



**Diamond Housing Limited v Omar (Environment and Land Appeal
22 of 2023) [2024] KEELC 4270 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 22 OF 2023
FM NJOROGE, J
MAY 23, 2024**

BETWEEN

DIAMOND HOUSING LIMITED APPELLANT

AND

SHARIFF MOHAMAD AHMED OMAR RESPONDENT

RULING

Application.

1. For determination is the Applicant's Notice of Motion Dated 21st November 2023 seeking the following orders:
 1.Spent;
 2.Spent;
 3. That this court be pleased to order a stay of execution of the ruling /or decree made on 15th November 2023 where mandatory injunction orders were granted against the appellant applicant pending the hearing and determination of this Appeal;
 - 4 That costs of this application be provided for.
2. The application is premised on the grounds set out on its face and in the supporting affidavit of Osman Erdinc Elsek, a director of the applicant company. The deponent stated that the magistrates court delivered a ruling on the 15th November 2023 in the respondent's favour allowing a mandatory injunction order in the ruling, and the respondent may in implementation of the ruling evict the appellant. The applicant claims to have heavily invested in the suit property and that if eviction issues it will be occasioned substantial harm. He states that it is necessary to preserve the subject matter of the appeal pending the appeal's hearing and determination. He proposes to pay the outstanding rent in 2 months' time.



3. The background to the present application is that the respondent having issued the applicant a notice of termination of lease, the applicant brought a suit against the respondent before the magistrate's court seeking an injunction against the respondent restraining him from interfering with its quiet possession of the suit premises. The respondent filed in that same suit an application for orders of mandatory injunction against the present applicant directing the applicant to vacate, as well as an order that the applicant should clear rent arrears owing and costs. The application was allowed hence the present appeal against the ruling of the magistrate's court and the present application for stay. The applicant stated that it had been in occupation of the suit premises since 2015 and has made major developments on the suit property to the tune of Kshs 42,000,000/=. The applicant stated that he is making proposals for the payment of rent and has approached the respondent with the same. The applicant stated that the issuance of a mandatory injunction in an application is fatal to his suit since it is a final order. The deponent stated that the applicant has made proposals to renew the lease or purchase the suit property in the event the lease may not be renewed.

Response.

4. The respondent filed a replying affidavit dated 4/12/2023 opposing the motion. He stated that the lower court was alive to the issue of a mandatory injunction at the interlocutory stage but stated that that it had observed that a mandatory injunction could be allowed on account of the expiry of the lease agreement while the disputed rent arrears issue would be ventilated at the hearing of the main suit. It stated that there are no developments on the suit property that were carried out during the lease period and that the lease terms must be honoured by the parties. He stated that the rent arrears stand at Kshs 5,316,850 and would keep on increasing if the applicant continues being in occupation of the suit property. The respondent averred that he does not wish to enter into any contract with the applicant or its agents despite proposals to that effect aimed at a renewal of the lease. He stated that the appeal is not arguable. He urged that in the event the court allowed the application then the applicant should be compelled to pay the rent arrears within 7 days from the date of the court's ruling.

Disposition

5. The Application was canvassed by way of written submissions. I have taken into consideration the parties' submissions. The issue for determination is whether the stay for execution is merited.
6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:
 - “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.
7. Therefore, the question arising first is whether in his application for stay of execution of a decree or order pending appeal the applicant has satisfied all the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.



8. The basis of the application is that there is real and imminent possibility of eviction. Which the applicant is apprehensive would cause it substantial harm if the orders of stay of execution are not granted. This court has considered that the memorandum of appeal and the application were brought timeously within 6 days of the impugned order. I have however examined the supporting affidavit and found nothing from the applicant to establish that he would suffer substantial loss if the orders sought are not granted.
9. Section 1A(2) of the *Civil Procedure Act* provides that “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” while under Section 1B some of the aims of the said objectives 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.”
10. Therefore, further to the provisions of Order 42 CPR as cited herein above, stay may be granted for sufficient cause and 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 court is 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.
11. In the present application, the applicant’s grievance is that the trial court issued a final order of mandatory injunction against it at an interlocutory stage and that pursuant to that order it risks being evicted from the suit premises. That complaint informs the formulation of the first ground in the memorandum of appeal dated 21/11/2024 filed in this court. Without more I find that the appeal has raised at least one arguable ground.
12. I find that in the circumstances of this case execution against the applicant should be stayed pending the determination of the issues raised in the appeal. This court is however aware of the need to balance between the rights of the applicant to be heard on appeal and the rights of the respondent to receive the admitted arrears of rent. This court has examined the lease agreement which provides for rent at the rate of Kshs 150,000/= per month. The respondent merely posits a figure of Kshs 5,316,850 as being outstanding rent without explaining how that figure was arrived at while the applicant is silent on the amount outstanding. This court lacks a basis to order in this ruling the immediate payment of any amount to the respondent as that kind of order may prejudice one party or the other. In any event this is a matter that the trial court directed to be resolved at the full hearing of the suit before it.
13. This is a curious application in which the applicant avers that it has employed numerous persons on the suit property where it operates its business and that such employees would be rendered jobless in the event of eviction. There are therefore wide ramifications of the eviction if it occurs. The lease is said to contain an option to purchase the suit premises and that may explain the claim of alleged development of the property by the applicant during the pendency of the lease and it is necessary to have the status quo preserved until the appeal is heard and determined.
14. The upshot of the foregoing is that this court finds in favour of granting the stay of execution orders sought. I therefore allow the application dated 21st November 2023 in as prayed terms of prayer no 3 thereof. The costs of the application shall abide by the outcome of the appeal.
15. To avoid delay in the finalization of the appeal the applicant is hereby directed to compile and serve the record of appeal within 45 days in default of which the stay of execution order issued in will



automatically lapse and the respondent may be at liberty to execute. This matter will be mentioned on 25/9/2024.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

