



X-Press Systems & Services Limited v Kifaru Enterprises Limited (Civil Appeal E061 of 2023) [2024] KEELC 3276 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 3276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E061 OF 2023**

JA MOGENI, J

MARCH 7, 2024

BETWEEN

X-PRESS SYSTEMS & SERVICES LIMITED APPELLANT

AND

KIFARU ENTERPRISES LIMITED RESPONDENT

RULING

1. Coming up before me for determination are two applications, namely: -
 - a. The Appellant's Application dated 15/12/2023.
 - b. The Appellant's Application dated 15/01/2024.
2. The Appellant's Application dated 15/12/2023 was filed under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules. The Appellant seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the Orders made by Honourable Andrew Mumma on 6/12/2023 that dismissed the Applicant's Amended Reference pending the hearing and determination of this Appeal.
 - d. Spent.
 - e. That the Appellant does continue making rental payments on the basis of 6,194.52 square feet pending the hearing and determination of the Appeal herein.



- f. That temporary injunction be issued restraining the Respondent from distressing for rent against the Appellant/Applicant pending the hearing and determination of this Application and the Appeal thereof.
3. The Appellant's second Application dated 15/01/2024 was brought pursuant to Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 40 Rule 1 & 2 & Order 51 Rule 1 of the Civil Procedure Rules. The Appellant seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending hearing and determination of the Appeal, this Honourable Court be pleased to issue a temporary injunction, restraining the Respondent herein by themselves, their servants, agents or any person claiming under them from transferring, seizing, removing, selling by way of auction, disposing of, alienating, or in any other manner interfering with all the properties stored in the Premises Godown No. 2 at Spectrum Business Park Baba Dogo on L.R No. 336/26.
 - d. That the Honourable Court does grant any further orders that it deems just.
 - e. That costs of this Application be provided for.

The grounds are on the face of both applications dated 15/12/2023 and 15/01/2024 and are listed as in paragraph 1-16 and 1-9 respectively. I do not need to reproduce them here.

4. The Appellant's application dated 15/12/2023 is supported by the affidavit sworn by Murtaza Dunganwala, the Managing Director of the Appellant herein sworn on 15/12/2023 and the second application dated 15/01/2024 is supported by the affidavit sworn by Murtaza Dunganwala, the Managing Director of the Appellant herein, sworn on 15/01/2024.
5. The Application dated 15/12/2023 is opposed. It is contested by the Respondent who filed a Replying Affidavit sworn on 16/12/2023. The second Application is not opposed. The Appellant submitted that the Respondent filed a Replying Affidavit sworn on 6/01/2024 opposing the second Application dated 15/01/2024 but the same is not in the Court record.
6. It is the Respondent's case the Notice of Motion Application lacks legal basis as the parties' relationship is contractual, with no grounds established for the orders sought. They highlight their ownership of the leased property and the terms of the lease agreement, including attempts to accommodate the Applicant during the Covid-19 pandemic by deferring rent and waiving rent increment. Despite these efforts, the Applicant failed to comply with payment arrangements and initiated disputes over the measurement of the premises.
7. The Respondent proposed amicable settlements, which the Applicant rejected in favor of prolonging the dispute. The Respondent argues that the Applicant's appeal and application for stay of execution lack merit, as the Applicant has not demonstrated substantial loss or provided security as required by law. They assert that the Applicant's actions are an attempt to avoid rent payment and prolong the dispute, and request the court to dismiss the application with costs to the Respondent.
8. On 30/01/2024, the Court gave directions that both applications be canvassed through written submissions and a Ruling date was reserved. Both parties duly submitted which I have considered. The Appellant filed written submissions dated 23/02/2024 on the even date and the Respondent filed written submissions dated 5/03/2024 on 7/03/2024.



Issues for determination

9. Having carefully read and considered both applications, the rival affidavits and the submissions thereto, I find that the following issues stand out for determination: -
- i. Whether the Appellant has made a case for the grant of an order of stay of execution.
 - ii. Whether the Appellant has met the threshold to grant an order of temporary injunction pending determination of the appeal.

Analysis and determination

Whether the Appellant has made a case for the grant of an order for Stay of execution.

10. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the Civil Procedure Rules that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

- “(2) 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.”

11. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.
12. I have already set out the three elements required in Order 42 Rule 6. I opt to start with the issue of delay. The Ruling in the lower court was delivered on 6/12/2023 and the application for stay was filed on 18/12/2023. A period of twelve (12) days cannot be said to have been inordinate. This court was thus satisfied that the present application was filed without unreasonable delay.
13. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979, Madan, Miller and Porter JJA*, while considering an application of this nature, had this to say: -
- i. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 - iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.



- iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
14. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. In the case of *Machira T/A Machira & Co. Advocates vs East Africa Standard* [2002] eKLR Kuloba J. as he then was held that an applicant’s ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful, it will be rendered nugatory.
15. It is the Respondent’s contention that an applicant in an application for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2). He opines that the Appellant/Applicant herein has not only failed to demonstrate before this Honorable Court what substantial loss may result to it if the stay is not granted, neither has the Appellant/Applicant demonstrated in any form or manner how it stands to suffer substantial loss over the decretal amount or prejudiced in any way should this Honorable Court not exercise its discretion in its favour.
16. The Applicant’s case is that they have been making overpayments for 605.48 square feet per month from the inception of the Lease in July 2019 and the Respondent acceded to the same but the Tribunal ignored that fact yet the information was the product of a report generated by dint of an order of the same Tribunal.
17. The Applicant also deponed that on 21/08/2023, the Tribunal had ordered the Applicant to pay rent at the rate of 6060 square feet and the Applicant has been faithfully paying the said amount as it falls due, however, the dismissal of the Amended Reference exposes the Applicant to backdated unlawfully computed rent for the period commencing July 2023 up to the end of the Lease on 31/05/2024. the dispute about the illegally computed lettable area has been the subject of discussion between the parties since the last quarter of 2022 when the Applicant wanted to vacate from the premises but the Respondent restrained the Applicant from vacating thus forcing the Applicant to remain in the premises without any justifiable cause. That the continued detention of the Applicant at the disputed premises caused an unnecessary payment of rent in 2023 thus causing the Applicant to lose rent for the whole of 2023 and this was a matter set out in the Amended Reference. That unless the prayers sought herein are allowed, the Respondent shall backdate the fraudulently computed rent from the month of July 2023 and lump onto the Applicant with demands of immediate payment failure to which distress for rent may issue.
18. They aver that the Respondent has threatened to issue distress for rent of the unlawfully computed rent backdated with interest which shall cause irreparable damage to the Applicant as he will lose his high valued machinery at the demised premises and ground the printing business at the disputed rental premises which is the mainstay of the Applicant, its directors, their families as well as employees. In view of the foregoing, I am satisfied that execution of the decree of the lower court will cause the Applicant substantial loss. The Applicant has demonstrated the substantial loss they will suffer should the Court disallow their prayer for stay.
19. Order 42 rule 6 of the Civil Procedure Rules requires the provision of security as a pre-condition for allowing a request to stay execution. On paragraphs 8 and 9 of the Applicant’s supporting Affidavit, the Applicant averred that he is ready and willing to continue making rental payments for the agreed lettable area being 6,194.52 square feet pending the hearing and determination of this Application and the Appeal thereof. That the Applicant is ready to continue paying the agreed rent pending the determination of the Appeal thus there will be no prejudice to the Respondent.



20. I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulates in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. See Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. See Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR.
21. In view of the foregoing, it is evident that there is an offer of security coming from the Applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the Applicant as a price for stay. See Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others [2012] eKLR.
22. In the case of Equity Bank Ltd (supra) was held that: -
- “of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought..... let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in Carter & Sons Ltd (Supra)
23. The importance of complying with the said requirement in my view was well emphasized in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 where it was held that: -
- “ To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.
24. Guided by the above, this Court shall exercise its discretion regarding the security of costs to be offered by the Applicant and direct that the Applicant continues making rental payments for the agreed lettable area being 6,194.52 square feet pending the hearing and determination of the Appeal.
25. In the end, having carefully considered the Application dated 15/12/2023 and the law, I am persuaded that the Applicant has satisfied the conditions stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

Whether the Applicant has met the threshold for granting an order of temporary injunction.

26. The Appellant/Applicant has sought for the grant of temporary injunctive relief pending the hearing and determination of this application and the appeal in both Applications.



27. The substantive law on this matter is Order 40 Rule 1(a) of the Civil Procedure Rules which provides:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

28. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicant has established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicant stands to suffer irreparable loss that the Respondent would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who’s favour the balance of convenience tilted. These principles were established in *Giella vs. Cassman Brown & Co. Ltd* 1973 E.A 358.

29. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in *Nguruman Ltd v. Jan Bonde Nielsen & 2 Others*, [2014] eKLR observed that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

30. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicant has established a prima facie case. A prima facie case was defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, where Bosire, JA stated as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

31. The Court of Appeal deliberating what amounted to a prima facie case in *Nguruman* (Supra) made the following comments: -

