



Egoli Estates Limited v Bluebill Enterprises Limited (Environment & Land Case E395 of 2021) [2025] KEELC 999 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E395 OF 2021
TW MURIGI, J
FEBRUARY 27, 2025**

BETWEEN

EGOLI ESTATES LIMITED PLAINTIFF

AND

BLUEBILL ENTERPRISES LIMITED DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 31st October 2024 in which the Applicant seeks the following orders:-
 - a) Spent.
 - b) Spent.
 - c) That pending the hearing and determination of this Appeal, there be a stay of execution of the Ruling and/or decree made on 15th October 2024.
 - d) That the costs of the application be in the cause.
2. The application is premised on grounds appearing on its face together with the supporting affidavit of the Applicant's Director, Nehemiah K. Rotich sworn on even date.

The Applicant's Case

3. The deponent averred that by a judgment delivered on 15th October 2024, the Defendant was ordered to pay to the Plaintiff Kshs. 5,132, 752/= together with costs of the suit. That being aggrieved, the Applicant filed an appeal which has high chances of success.
4. He contended that the Applicant is willing to abide with any condition the court may impose. He urged the court to take judicial notice that there is no boundary dispute between the parties and that



the Respondent has already completed constructing a 13 story building worth over Kshs. 300,000,000/= and has tenants already in occupation.

5. The deponent is apprehensive that the Respondent may execute the judgment if an order of stay is not granted thereby rendering the appeal nugatory.

The Respondent's Case

6. The Respondent opposed the application through a replying affidavit of its director, Eric Gitonga Bengi sworn on 22nd November 2024. The deponent contended that the application is intended to deny the Respondent the fruits of its judgement. He argued that the Applicant has not demonstrated that it has an arguable appeal or that it will suffer substantial loss in the event that the decree herein is enforced.
7. The deponent contended that the Applicant has not shown how the execution shall render the appeal nugatory. He further contended that the Applicant has not offered security for the due performance of the decree.
8. He argued that the Applicant should deposit the judgment sum of Kshs.5, 133, 752/= in court pending the hearing and determination of the Appeal should the court exercise its discretion in its favour.

The Response

9. The Applicant filed a further affidavit in response to the Respondent's replying affidavit. The deponent reiterated the contents of his affidavit in support of the application. He insisted that the Applicant had filed a memorandum of Appeal together with the record of appeal.
10. The application was canvassed by way of written submissions.

The Applicant's Submissions

11. As at the time of writing this ruling, the Applicant had not filed its submissions as directed.

The Respondent's Submissions

12. Respondent filed its submissions dated 13th February 2024.
13. On its behalf, Counsel outlined the following issues for the court's determination: -
 - a) Whether the Applicant has met the conditions for granting stay of execution pending Appeal.
 - b) If issue No 1 is answered in the g=negative, whether the Applicant is entitled to stay of execution of the Decree following judgment delivered on 15th October 2024.
 - c) Whether the application is an abuse of the court process.
14. On the first issue, Counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules to submit on the conditions necessary for the grant of stay of execution pending Appeal. Counsel submitted that the Applicant has not demonstrated that it will suffer substantial loss if stay of execution is not granted. Counsel further submitted that the Applicant has not demonstrated that the Respondent has no means of repaying the decretal amount in the event that the intended Appeal is successful.
15. On the second condition, it was submitted that the Applicant has not offered security for the due performance of the decree.



16. Concluding his submissions Counsel submitted that the Applicant has not met the legal threshold for the grant of the orders sought. Counsel contended that the application is a well scheme to deny the Respondent the fruits of its judgment. Counsel urged the court to dismiss the application with costs.

Analysis And Determination

17. Having considered the application, the respective affidavits and the submissions by the Respondent, the only issue that arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
18. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay as follows;

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- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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- (2) No order for stay of execution shall be made under sub-rule (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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.

19. The grant of an order of stay of execution is a discretionary one. In the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal gave the following guidelines on how a court should exercise its discretion as follows;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

20. Similarly, in the case of *RWW vs EKW* (2019) eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

21. The Court is therefore called upon to balance both the rights of the successful party so as not to hinder it from its fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

22. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

23. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.

On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that it is likely to suffer substantial loss, it must prove that it will suffer substantial loss if stay orders are not granted.

24. In so finding, I am persuaded by the decision in the case of Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR where the Court Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

25. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs Abuoga (1988) KLR as follows;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.

26. In Tropical Commodities Suppliers Ltd and Others Vs International Credit Bank Ltd (in Liquidation) (2004) 2EA 331 the court defined substantial loss as follows;

“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

27. The Applicant contended that if stay of execution is not granted it will suffer substantial loss. It was further contended that the Respondent will proceed to execute the judgment in the absence of stay. From the foregoing, I find that the Applicant has demonstrated that it will suffer substantial loss if the Respondent executes the decree.

28. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that judgment was



delivered on 15th October, 2024. The present application was filed on 31st October, 2024. I find that the application was filed without unreasonable delay.

29. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of *Arun C Sharma Vs Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR, the court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

27. The Applicant has expressed its willingness to provide security as directed by the Court.

In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.

The upshot of the foregoing is that the application dated 10th July, 2024 is merited and the same is hereby allowed in the following terms:-

- i. Stay of execution of the decree issued on 15th October 2025 is granted pending the hearing and determination of the Applicant’s Appeal.
- ii. The Applicants shall deposit the entire decretal sum in court within 90 days from the date of delivery of this ruling and in default the stay orders shall automatically lapse.
- iii. Costs to abide with the outcome of the Appeal.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY, 2025.

In the Presence of:-

Muthoni Matu for the Defendant/Applicant

Ahmed – Court Assistant

