



**Kassam & 12 others v Exotic Real Estate Limited & 12 others (Environment & Land
Petition E002 of 2024) [2025] KEELC 967 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E002 OF 2024
AA OMOLLO, J
FEBRUARY 27, 2025**

BETWEEN

**KARIM SHERALI KASSAM & 12 OTHERS & 12 OTHERS & 12
OTHERS PETITIONER**

AND

**EXOTIC REAL ESTATE LIMITED & 12 OTHERS & 12 OTHERS & 12
OTHERS RESPONDENT**

RULING

1. The Petitioners/Applicants filed a notice of motion dated 3rd September 2024 supported by an affidavit sworn on the same date seeking for the following the following orders;
 1. Spent
 2. spent
 3. That leave be granted to file this application out of time.
 4. spent
 5. spent
 6. That there be a stay of proceedings of the Petition dated 2nd February 2024 pending hearing and determination of COA Civil Appeal No. E668 of 2024- Karim Sherali Kassam & 12 Others Vs Exotic Real Estates Limited & 12 Others.
 7. That the status quo on L.R. No. 209/20729 (Original no. 209/870/3/5)- City Park Drive, Parklands as at 20th January 2024 be maintained pending hearing and determination of Civil Appeal No. E668 of 2024- Karim Sherali Kassam & 12 Others Vs Exotic Real Estates Limited & 12 Others.



8. That costs be in the Petition.
2. The motion was based on the grounds that on 2nd February 2024, the Petitioners filed a petition accompanied by the notice of motion application seeking for temporary relief in the nature of asking the court to issue orders concerning the environmental protection of the property L.R. 209/20729, specifically concerning construction works and the hours during which it could occur.
3. That in opposing the application, the 2nd to 4th respondents filed replying affidavits while the 5th respondent raised a preliminary objection. On 15th August 2024, the court ruled on the two, dismissing the preliminary objection and issuing conservatory orders limiting construction activities and requiring dust covers to be installed.
4. The Petitioners being dissatisfied with the ruling, particularly regarding the ongoing construction activities on the said property, filed an appeal on 30th August 2024 explaining that the delay in filing the appeal was due to the time it took to obtain the certified copies of the court's ruling and proceedings. The Petitioners stated that the issues raised in the appeal are of significant importance and have strong chances of success, as the impugned orders effectively determined the petition.
5. Further, they contend that the impugned orders allow the 1st to 4th Respondents to continue construction, including excavation work and the development of residential apartments, without the necessary development permission and NEMA licenses.
6. That the said orders also seem to disregard the enforcement notices issued by the relevant authorities, such as the 5th and 7th Respondents, which had stopped the work due to its illegal nature. Moreover, construction activities, including the building of a site office, have continued on the property since 21st August 2024, despite the court's order to install dust covers under NEMA's supervision.
7. That the Respondents have failed to involve them, in these activities, and no signboard has been erected on the site to provide details on the ownership and development of the property, which includes a proposed change of user from single residential to multi-residential apartments.
8. The Petitioners argue that unless the impugned orders are stayed, the ongoing construction and excavation will continue to harm the environment and violate their rights to a clean and healthy environment. Further, that the said orders will render their petition academic and make their rights to life and environmental protection impossible to uphold. They argued that the damage to the environment and their well-being will be irreversible, and no prejudice will be caused to the Respondents.
9. In opposition, the 4th Respondent who is a director of the 2nd Respondent and stating he had authority from the 3rd Respondent filed a replying affidavit sworn by Abdi Ali on 25th September 2024. The 2nd to 4th Respondents argue that the petitioners' claim of non-compliance with the court's orders is untrue, as the construction has stalled pending a NEMA report, as per the impugned court's orders.
10. They assert that the petitioners have not provided proof of ongoing construction or development activities that would violate the said orders, and that the actions taken on site were simply to secure it from theft and prevent further damage. The respondents also explained that delays in obtaining the necessary NEMA approvals were due to delays in obtaining the court orders and issues with the representative of NEMA.
11. The 2nd Respondent contends that they have all the necessary licenses and approvals, including excavation permits and environmental impact assessments, to carry out excavation works on the



property. They argue that the construction is still in the excavation stage and that the 2nd Respondent is awaiting the court's conditions to proceed with further development.

12. The Respondents further claim that the petitioners' appeal does not present clear grounds for staying the court's orders or proceedings, and the petitioners have failed to demonstrate any real harm or prejudice that warrants the granting of such orders. The Respondents assert that the petitioners are attempting to use the court to frustrate the development of the property, as they have not shown any loss or damage that would result from the construction resuming.
13. The 5th Respondent filed a replying affidavit sworn by Patrick Analo Akivaga on 11th September 2024 in support of the motion. He stated that the impugned orders directed that the 5th, 11th, and 13th Respondents to prevent actions that harm the environment and to ensure that construction work in subject is done within set hours.
14. Further, that orders were given to halt excavation and construction activities by the 1st, 2nd, 3rd and 4th Respondents unless certain conditions were met, including installing dust covers and providing reports to NEMA. He avers that the 2nd Respondent applied for and received development permission for the construction which was approved on 20th July 2023. That the approval was conditional, requiring compliance with certain regulations such as installing a project signboard and obtaining an environmental impact assessment (EIA) license from NEMA before construction could commence.
15. The 5th Respondent posited that the 2nd Respondent failed to comply with these conditions, prompting an enforcement notice to be issued on 1st January, 2024, which demanded cessation of excavation and the submission of a Geotechnical Survey Report. Despite the enforcement notice being in place, the 2nd Respondent has not complied with the requirements together with the conditions of an Authority to excavate issued on 11th January, 2024.
16. The 5th Respondent argues that the 2nd Respondent's construction activities are illegal due to the lack of approval for the DIA Study Report and an EIA license, thus believes the Petitioner's application has merit.

