



REPUBLIC OF KENYA



KENYA LAW
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Kenya Railways Corporation v Osman (Environment and Land Appeal E155 of 2024) [2025] KEELC 692 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 692 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E155 OF 2024
TW MURIGI, J
FEBRUARY 20, 2025

BETWEEN

KENYA RAILWAYS CORPORATION APPELLANT

AND

HON HASSAN ADEN OSMAN RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 15th October 2024 brought under Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 of the Civil Procedure Rules in which the Applicant seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending the hearing and determination of this Appeal an order do issue suspending and/or staying execution of the ruling and consequential orders issued by the Chief Magistrate Court in Nairobi in MCELC No. 407 of 2022 Honourable Hassan Aden Osman vs Kenya Railways Corporation on 11.10. 2024.
 - e. The court be pleased to direct that the matter be heard in open court.
 - f. The costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mark Murkomen the Appellant's security services manager sworn on even date.



The Applicant's Case

3. The deponent averred that the Appellant is the legal and registered owner of Kileleshwa House No. K16 the suit property herein. He further averred that the Appellant had leased the suit property to the Respondent vide a lease agreement dated 27th October 2021. That in October 2022, the Appellant made the decision to terminate the lease as it was in the process of reorganizing its business to enable it to accomplish its mandate as a state corporation. That it issued the Respondent with the requisite notice of termination dated 28th October 2022.
4. He deposed that the Respondent went to court on 6.1.2023 and obtained interim orders restraining the Appellant from evicting him from the suit property pending the hearing and determination of his application dated 17.11.2022. That the said orders were extended on several occasions being 2.8.2024 and 11.9.2024 but on 2 occasions, they were not extended and thus lapsed after a year of issuance.
5. That as a consequence of the lapse of the interim orders of 2023. and noting that the Respondent was in rent arrears for almost 2 years, the Appellant evicted him on 7.10.2024.
6. He explained that when the matter came up for mention on 8.10.2024 before Hon. Pamela Achieng CM, the interim orders were not extended. That later in the day, the Appellant was served with an order extending the interim orders.
7. That subsequently, the Appellant filed an application dated 9.10.2024 seeking to set aside the orders of 08/10/2024. That upon filing the application, the court granted an order dated 09/10/2024 that the status quo prevailing before the extension of the interim order be maintained. That after the application was heard on 11.10.2024, the court ordered that the interim orders granted on 6.1.2023 be extended and that the Respondent be reinstated in the suit property.
8. He averred that it is imperative that the orders of 11.10.2024 be stayed pending the hearing and determination of the Appeal so that the substratum of the appeal is protected and for the appeal not to be rendered nugatory. The Applicant is apprehensive that if stay is not granted, the Respondent may move back to the suit premises without paying rent. He contended that the Respondent would not be prejudiced if the orders sought are granted as he is not in occupation of the suit property. The deponent urged the court to allow the application so as to protect the Appellant's proprietary rights guaranteed under Article 40 of *the Constitution*.

The Respondent's Case

9. The Respondent filed a replying affidavit sworn on 22.10. 2024 in opposition to the application. He averred that he acquired property known as Kileleshwa House No. K16 from the Applicant vide a commercial lease dated 27th October 2021 for a period of 6 years expiring in 2027. That sometime in the year 2022, a letter dated 28th October 2022 was dropped at Kileleshwa House No. K16 with the caption notice to terminate tenancy Kileleshwa House No. K6. He averred that the letter dated 28.10.2022 purportedly evicting him from the suit property relates to a different tenancy; Kileleshwa House No. K6.
10. That he moved to court in ELC No. 407 of 2022 and obtained interim orders dated 6.1.2023 pending the hearing and determination of the application dated 17.11.2022. He added that, the interim orders have been extended severally, the last time being on 8.10.2024. He further contended that the said application is yet to be heard and determined adding that he is in occupation of the suit property until the court directs otherwise. He maintained that he has not been evicted from the suit property



and added that the Applicant did not seek for eviction orders. He further maintained that it was not possible to conduct an eviction as the notice relates to house No K6 and not house No.K16.

