



China Henan International Co-operative v Kadima (Civil Appeal E145 of 2024) [2024] KEHC 10045 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E145 OF 2024
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

CHINA HENAN INTERNATIONAL CO-OPERATIVE APPLICANT

AND

MOSES ODONGO KADIMA RESPONDENT

RULING

Representation:

M/s Onyikwa & Company Advocates

1. Before me for determination is a notice of motion dated 18th May, 2024 expressed to be brought under the provisions of Section 3 and 3A and 79 (G) of the *Civil Procedure Act*, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of *the constitution* of Kenya. The applicant seeks reliefs as follows:
 - a. Spent.
 - b. That there be stay of execution of the decree issued in Eldoret CMCC No. 960 of 2017 between Moses Odongo Kadima vs. China Henan International Co-operative Group pending the hearing and determination of this application inter-parties.
 - c. That leave be granted to the applicant to file an appeal out of time against the judgment of Hon R. Odenyo (SPM) delivered on 9.11.2023 in Eldoret CMCC No. 960 of 2017 between Moses Odongo Kadima vs China Henan International Co-operative Group.
 - d. That upon grant of prayer (3) above there be stay of execution of the decree issued in Eldoret CMCC No. E960 of 2017 between Moses Odongo Kadima vs China Henan International Co-operative Group pending the hearing and determination of the intended appeal.



- e. That the costs of this application be in cause.
2. The application is anchored on 16 grounds and an affidavit in support sworn by Judith Onyango.
3. In opposition to the application, the Respondent swore a replying affidavit dated 27th May, 2024.

Analysis and determination

5. Traditionally, applications for stay are brought under the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules. As rightly highlighted by the applicant there is a judgment and decree in Eldoret CMCC 960 of 2017 on liability and award of general damages of Kshs. 4,000,000/= and special damages Kshs. 10,000 plus interests and costs. The appellant is aggrieved by the entire judgment of the court below as premised in the memorandum of appeal dated 18th May, 2024.
6. The respondent on his part, contests the notice of motion on grounds that the application's objective is to deny him the fruits of his judgment duly pronounced by the trial court and a subsequent decree issued to be settled by the applicant intended appellant.

The Law

7. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“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 orders set aside.

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 1st 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.
8. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
 - a. Substantial loss may result to him unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



9. These principles were enunciated in *Butt vs 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.

Substantial loss

10. This limb requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

11. As a general rule the only ground for such a stay of execution was an affidavit by the applicant showing that if the stay is not granted there was no reasonable probability of refunding back the decretal sum in the event the appeal succeeds. From the facts of the primary suit in CMCC E960 of 2017 the respondent was an accident claimant the applicant intended appellant on a claim based on tort of negligence and award of damages arising out of an accident involving a motor tractor owned by the applicant/intended appellant. As the court remarked in *Tropical Commodities Suppliers Ltd & others vs International Bank Credit (in liquidation)* (2004) 2 EA 331;

“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.”(See also James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR)”

12. As observed by Justice Kimaru in *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that... Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

13. In response to the applicant’s contention on the issue of substantial loss, the Respondent replying affidavit dated 27th May, 2024 fails to address the issue of substantial loss and his capacity to refund the decretal sum in the event the appeal when determined on the merits it is reversed, varied or interfered with by an appeals court on any of the grounds adverted to by the applicant. The issue as to whether the applicant/intended appellant did not file a defence might be also a justiciable issue on appeal. It is a matter to be canvassed at the right forum upon the applicant satisfying the criteria on appeals process in Order 42 of the Civil Procedure Rules.
14. The next condition precedent to be met by the applicant is on deposit of security for due performance of the decree. With respect to this question, the court in Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR pronounced itself as follows: -.