Submissions

17. The Applicants did not file any submissions. The 2nd to 4th Respondents filed submissions dated 18th December 2024 stating that the issue of whether there are grounds for a stay of proceedings hinges on the conditions laid out under Order 42 Rule 6 of the Civil Procedure Code, which requires the applicant to satisfy three conditions of: proof of substantial loss that may result unless the order is made, no unreasonable delay in bringing the application, and that security has been provided.
18. These conditions were further clarified in the case of William Odhiambo Ramogi & 2 Others v. the Honourable Attorney General & 3 Others [2019] Eklr where the High Court laid out six key principles for granting a stay of proceedings pending appeal, including the requirement for an appeal to be pending and that the applicant must demonstrate substantial questions or exceptional circumstances for the stay to be granted. They submitted that in the case at hand, the Applicant has failed to meet these principles.
19. The 2nd and 4th Respondents contended that the appeal lacks merit, and the Applicant has not provided a satisfactory explanation for why the stay of proceedings was not sought in the Court of Appeal. Moreover, that the Applicant has not shown that the Appeal raises substantial questions or it would be rendered nugatory if the stay is not granted. Also, there is no evidence of exceptional circumstances that would warrant staying the proceedings rather than allowing the case to proceed to its conclusion.



20. They submitted further that the request for a stay is a delaying tactic, given the numerous previous unmerited applications filed. That the case involves significant potential financial loss for the 2nd and 3rd respondents, who are facing uncertainty in their development project, with investors pulling funds. Further, the 2nd - 4th Respondents submitted that the Applicants have failed to prove that they have the necessary funds to compensate for the delays that will be occasioned.

Analysis and determination:

21. I begin by stating that the Applicants did not require leave of the court to bring the present application as sought in paragraph 3 of the application. This leaves only two issues for determination; whether the Applicants have met the set threshold for granting an order of stay of proceedings pending appeal, and whether an order of status quo should issue.
22. The status quo according to this court is staying the orders that were issued in the Ruling delivered on the 15th of August 2024. The Applicants have lodged an appeal against the said determination registered before the Court of Appeal and gave the number Civ appeal case no. E668 of 2024
23. Once the Applicants opted to lodge an appeal, this court cannot in law under the provisions of order 42 and 45 of the Civil Procedure Rules go back to stay or review its orders under the guise of invitation of a prayer for an order for status quo. The Applicants should move the Court of Appeal for any orders of a temporary nature pending hearing of their appeal. I decline to consider that request.
24. The grounds for staying proceedings pending appeal was discussed in the High Court case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, where Gikonyo J held that:
- “Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
25. Further, in the persuasive authority of Karia v Keshe (Environment and Land Appeal E006 of 2023) [2024] KEELC 1184 (KLR) (6 March 2024) (Ruling) cited Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.
26. The Applicants’ grounds for seeking the stay of the proceedings order is inter alia, that their appeal has a high chance of success as the impugned orders effectively determined the petition. Secondly, that the said orders also seem to disregard the enforcement notices issued by the relevant authorities which had stopped the work. Whether or not the application determined the petition or disregarded the



enforcement notice forms good grounds of appeal against the impugned ruling for consideration by the Court of Appeal.

27. Besides, the Applicants have not demonstrated how prosecuting this Petition will interfere with the outcome of their appeal since it is against an appeal against an order arising from an interlocutory application. They have also not pleaded what is the special circumstance other than stating that their appeal has high chances of succeeding. It is this court's view that the two matters can be prosecuted in parallel as the outcome of the pending appeal would not cancel the hearing and determination of the Petition on its merits.
28. On the allegation that the 2nd to 4th Respondents' have not complied with the order of the court, the option available to the Applicants is to pursue contempt proceedings against the said Respondents for the non-compliance with the orders in question. Staying of the proceedings if granted would not per se undo the alleged non-compliance. For the 5th Respondent's enforcement notice, the Regulations under which such Notice was issued must be self-executing for the defaulters. Again, I am not persuaded that staying these proceedings would answer to the argument that the impugned order disregarded the notice.
29. Therefore, taking all the facts raised for and against the application, it is my view and I so hold that there are no exceptional circumstances warranting the grant of the order for stay of proceedings. As stated in paragraph 22 hereinabove, the court is not clothed with jurisdiction to issue the status quo orders sought. Consequently, the application is found to be lacking in merit and is hereby dismissed with no costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH FEBRUARY, 2025

A. OMOLLO

JUDGE

