



Yellow Arrow Express Limited v Kenya Red Cross Society (Civil Appeal E201 of 2024) [2024] KEHC 11617 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E201 OF 2024**

**FR OLEL, J
SEPTEMBER 30, 2024**

BETWEEN

YELLOW ARROW EXPRESS LIMITED APPELLANT

AND

KENYA RED CROSS SOCIETY RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 31st July 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. Prayers (1) and (2) of the said application are basically spent and the main prayer sought is prayer (3) that this court be pleased to issue an order of stay of execution of the default judgment entered on 22nd day of May 2024 in civil case No E509 of 2024 and all consequential orders arising therefrom/decree pending the hearing and determination of the appeal filed herein. The application is supported by the grounds on the face of the said application and the supporting affidavit, dated 31st July 2024, sworn by one Joseph Muthama.
2. The applicant did aver that default judgment was entered as against them on 22nd May 2024 and they did file an application to have it set aside dated 5th June 2024. The said application was heard on merit and dismissed on 8th July 2024. They filed a second application of review dated 10th July 2024, which again was heard on merit and dismissed on 29th July 2024, hence this appeal. The appellants basically contend that they had been condemned unheard.
3. This application is opposed by the Respondent who filed their Replying Affidavit dated 26th August 2024, sworn by Hussein Kassim, their logistics officer. He did depone that the said application was misconceived as the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010 and thus the said application should be dismissed. In the alternative, he did aver that if the court was inclined to grant the orders sought, then the applicant should be made to deposit the decretal sum in court pending hearing of the said Appeal.



Analysis & Determination

4. 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 22nd May 2024 issued in Machakos SCC No E509 of 2024.
5. 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.”
6. 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
7. 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.

8. To the foregoing I would add that an order of stay may also be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in 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 vs. Amboseli Resort Limited* [2004] 2 KLR 589.
9. The ruling appealed against was delivered on 29th July 2024. The Appeal and application for stay herein were filed on 31st July, 2024 Thus, it can be said that this appeal and application for stay of execution have been file timeously.
10. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a 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 Vs Miriam Maalim Bishar & Another* (2010) eKLR , *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR.
11. Guided by the above authorities and in the absence of the requisite proof from the Respondent regarding their liquidity position/ financial means, I find that the Appellant have satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before this appeal is heard. The Appellant has therefore fulfilled this condition.
12. On the security, the Appellant has indicated that they are ready and willing to abide by this courts orders as to security for due performance of the decree. The respondent on the other hand had deponed that the applicant should deposit the entire decretal amount in court as security of the appeal.
13. 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 Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008*; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.

Disposition

14. 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/Applicant will deposit into court the entire decretal sum of Kshs.321,093.00/ = within the next 30 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.
15. The costs of this Application will be in the cause.
16. It is so ordered.

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



FRANCIS RAYOLA OLEL

JUDGE

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

In the presence of: -

Mr. Idembo Appellant

No appearance for Respondent

Susan/Sam Court Assistant