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but



for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

15. In this respect, although the applicant has not alluded to this condition, I am of the view that in lodging the appeal, the court should take into account the facts and circumstances of the case in which the Plaintiff obtained judgment and a decree from the trial court. The Respondent presently has a right to have the decree executed in order to satisfy his judgment thus if the Respondent is to be denied the fruits of judgment, the court ought to consider the justice of the case including the possibility of ordering for an interim payment or deposit of security for due performance of the decree.
16. It is also incumbent upon this court to determine whether leave should be granted for extension of time for the intended appellant to file the appeal out of time. The applicable provision is Section 79(g) of the *Civil Procedure Act*. The discretion to extend time in favor of a litigant or a party by the court is unfettered but it has to be exercised judiciously not on whim, sympathy or caprice. The principles in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* 2013 eKLR observed that
17. It has been stated time and again that an application under Rule 4 of the Rules, the learned judge is called upon to exercise his discretion, which discretion is unfettered. Over the years has of course set out guidelines on what a single judge should consider when dealing with an application for extension of time. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Appeal No. 255 of 1997. The court expressed itself as follows:
18. it is now well settled that the decision whether or not to extend the time for appealing, for appealing is essentially discretionary. It is also well settled that in general the matters which this court in deciding whether to grant an extension of time are: First, the length of the delay, secondly, the reasons for the delay, thirdly, chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice if the application is granted. See *Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) KLR – SCK.
19. It is clear from section 79 (g) of the *Civil Procedure Act* and the principles in the above cases that a judge has complete and unfettered discretion not only as to whether to grant extension of time but also to decide upon what terms should be imposed on granting the extension of time. I have taken the liberty to examine the application on both prayers of stay of execution and extension of time for the applicant to file an appeal out of time. I have come to the view that the stay of execution applied for should be granted particularly in light of the size of the award in general damages in favor of the Respondent. This view is strengthened much more by the fact that the Respondent has not demonstrated his capacity to repay the decretal sum in the event the decision of trial court is overturned on appeal. I hold that such a stay of execution is also effective to restrain the auctioneer as an agent of the respondent from carrying out the seizure and sell of the applicant/intended appellant good under the terms of the decree. However, I am also firmly of the view that the interest of justice requires that applicant/intended appellant do deposit security for due performance of the decree.
20. On extension of time, some of the stated grounds in the affidavit include that the applicant’s legal counsel did not update or inform the applicant or its insurers of the status of the said suit and therefore the applicant or its insurers were not aware of the judgment. That the applicant’s insurers became aware of the judgment on 11th April, 2024 when they received a letter from the Respondent’s advocate demanding payment of the decretal sum and informing them of the intention to file a declaratory suit against the insurance. That the failure to appeal within



the prescribed period in law was not deliberate but was occasioned by unawareness of the said judgment by the applicant's insurers. That the applicant is aggrieved by the aforesaid judgment and desires to appeal.

21. Given the above background, the applicant did not seem to have participated in the court below and therefore bring the case within the acceptable reasons for not filing the appeal within the prescribed period in the *Civil Procedure Act*. Although the length of delay is a factor to be considered in applications of this nature, there is no principle which has been developed in the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay and reasons thereof are but some of the factors to be considered by the court in its objective of dealing fairly with the issues raised in the Notice of Motion to avoid prejudice, injustice and saving expenses to ensure cases are dealt with expeditiously as envisaged in Section 1A of the *Civil Procedure Act*. While the likelihood of the success of the appeal is a factor for the court's consideration, there is no requirement in law for an applicant to file detailed evidence to demonstrate the merits of the appeal.
22. In my judgment, having regard to all the circumstances, the notice of motion dated 18th May, 2024 be and is hereby allowed. The time for filing and serving the record of appeal is enlarged until the 6th of September, 2024. In the same vein, stay of execution of the decree arising out of the judgment in CMCC E960 of 2017 is granted so as not to render the intended appeal nugatory. The applicant also is under duty to deposit the decretal sum of 4,000,000/= with the registrar of the High court or the interest earning account opened with the names of both legal counsels seized of the subject matter on behalf of their respective parties. That in the alternative, the applicant is also at liberty to file with the Deputy Registrar, a bank guarantee of the decretal sum both within a period of 30 days from the reading of this ruling. The costs of this application to abide the outcome of the appeal.
23. The status conference to be held on 17th September, 2024

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

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R. NYAKUNDI

JUDGE

