinafter referred to as “the applicant”) filed a notice of motion application dated 21<sup>st</sup> August 2023 (hereinafter referred to as “the present application”) seeking for the following orders; -
  - a. The instant application be certified urgent and same be heard ex-parte in the first instance.
  - b. Pending the hearing and determination of this application, the honourable court be pleased to grant an interim order of stay of execution and/or implementation of the judgement and orders dated 24<sup>th</sup> October 2019 together with all consequential orders and in particular Order No. 4 which required the Defendant (applicant) to move out of the suit property within Sixty (60) days from the date of this Judgement failure to which eviction orders to issue.
  - c. The honourable court be pleased to grant an order of stay of execution of the judgement and orders dated 24<sup>th</sup> October 2019 together with all consequential proceedings and/or orders in particular Order No. 4 which required the Defendant to move out of the suit property within 60 days from the date of this judgement failure to which eviction orders to issue pending the hearing and determination of the intended Appeal.
  - d. Such further and/or other orders be made as the Court may deem fit and expedient.
  - e. Costs of this application to abide the outcome of the Appeal.



2. The grounds upon which the above prayers are premised have been provided in the body of the present application as well as supporting affidavit sworn by the applicant on the 21.08.2023 and can be summarised as follows; -
  - a. The applicant intends to appeal against the whole judgement pronounced on the 23.03.2023 to the Court of Appeal.
  - b. In view of the judgement pronounced on the 22.03.2023, the Respondent herein through a judgement pronounced on the 12.11.2019 is at liberty to implement the same by way of an eviction order.
  - c. Unless this honourable court hereby grants an order of stay of execution of the judgement pronounced on 12.11.2019 and all other consequential proceedings emanating thereof pending the hearing and determination of the intended appeal at the Court of Appeal, then the said intended Appeal will be rendered nugatory.
  - d. The applicant believes that the intended Appeal to the Court of Appeal raises triable legal issues which need adjudication and therefore the execution and/or implementation of the judgement and orders issued on the 12.11.2019 should be stayed.
  - e. The applicant further submits that the right to Appeal is a constitutional one which entails the right to a fair hearing.
3. The present application was served on the Respondent who opposed the same by filing a Replying Affidavit sworn on the 03.09.2023.
4. According to the Replying Affidavit sworn on the 03.09.2023, the Respondent opposed the present application on the following grounds; -
  - a. First and foremost, the Respondent confirmed that indeed there is a judgement dated 24.10.2019 in his favour.
  - b. In the judgement pronounced on 24.10.2019, the applicant was directed to vacate the suit property known as L.R.No.Transmara/Shartuka/180 measuring approximately 10.32 Hectares within Sixty (60) days from the date of the judgement.
  - c. In view of the judgement pronounced on the 22.03.2023 by this honourable court, he is now desirous of taking possession of the entire suit property and develop it to his needs.
  - d. Similarly, the Respondent submitted that the applicant had already filed another Appeal relating to the same judgement pronounced on the 24.10.2019 but the same was struck out with costs.
  - e. In essence therefore, the Respondent was of the view that the intended Appeal did not raise any triable issues and is not merited.
  - f. Finally, the Respondent stated that any further delay in the implementation of the judgement pronounced on the 24.10.2019 would cause him irreparable damages thereof.
5. The applicant responded to the Replying Affidavit by filing a Further Affidavit sworn on the 06.09.2023 and reiterated the following issues; -
  - a. The intended Appeal has triable issues including the granting of Order 5 in the Judgement pronounced on the 24.10.2019 which had not been prayed for.



- b. After the determination of the Appeal before this honourable court on the 22.03.2023, the Stay orders which had been granted in the Trial Court lapsed.
  - c. It is therefore necessary that this honourable court grants an order of stay of execution pending the hearing and determination of the Intended Appeal failure to which an eviction order will issue and its implementation will render the intended appeal nugatory.
6. Both parties duly filed their written submissions in support of the different positions.
  7. The issue for determination before the honourable court is whether or not the applicant should be granted an order of Stay of execution pending the hearing and determination of his intended appeal.
  8. To begin with, in determining applications for stay of execution pending Appeal, the Courts rely on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which provide 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.”
  9. In the case of *RWW v EKW* [2019] eKLR, the Court observed the significance of an order for a stay of execution order pending appeal in the following manner; -
    - “The purpose 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 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.”
  10. In another case of *Vishram Ramji Halai v Thornton & Turpin* (Nairobi) Civil application No.15 of 1990 [1990] KLR365, the Kenyan Court of Appeal observed as follows; -
    - “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. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions.



