



**BGP Kenya Limited v Mahia-Ini (Commercial Appeal
E003 of 2024) [2024] KEHC 9747 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
COMMERCIAL APPEAL E003 OF 2024**

**FR OLEL, J
JULY 30, 2024**

BETWEEN

BGP KENYA LIMITED APPELLANT

AND

WILGRIDAH MACHANJA MAHIA-INI RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 22nd April 2024 brought pursuant to provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law and the main prayer sought is prayer (c) that; this court be pleased to issue an order of stay of execution of the judgment/decree issued in Mavoko MCCC NO E467 OF 2021 pending the hearing and determination of the appeal filed herein. The application is supported by a supporting affidavit dated 2nd April 2024, sworn by one Bismarck Ngene Kakuna.
2. This application is opposed by the Respondent who filed her Replying Affidavit's dated 14th June 2024. She maintained that the said application was misconceived and the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, 2010. The applicant had filed a similar application before the trial court where stay of execution was not granted and She had instructed Bemac auctioneer to proclaim before this 2nd application of stay pending appeal was filed in this court and thus the applicant should be directed to pay auctioneers costs

Analysis & Determination

3. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 24th March 2024 issued in Mavoko CMCC No 467 of 2021.



4. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.
- (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.”

5. The three conditions to be fulfilled can therefore be summarized as follows;

- a. that substantial loss may result to the applicant unless the order is made
- b. application has been made without unreasonable delay
- c. security as the court orders for the due performance

6. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle 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 the appeal court reverse the judge’s discretion.
- c. Thirdly, 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.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

7. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding



objective stipulated under sections 1A and 1B of the Civil Procedure Act, to enable court give effect to the overriding objective, while in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman v. Amboseli Resort Limited [2004] 2 KLR 589.

8. The judgment before the trial Magistrate was delivered on 22nd March, 2024, and this Appeal filed on 16th April 2024. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
9. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking for stay of execution demonstrated that he/she would have to go through hardship to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* (2010) eKLR, National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006) eKLR.
10. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
11. On the security, the Appellant has indicated that they are willing to abide by court directions on the same, with a view of preserving the subject matter. The respondent on the other hand has averred that the entire decretal sum should be deposited in a joint interest earning account held by counsels of the two parties pending determination of this appeal.
12. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his/her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd v Kibiru & another (Supreme); Mukuma v Abuoga (1988) KLR 645.

Disposition

13. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant herein shall deposit the sum of Kshs.1,698,678.90/= in a joint interest earning account held in the joint names of the counsels herein and the same shall be retained as security for this Appeal until its determination.
 - b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
14. The costs of this Application will be in the cause.
15. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.



FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 30TH DAY OF JULY, 2024.

In the presence of: -

Mr Agwara for Appellants

Mr Michuka Respondent

Susan /Sam Court assistant