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This



means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

32. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.
33. It is the Appellant/Applicant's case that the lease agreement between the parties herein states the lettable area as 6,800 square feet, but joint measurements ordered by the Tribunal revealed it to be 6,194.52 square feet. This resulted in overpayments by the Applicant of Kshs. 1,166,452.24 up to June 2023. Despite faithfully paying rent at the adjusted rate, the dismissal of the Amended Reference exposes the Applicant to backdated rent demands from July 2023, causing potential distress for rent. The Applicant seeks to challenge the Tribunal's judgment and orders to avoid such unjust demands. Additionally, the Respondent's issuance of a Proclamation Notice for alleged arrears and auctioneers' charges aims to frustrate the Applicant's legal proceedings and potentially harm its business by auctioning its printing machines. The Applicant seeks relief from these actions to prevent irreparable damage to its business.
34. On the other hand, the Respondent deponed that the Appellant and the Respondent entered into a lease agreement in March 2019 for premises at a monthly rent of Kshs 204,000 plus VAT, with a 5% annual rent escalation. Due to the Covid-19 pandemic, the Appellant requested rent deferment, which the Respondent agreed to, also waiving the rent increment. Despite these concessions, the Appellant continued to default on rent payments. Further discussions in February 2021 led to an agreement to defer rent payments until mid-June 2021, with the condition of regularizing monthly payments from February 2021. However, the Appellant failed to comply, prompting discussions in December 2022 where it was agreed the Appellant would vacate the premises, using their motor vehicle as collateral for outstanding rent. Later, the Appellant raised an issue regarding the measurement of the premises' lettable space and filed a reference with the tribunal. Despite the tribunal's joint measurements, the Respondent proposed an amicable settlement for the Appellant to vacate the premises by July 17, 2023, without payment, to enable the Respondent to lease the premises to other tenants, which the Appellant refused.
35. In considering the above circumstances, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.
36. I note that this application was also brought under the provisions of Sections 3A of the [Civil Procedure Act](#), which grants this court a wide discretion to grant interlocutory orders as may appear to be just and convenient.
37. The Black's Law Dictionary, Butter Worth's 9th Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been reiterated in a number of decisions.
38. In the case of Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Odunga J. stated: -

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve the existing



state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”

39. In the case of Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR, the purpose of a status quo order was explained as follows: -

“ ... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

40. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the court that apart from preserving the substratum of the subject matter, an order of status quo is a case management strategy, where the Court will be keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit. The circumstances in this matter demonstrate that both parties as it stands have an interest that needs to be preserved pending the determination of this suit. To meet the end of justice, neither party should be prejudiced.

41. Having discussed the definition and purpose of a status quo order, the next question is the nature of the order and whether it differs from an injunctive order. In the case of Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR, it was stated as follows: -

“Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows: “In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

42. Further, in the case of Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others [2015] eKLR, Onguto J. stated that an order of status quo can be given by the court exercising its general jurisdiction and that the order need not necessarily be prayed by the parties and in fact, can be originated by the court.

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not



always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

43. Odunga J. in the case of Thugi River Estate Limited (*supra*) goes further to set out the proper manner in which the court ought to frame a status quo order, especially where it is one that the court has originated. He stated that;

“.... Ordinarily where it is the court that has prompted a status quo order or has prompted the parties to it, it is more appropriate and exceedingly relevant to describe clearly the state of affairs at the time the order for status quo is issued. It is undesirable to simply make an order of status quo to be maintained without clearly describing the state of affairs then existing and being preserved. Assistance of the counsel should always be sought in such instances otherwise each party may walk away with its own state of affairs in mind.”

44. In summary from the above cases, the following matters relating to status quo orders are emergent; that status quo orders can be made by the court on its own motion in the exercise of its general jurisdiction; that status quo orders can be issued for the purpose of preserving the subject matter of the property, for case management reasons and in a bid to prevent prejudice from being visited against either party to the case; that status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessary under status quo orders; and that a court originating status quo orders to explicitly frame the state of affairs to be preserved.
45. Ultimately having found as herein above, I hereby find and hold that both the Application dated 15/12/2023 and 15/01/2024 respectively are merited and are hereby allowed in terms specified hereunder.

Final orders

46. Arising from all the above, this Honourable Court proceeds to make the following findings. These findings are: -
- a. The Application dated 15/12/2023 is allowed in terms of prayer 3 and 5.
 - b. The Court issues an order for status quo to be maintained on the suit property meaning there shall be no transaction whatsoever including but not limited to distressing for rent against the Appellant/Applicant, transferring, seizing, removing, selling by way of auction, disposing of, alienating, or in any other manner interfering with all the properties stored in the Premises Godown No. 2 at Spectrum Business Park Baba Dogo on L.R No. 336/26 until the Appeal is heard and determined.
 - c. That there shall be no eviction of the Appellant/Applicant from the suit property until the Appeal is heard and determined; and
 - d. That there shall be maintained peace and tranquility by all the parties and their agents at the suit premises at all times during the pendency of this Appeal until it is heard and determined.
 - e. Costs of this Application to abide the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2024

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MOGENI J



JUDGE

In the virtual presence of:

Mr. Tanui for the Respondent

Mr. Munga holding brief for Mr Waithaka for the Appellant Respondent

Caroline Sagina : Court Assistant

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MOGENI J

JUDGE

