



**Beta Healthcare International Ltd v Wesa (Civil Appeal
110 of 2022) [2023] KEHC 50 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 50 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 110 OF 2022
RN NYAKUNDI, J
JANUARY 18, 2023**

BETWEEN

BETA HEALTHCARE INTERNATIONAL LTD APPELLANT

AND

EDWIN KHAKULI WESA RESPONDENT

RULING

1. By a Notice of Motion dated July 29, 2022, the applicant, Beta HealthCare International Ltd, seeks orders that: -
 1. Spent.
 2. Spent.
 3. That pending the filing, hearing and determination of the applicant's intended appeal, the execution of the ruling of the principal magistrate (honourable Nancy N Barasa) and any resultant order and or any further proceedings arising therefrom be stayed.
 4. That the costs of and occasioned by this application be costs provided for.
2. The applicant's application is premised on the grounds therein and is further supported by the affidavit sworn on July 29, 2022 by Margaret Waithera John Mathenge, the regional head of human resources and administration at the respondent's company.

The applicant's case.

3. The applicant's case is that the respondent herein instituted a suit against it at the lower court and *ex-parte* judgment was delivered by honourable D Milimu (RM) on January 14, 2022 in his favour.



4. The applicant contends that it had no knowledge of the said proceedings and only became aware of the said judgment when it was served with a letter dated January 14, 2022 by the respondent's counsel informing it that judgment had been rendered and further demanding for payment of the decretal sum plus costs to the tune of kshs 2,365,033/=.
4. Aggrieved by the said judgement, the applicant filed an application dated January 28, 2022 seeking to set aside the *ex-parte* judgment. Upon hearing the application, Hon Nancy N Barasa (PM) delivered her ruling dated July 14, 2022 allowing the applicant's application on condition that:
 - a. The defendant (now appellant) is ordered to release to the plaintiff (now respondent) a sum of 1 million within 20days from the date of the ruling.
 - b. The balance thereof (kshs 1,365,033) to be deposited into a joint interest earning account in the names of the advocates of both parties within 30 days of this ruling.
 - c. In default of any of the above conditions in (a) and (b) above, *ex-parte* judgment reverts automatically.
 - d. Costs of the application to the plaintiff.
5. Aggrieved by the said decision, the applicant has since filed a Memorandum of Appeal challenging the said decision.
6. The applicant's position is that it will be highly prejudiced by the said orders as the financial capability of the respondent to refund the said amount of monies is unknown.
7. The applicant contends that it was condemned unheard and should thus be given an opportunity to ventilate its case.
8. The applicant seeks orders of stay of execution against the said ruling so as to preserve the subject matter of the intended appeal.
9. According to the applicant the intended appeal as high chances of success which might be rendered nugatory if orders of stay of execution are not rendered.
10. The applicant is willing and ready to abide by any conditions of stay that the court may deem fit.

The respondent's case

11. The application is opposed by the respondent vide his Replying affidavit dated September 7, 2022 and filed in court on September 9, 2022.
12. The respondent's case is that the court delivered a ruling in his favour on July 14, 2022. The respondent contends that the applicant herein has since not complied with conditions stipulated by the said ruling.
13. The respondent contends that court orders are never issued in vain.
14. The respondent maintains that the applicant has not demonstrate to court the substantial loss it likely to suffer in the event stay orders sought are not granted.
15. The respondent further deposed that his advocate on record has since paid a further kshs 66,942/= to a view to jumpstart the execution process.
16. The respondent contends that the applicant's appeal does not raise any triable issue. The respondent maintains that litigation has to come to an end.



17. Both parties filed their written submissions.

Determination

18. I have carefully considered the application, the affidavits both in support and in opposition and the submissions on record. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

19. Order 42rule 6(1) of the [Civil Procedure Rules](#) 2010 stipulates 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.

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.”

20. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal*(1982) KLR stated as follows: -

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal court reverse the judge’s discretion.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

21. From the above cited provisions and case law, it is clear that an applicant for orders of stay of execution pending appeal is required to firstly; demonstrate that he will suffer substantial loss unless the stay is granted; that the application has been filed without unreasonable delay and that he is willing to offer security for due performance of the decree.
22. In the trial court, the applicant was granted orders of stay on condition that it pays the respondent kshs 1 Million and that the remainder thereof be deposited in a joint interest earning account in the names of the parties advocates on record.
23. The applicant’s main contention is that the respondent financial capability is unknown and that it was condemned unheard. The applicant has since lodged an appeal and is apprehensive that in the event of execution the appeal will be rendered nugatory and it will suffer substantial loss. The respondent on the other hand contends that the applicant has not demonstrate to court the substantial loss it likely to suffer in the event stay orders are not granted.
24. In my considered view, the question of financial inability without *prima facie* evidence should not dissuade the court from applying the principles of the law as settled. In addition to our own jurisprudence, I find motivation to the position taken by the court in the cases of:

*Marguerita Desir v Sabina James Alcide*⁶, In Marie Makhoul Madam George Creque JA (as she then was) stated the principles in paragraph 3 to 5 of the judgment as follows:

1. The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favor, particularly after a full trial on the merits.
2. The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd v Baker* where Staughton L J opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.
3. The authority of *Hammond Suddard Solicitors v Agrichem International Holdings* is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus: u ... whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?”
4. Similarly, in the *Marguerite Desir* case the court held *inter alia* as follows: “The court’s jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should



be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason."

25. While balancing these competing interests the court must at all times be cautious not deny a successful party the fruits of their judgment and also be keen not to deny a party his or her day in court. It should be not that a triable appeal does not necessarily mean one that would automatically succeed.

26. The comparative jurisprudence is also consonant with the decision of the court in the cases of: *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

"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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

1. In the instant case, the applicants aver that they stand to suffer substantial loss of over kshs 503,050 as well as costs and interest if stay of execution is not granted. They further aver that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The appellants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank.

2. On his part, the respondent has not addressed the issue of stay of execution but instead delved into the merits of the appeal. This is evident from a scrutiny of the authorities relied on by the respondent which as earlier stated address setting aside of orders of a trial court.

3. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

4. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the Respondent."

27. On the issue of security, the court notes that even though the applicant did not present any evidence to show that the respondent is incapable of refunding the decretal sum in the event the appeal succeeds. The respondent on the other hand made no effort to show that he will be in a position to refund the decretal sum in the event the appeal succeeds.



28. The court should always lean towards letting parties ventilate their disputes. When a court finally renders its determination over any dispute submitted to it to resolve, either party ought to feel they had their day in court even if the decision might not favour them.
29. An *ex-parte* hearing therefore deprives a party of this right and should only be conducted in exceptional cases where it is plain and clear that the defendant was properly served but failed and or ignored to attend court.
30. Having said so, the court is therefore persuaded in the circumstance of this case to grant the appellant stay of execution of the ruling delivered on July 14, 2022 pending hearing and determination of the present appeal.
31. Accordingly, I hereby allow the application dated September 29, 2021 on the following conditions: -
 1. That the applicant deposits half the decretal sum in an interest earning account held by both counsels for the parties within sixty (60) days of this date and in default execution to issue.
 2. Costs of this application to abide the outcome of the appeal.
32. Parties are however urged to fast track the hearing and disposal of the appeal.
33. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF JANUARY, 2023.

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R NYAKUNDI

JUDGE

