



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Shabaa Supplies Solutions Building & Construction Engineering
Limited & 2 others v SMP Capital Limited (Civil Appeal E059 of 2022)
[2023] KEHC 1180 (KLR) (Commercial and Tax) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 1180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E059 OF 2022
PN GICHOHI, J
JANUARY 26, 2023**

BETWEEN

**SHABAA SUPPLIES SOLUTIONS BUILDING & CONSTRUCTION
ENGINEERING LIMITED 1ST APPLICANT
JUSTUS AMONI AWOI 2ND APPLICANT
CECILIA ASIYENI 3RD APPLICANT

AND

SMP CAPITAL LIMITED RESPONDENT**

RULING

1. On May 20, 2022, the firm of Otieno Ogola & Co Advocates filed a Notice of Motion under a certificate of urgency and on behalf of the Appellants/Applicants under Order XLIII Rule 1(3) & (4) of the [Civil Procedure Rules](#), Section 3,3A, 63 (e) ,75 of the [Civil Procedure Act](#) seeking orders:-
 1. Spent.
 2. Spent.
 3. Pending the hearing of this appeal, there be interim stay of execution of the judgment delivered on April 14, 2022 at Milimani Magistrate Court and all consequential orders.
 4. The costs of this application be provided for.
2. The application is supported by the affidavit sworn by Justus Amoni Ewoi on May 20, 2022. The main ground is that being aggrieved with the said judgment, the Applicants were granted 30 days stay of



execution pending appeal which have since lapsed but they have since preferred an appeal which has high chances of success.

3. Their contention is that the judgment sum of Kshs 5,020,707/- is substantial and since they do not know of the Respondent's financial status, there is no guarantee that the amount will be refunded if the appeal was successful. He states that the application has been brought timeously and that while they will suffer substantial loss if the application is not granted, the Respondent stands to suffer none.
4. The Respondent has opposed that by filing a replying affidavit sworn by Mehul Shah on June 7, 2022 drawn by the firm of Orenda & Associates Advocates for the Respondents and seeks that the application be dismissed with costs. While highlighting the relationship between the Appellants and the Respondent leading to the dispute herein, he contends that the Appellants were not keen to prosecute the matter for reasons that they failed to apply for certified copies of the proceedings and list the matter for directions before the Deputy Registrar.
5. On whether the appeal has high chances of success, the Respondent states that the Appeal is clouded by the fact that the Memorandum of Appeal contradicts the Defendant's statement of Defence in the lower court. He stated the Memorandum of Appeal is just meant to buy time and the same would prejudice the Respondent.
6. While stating that the Respondent is a financial institution capable of repaying the decretal amount and interests in the event the appeal succeeds, he faults the Appellants/Applicants for not offering any form of security for due performance of the decree and failing to produce evidence to show that they would suffer substantial loss.
7. In their supplementally affidavit sworn by Justus Amoni Ewoi on July 5, 2022, the Appellants state that the reasoning by the Respondent does not in any way depict lack of seriousness by the Appellants in prosecuting the appeal. Instead, he maintains that they have an arguable appeal and that the mere fact that the Respondent is financially able to pay the decretal sum should the appeal succeed is not sufficient to deny the Applicants the orders sought.
8. On the converse, he states that should the Applicants fail to repay all the decretal sum at a go, then the Respondent can proceed to attach their property which will cause the Applicants substantial loss. Further, he states that it is not mandatory for the applicants to provide security deposit before stay orders are granted.
9. The application was canvassed by written submissions dated July 5, 2022 and July 19, 2022 by the Applicants and the Respondents respectively. Counsel for the Appellants submit that the decretal amount is substantial and the Respondent is likely to attach the company's properties which in turn would paralyze the activities of the company. It is submitted that failure to grant stay of execution would render the appeal nugatory. Counsel submits that the application was filed in time without undue delay.
10. On their part, counsel for the Respondent submits that deposit for security of costs is crucial in an application for stay of execution but the Applicant has failed to show how it was unable to pay the security. He further submits that the Applicants have failed to demonstrate that they will suffer substantial loss. Lastly, counsel submits that the Applicants are keen on denying the Respondent the fruits of its judgment and that the application should be dismissed with costs to the Respondent.