11. In a further affidavit sworn on 20.1.2025, the Respondent contended that his lease with the Appellant is for 6 years and would expire in the year 2027. He further contended that the lease was terminated pursuant to clause 3(c) which does not exist in the lease agreement dated 27.10.2021. He further averred that he had observed at all times the terms of the lease agreement by paying rent and bills when they fell due. He asserted that as the time the Applicants agents were invading the suit property he had paid his rent in excess of Kshs. 20,000/=.
12. He averred that he paid rent dutifully and timely up to January 2025 despite his occupation being characterized by endless raids and invasion the latest being on 7.10. 2024. In this regard, he annexed several OB numbers to show that he had reported the frequent raids as well as copies of RTGS payments for rent.
13. He pointed out that on 8.10.2024, he was arrested and assaulted by officers from Railways police station on the Appellant's instructions and later released on a cash bail. He averred that there are ongoing criminal investigations on the conduct of the Appellant's agents.
14. He further averred that in the ruling delivered in MELC No. 407 of 2022, the Chief Magistrate declared the eviction allegedly conducted in the evening of 7th October 2024 by the Applicant's agents as illegal and unlawful. That in addition the court stated that the Applicant ought to have moved the court to seek an eviction order before conducting the actual eviction. He averred that the Appellant operates with impunity and that its managing director arrested and detained his staff and nephew within the suit property prompting them to file a Petition before the Human Rights and Constitutional division.
15. In a supplementary affidavit sworn on 29th October 2024, the Respondent averred that the Deputy OCS Railways Police Station served him served him with a letter dated 28th October captioned "court order for repossessing house No. K16 Kileleshwa." He further averred that he was also served with a similar letter dated 29th October 2024 by the Sub County Commander Nairobi Railways. He contended that the order dated 17/10/2024 did not grant orders for the repossession of Kileleshwa House No. K16 but were on the contrary in respect of the ruling and order dated 11/10/2024. He further contended that the Applicant deceived the court into being granted the order of 17/10/2024 to conduct its illegal and unlawful activities. He urged the court to reinstate the status quo before the issuance of the court order dated 17/10/2024.
16. The application was canvassed by way of written submissions.

The Appellant/applicant's Submissions

17. The Applicant filed its submissions dated 10th February 2025.
18. On its behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Appellants have an arguable appeal.
 - ii. Whether the Appeal will be rendered nugatory if stay is not granted.
19. On the first issue, Counsel submitted that the trial court erred in granting the orders dated 11th October 2024. To buttress this point, Counsel relied on the contents of the affidavit in support of the application.
20. On the second issue, Counsel submitted that the Appellant has demonstrated that the Appeal will be rendered nugatory if the orders sought are not granted. Counsel submitted that the Applicant is



apprehensive that if the Respondent is allowed to occupy the suit property he will continue to do so without making any payments. It was submitted that the Respondent owes the Appellant Kshs. 2, 170, 000/= as at 07/10/2024.

21. Counsel further submitted that the application was made in good time noting that it was filed on 15/10/2024 while the order was made on 11/10/2024.
22. In conclusion, Counsel urged the court to allow the application as prayed. None of the authorities cited by Counsel were availed for the court's perusal.