The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

Under section 1B some of the aims of the said objective are; 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.

11. The general principle adopted by the Courts is that a litigant seeking for an order of stay of execution pending appeal must satisfy the three ingredients to be able to be granted such an order.
12. Applying the first principle of a establishing a sufficient cause, the Court need to simply evaluate whether or not the applicant has an arguable Appeal through triable issues.
13. In the present application, the applicant states that one of the grounds of Appeal is that the Trial Court granted Order No. 5 which had not been sought for by the Respondent.
14. Secondly, the applicant who is the registered owner and in occupation of the property known as L.R.NO.Transmara/Shartuka/1042 is challenging his removal from the said property by the Respondent who is the registered as the owner of the property known as L.R.NO.transmara/Shartuka/180.
15. Clearly therefore, the applicant’s intended Appeal seeks to interrogate the validity of the two properties namely L.R.NO.Transmara/Shartuka/180 and L.R.NO.transmara/Shartuka/1042 belonging to the Respondent and applicant respectively as well as their physical locations on the ground.
16. Such an issue is one which is triable and therefore the applicant has shown sufficient cause and/or established the existence of an arguable appeal as required by law.
17. The second ingredient in considering an application for stay of execution pending appeal is the nature of damages that will be caused if the said orders are not granted.
18. The requirement is that such a damage should be one which is of sufficient nature to cause an extreme hardship or which can not be compensated by way of damages.
19. In this instant case, the applicant who resides on the property known as L.R.NO.Transmara/Shartuka/1042 is required to vacate and/or relocate from the land which is claimed by the Respondent as L.R.NO.Transmara/Shartuka/180.
20. The applicant’s occupation of the property known as L.R.NO.Transmara/Shartuka/1042 which again is being claimed to be within the property known as L.R.NO.Transmara/Shartuka/180 has not been denied by the Respondent.
21. The implementation of the Judgement pronounced on the 24.10.2019 in favour of the Respondent will mean that every development and/or improvement on the ground will be demolished and/or removed even before the intended Appeal is heard and determined.
22. The applicant claims that they have been on the suit property since the year 1980s and therefore such an act would dislodge them from their property known as L.R.No.transmara/Shartuka/1042.



23. Indeed, the demolition and/or removal of the developments and/or improvements done by the applicant since the year 1980s would cause not only substantial loss but irreparable loss.
24. There is no prejudice caused to the Respondent if the applicant is allowed to occupy the said portion he has developed pending the hearing and determination of the Appeal that can not be remedied by way of costs.
25. In essence therefore, this honourable court is satisfied that the applicant stands to suffer substantial loss and harm if the order of stay of execution pending appeal is not granted herein.
26. The last ingredient is that of security of costs.
27. So far, the Respondent has not made any submissions on the inability of the applicant to meet the costs of the intended Appeal if not successful.
28. Consequently therefore, this honourable court has no doubt that the applicant is capable of depositing the necessary security for the costs as will be pronounced herein below.

**Conclusion.**

29. In conclusion therefore, this honourable court hereby makes the following Orders in determination of the Notice of Motion application dated 21.08.2023; -
  - A. pending the hearing and determination of the appellant's appeal before the court of appeal, there be a stay of execution of the Judgement from the trial Court Pronounced on the 24.10.2019 together with all other Consequential Proceedings Including Its Implementation Thereof.
  - B. The appellant Is Granted Sixty (60) Days from the date of this ruling to prepare, file and serve the record of appeal on the respondent herein.
  - C. The appellant is directed to further deposit a sum of kenya Shillings One Hundred Thousand (kshs 100,000/-) towards security of costs within Twenty-one (21) Days From The Date of this ruling failure to which order 1 shall automatic lapse and the stay of execution vacated thereof.
  - D. Costs of this application Will Abide The outcome of The Substantive Appeal.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 18TH JANUARY 2024.**

**EMMANUEL.M.WASHE**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the Presence of:**

Court Assistant: Mr. Ngeno.

Advocates for The applicant: Mr. Bigogo

Advocates for The Respondents: Ms. Gogi