Determination

11. I have considered the court record, the affidavits and submissions in respect of this application. The main issue for determination for an application is whether the court should grant an order of stay of



execution pending hearing and determination of the appeal. A stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University [2015] eKLR*, High Court had this to say: - 'stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...

12. Indeed, the conditions for granting stay of execution pending appeal as set out under Order 42 Rule 6 (2) of the Civil Procedure Rules are: -
 1. The application must be brought without unreasonable delay.
 2. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 3. 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.
13. From the material before court, I note that even though no record of appeal has been filed to date, there was no undue delay in filing this application. On the issue as to whether the Applicants have demonstrated that they will suffer substantial loss, I note from the history of the matter as given by the Respondent is that the Applicants were granted a loan of Kshs 9,000,000/= by the Respondent so as to purchase two Mercedes Benz Tippers jointly and worth Kshs 16,000,000/= whereupon the 1st Respondent entered into a Hire Purchase agreement with the Respondent to on the same date towards the purchase of the said two Tippers.
14. However, the Applicants breached the terms of the agreement by failing to pay the outstanding sums and hence the loan ran into arrears. This led the Respondent to repossess and sell both vehicles towards clearance of the sums incurred in the hire purchase agreement. The Respondent states that the sale realised a net sum of Kshs 7,630,300/= after deducting repossession and storage charges. However, this did not clear the outstanding sum of Kshs 5,020,706/= which still remained. It is not sufficient for the Applicant to boldly state that he will suffer substantial loss and that the appeal will be rendered nugatory if the application for stay is granted.
15. In *James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR*, Gikonyo J had this to say on this issue:-

' No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.'
16. The Applicants are apprehensive that the Respondent would begin executing the decree and in doing so attach the company's property and this would be detrimental to the running and functioning of the company. It is not sufficient for them to state that the decretal sum is a large amount of money or that the financial position of the Respondent is not known. They have not demonstrated that the Respondent is a man of straw and will not be in a position to refund the money if the appeal succeeds. Coupled with the history of default, it is clear that the Applicants have not sufficiently demonstrated that they would suffer loss if stay is not granted. If there is no substantial loss, then the appeal would not be rendered nugatory.



17. On the issue of deposit of security, the Applicant have not offered such security at all. While citing the case of *HGE v SM*[2020]eKLR, they argue that the same is not mandatory but discretionary. In that case, the court cited the case of *Focin Motorcycle Co Limited vs Ann Wambui Wangui & another* [2018] eKLR where the court had this to say:-

' Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.'

18. The same court also quoted the case of *RWW v EKW* [2019] eKLR, where the court held:-

' The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders.'

19. It is for that reason that the court in *HGE v SM* (supra) went ahead to grant stay while holding:-

' From the above decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Looking at the circumstances of the case and the fact that the parties herein are both of advanced ages, it would be in the interest of justice that security is not be imposed on the appellant.'

20. In my view, the above decisions do not state that security for costs is not mandatory as implied by the Applicants. In *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the court had this to say:

' 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 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 fails.'

21. Indeed, Order 42 Rule 6 (2) of the Civil Procedure Rules is couched in mandatory terms:-

'(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.'

22. *In Re Estate of Richard Churko Stephen alias Richard Churko Guyo (Deceased)* [2021] eKLR, the court dismissed the application for stay of execution pending appeal where the Applicant had failed to meet the condition regarding security for costs.



23. From the history of the matter before this court and as stated above, the Applicants should not be allowed to make it more difficult, if not impossible, for the Respondent to realise the fruits of its judgment. Though the Applicants have failed to offer deposit of security, the issue is not whether the Applicant is willing or not to deposit security. It is for the court to determine such security depending the circumstances of the case as the Applicants pursue their right of appeal whether such an appeal has merit or not. It is in the circumstances herein that this court makes the following orders:-

1. Stay of execution is hereby allowed on condition that the Appellants/ Applicants deposit the entire decretal sum in a joint interest earning account in the names of their advocates and advocates for the Respondents within 30 days from today.
2. In default, this application will be deemed to have been dismissed.
3. Costs of the application to abide the outcome of the appeal.

READ, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 26TH DAY OF JANUARY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellants/Applicants

Ms Yegon for the Respondent

Grace Njuki, Court Assistant