The Respondent's Submissions

23. The Respondent filed his submissions dated 12th February 2025.
24. On his behalf, Counsel outlined the following issues for the court's determination:-
 - i. Whether the learned trial court exercised its discretion judicially in granting the injunctive order restraining the Appellant from evicting the Respondent from the suit property.
 - ii. Whether the Appellant shall suffer substantial loss if stay is
 - a. not granted.
 - iii. Whether the Appellants have sought an order of stay of proceedings of the lower court matter.
 - iv. Whether the Appeal would be rendered nugatory if the orders sought are not granted.
25. On the first issue, Counsel submitted that the trial court exercised its discretion judicially in determining that the interim orders issued on 06/02/2023 had not lapsed since they had been extended procedurally. Counsel further submitted that the court noted that the Appellant illegally evicted the Respondent without a court order.
26. It was submitted that the trial court exercised its discretion and immediately ordered for the reinstatement of the Respondent in the suit property so as to protect the substratum of the suit.
27. Counsel contended that the court's intervention was essential to safeguard the rights of the parties and prevent irreparable harm.
28. On the second issue, Counsel submitted that the Applicant has failed to sufficiently demonstrate that it will suffer substantial loss if stay is not granted.
29. Counsel further submitted that the Respondent has been paying rent and had attached rent receipts to show that he has been paying rent. Counsel argued that the Applicant has not availed a statement of account to show the alleged rental arrears.
30. It was further submitted that the Respondent is likely to suffer substantial loss if stay is granted since he is in occupation of the suit property. Counsel contended that the Applicant has not demonstrated that the alleged loss is incapable of being compensated.
31. On the third issue, Counsel submitted that the Applicant failed to seek an order of stay of proceedings in the lower court which is a necessary step in the proceedings herein.
32. On the fourth issue, Counsel submitted that the Applicant has not demonstrated that the Appeal will be rendered nugatory if stay is not granted. Counsel further submitted that the primary consideration in determining whether an appeal will be rendered nugatory is whether the Applicant will suffer



substantial loss if stay is not granted. Counsel contended that the Applicant has not adduced cogent evidence to show that it will suffer substantial loss if stay is not granted.

33. Counsel submitted that the Appeal will not be rendered futile if the orders of stay are not granted as the suit property remains preserved by the lawful lease agreement and the orders issued by the trial court.

34. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

Analysis And Determination

35. Having considered the application, the respective affidavits and the rival submissions, 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.

36. 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;

6(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.

6(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.

37. The grant of an order of stay of execution is discretionary. 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 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.”

38. 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.”

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

40. 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.

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.”

41. 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.

42. 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...”

43. The Appellant and the Respondent are in a tussle over the property known as Kileleshwa House No. K16 which was leased to the Respondent by the Appellant vide a lease agreement dated 27th October, 2021.

44. The Appellant is seeking to stay the order issued on 11/10/2024 by the Chief Magistrate Court in Nairobi CMELC No. E407 of 2024 on. The Appellant contended that it will suffer substantial loss if the order of stay is not granted. It is the Appellant’s contention that the Respondent was evicted on 07/10/2024. The Appellant is apprehensive that if the order of stay is not granted, the Respondent may re-enter the suit property and continue occupying the premises without paying rent.



45. The Respondent on the other hand contended that he is in occupation of the suit property and has been paying rent. He contended his occupation of the suit property has not been quiet and peaceful as it has been characterized by frequent raids. He has also demonstrated that he has endeavored to pay rent which the Appellant has accepted even up to the latest month, January 2025.
46. The Appellant deposed that it evicted the Respondent on 07/10/2024. The Respondent denied having been evicted from the suit property. The Appellant's evidence of eviction is annexure MM3 attached in the affidavit in support of the application. Annexure MM3 is an eviction notice dated 28.10. 2022. It does not show that there was actual eviction. The Appellant did not adduce any evidence to show that it carried out an eviction on 07/10/2024. In my view, if indeed the Respondent has been evicted from the suit property, he would not be paying rent for the same.
47. As much as the application was filed without unreasonable delay and based on the evidence presented before me, I find that the Applicant has not demonstrated that it will suffer irreparable loss and that the Appeal will be rendered nugatory if stay is not granted. The most important limb of the application for stay of execution is proof of substantial loss. The Applicant having failed to demonstrate this limb, I need not delve into the other conditions.
48. In the end, I find that the application dated 15th October 2024 is devoid of merit and the same is hereby dismissed.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY, 2025.

In The Presence Of: -

Ms. Muriranja for the Appellant/Applicant

Weyombo present together with Anyona for the Respondent

Ahmed – Court Assistant

