



**Ndungu t/a Miangeni Hardware and Contractors & 2 others v Mabati Rolling Mills Limited
(Civil Appeal E089 of 2024) [2024] KEHC 13340 (KLR) (Civ) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E089 OF 2024

AN ONGERI, J

OCTOBER 31, 2024

BETWEEN

**MUEMA NDUNGI T/A MIANGENI HARDWARE AND
CONTRACTORS 1ST APPELLANT**

**MARGARET MUMBUI MUEMA T/A MIANGENI HARDWARE AND
CONTRACTORS 2ND APPELLANT**

MIANGENI HARDWARE AND CONTRACTOR LIMITED 3RD APPELLANT

AND

MABATI ROLLING MILLS LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 8/4/2023 seeking stay of execution pending appeal.
2. It is supported by the affidavit of the applicant stating as follows;

The Applicant sore the affidavit behalf of the 2nd and 3rd Appellants and with their Authority.

On 30/10/2021, the Applicant filed an Application seeking an entry for Judgement on Admission against the Applicants in the sum of Kshs. 9,085,477.48. The Court heard an allowed the Application and entered judgement in favour of the Respondent together with costs and interests. The Applicants are aggrieved with the ruling and have already preferred an appeal thereto. As the appeal did not lie as a right, the Applicants, sought from the subordinate court leave to Appeal the said judgement, which was granted.



The Application also sought stay of execution which was granted for 45 days which had lapsed by the time of this application.

The Respondent having already proclaimed the Applicant's assets in execution of the said judgement, there is danger that the Respondent will proceed with the attachment of the proclaimed assets, yet the Applicant's appeal which has high chances of success will be rendered nugatory. Staying the execution of the judgement will serve the course of justice.

The Applicants are ready and willing to deposit security and abide by such conditions as the Court may deem expedient and no prejudice will be suffered by the Respondent if the orders sought are granted.

3. The Respondent opposed the application by the Replying Affidavit sworn by George Githoge Maina, its Legal Officer. He deposed that the Application is without merit as the pre-requisites for orders of Stay of Execution have not been met. He contended that the Appeal has no chance of success as there was clear, written and implied admission of the debt owed to the Respondent, and the Applicants had not deposited the decretal sum as security.
4. The Respondent further deposed that the applicants have sought stay after proclamation and the Applicants ought to pay the Auctioneers Kshs. 569,639/- for the attachment levied.
5. He further contended that judgement had been entered in favour of the Respondent two years before the instant application in March 2022 and the Applicants have not explained the delay after expiry of the 45 day stay orders issued on 18th December 2023.
6. He further deposed that the Applicant's debt has been outstanding since the year 2019, and the Plaintiff stands prejudice if the orders are granted.
7. He urged the Court that this application be dismissed with costs to the Respondent.

The Submissions

8. Counsel for the Applicants submitted that the applicable principles and the conditions in deciding whether or not to grant a stay of execution pending appeal have been met by the application and unless stay orders are granted substantial loss will result to the Applicant.
9. He further submitted that the Respondent had already instructed auctioneers and the Applicants stand to suffer irreparable loss, including the demise of the business if the Respondent is allowed to proceed with proclamation. If the Appeal succeeds, the Applicants will have to go through hardship to recover the decretal sum, failure to which the Appeal will be rendered nugatory and yet the Appeal has robust chances of success.
10. He prayed that the present application be allowed and costs be allowed to the Applicant.
11. The Respondent submitted that an application for an order of stay pending appeal, an applicant must show substantial loss to be suffered, furnish security and demonstrate that the application has been made without unreasonable delay.
12. He asserted that a Court ought not to deny a successful litigant of the fruits of judgement exceptional circumstances which are not present.
13. He submitted that the Appeal lacks merit with no chances of success, thus only intended to delay the Respondent's enjoyment of its judgement.



14. He contended that the Applicants had failed to demonstrate that they will suffer substantial loss if the orders are not granted. The Respondent is a well known supplier of roofing solutions with capacity to satisfy the judgement if the appeal is successful and mere stating that they will suffer loss is not the required legal standard.
15. The sole issue for determination is whether stay of execution pending appeal should be granted.
16. The governing provision for stay of execution pending appeal is Order 42 Rule 6 which states as follows;

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.

- (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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
17. The duty of this court is to balance the interest of the parties.
 18. I grant stay of execution pending appeal on condition that the entire decretal sum is deposited in court within 30 days of this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

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A. N. ONGERI

JUDGE



In the presence of:

..... for the Appellant

..... for the Respondent

