



REPUBLIC OF KENYA



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**Set Point East Africa Limited & another v Zhongmei Engineering Group Limited
(Civil Appeal E004 of 2023) [2023] KEHC 2563 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E004 OF 2023
WA OKWANY, J
MARCH 29, 2023**

BETWEEN

SET POINT EAST AFRICA LIMITED 1ST APPELLANT

DEMO CONTRACTORS & SERVICES LIMITED 2ND APPELLANT

AND

ZHONGMEI ENGINEERING GROUP LIMITED RESPONDENT

*(Being an Appeal against the Judgment of Hon M C Nyigei – PM
Nyamira dated and delivered at Nyamira on January 11, 2023 in the
original Nyamira Chief Magistrate’s Court Civil Case No 100 of 2017)*

RULING

Introduction

1. The Appellants/Applicants were the Plaintiffs before the Lower Court. They sued the Respondent seeking, *inter alia*, damages for loss of user of a motor vehicle. The Respondent/Defendant did not enter appearance or file a defence thereby precipitating the entry of default judgment.
2. The default judgement was however subsequently set aside but on condition that the Respondent deposits the entire decretal sum of Kshs 3,534,359/= in court.
3. The case thereafter proceeded for hearing and at the close of the trial, the Lower Court dismissed the Plaintiffs’ suit. Aggrieved by the judgment dismissing their case, the Appellants filed the instant appeal and the application dated January 26, 2023 which is the subject of this ruling.

Application

4. The Applicants seeks the following orders through the application dated January 26, 2023: -



1. Spent
2. That an order do issue that the sum of Kshs 3,534,359/= deposited in Lower Court in Chief Magistrate Civil Case No 100 of 2017 do remain deposited in court pending the hearing and determination of this application.
3. That there be stay of execution of the Judgment herein delivered on January 11, 2023 and all consequential orders emanating therefrom pending the hearing and determination of this application.
4. That there be stay of execution of the Judgment herein delivered on January 11, 2023 and all consequential orders emanating therefrom pending the hearing and determination of this Appeal.
5. That the costs of this application be in the cause.
5. The application is supported by the affidavit of the 1st Applicant's Director, Mr James Karanja Mbugua, and is premised on the grounds that: -
 - A. That the judgment herein was delivered on January 11, 2023 and the applicants being aggrieved thereto lodged an appeal.
 - B. The Memorandum of appeal is duly filed and same pending directions of the Honourable Court.
 - C. The Respondent is in the process of obtaining the Decree and Certificate of Costs and has commenced execution to the irreparable detriment of the Applicant herein.
 - D. That in the event the appeal succeeds after the money has been returned to the respondent the outcome of the appeal may be jeopardized as the Respondent is a multinational company capable of moving out to conduct business outside the jurisdiction of this Honourable Court.
 - E. The filed appeal raises serious triable issues of law and fact with overwhelming chances of success.
 - F. In the circumstances, if this application is not heard as a matter of urgency, the appeal shall be rendered nugatory.
 - G. This application has been brought without delay.
 - H. It is mete, just and in the wider interests of justice that the applicant herein be given an opportunity to pursue the appeal herein to its logical end without same being rendered nugatory by executing the decree herein.
 - I. No prejudice whatsoever or at all shall be occasioned upon the respondent if the orders sought herein are granted.
6. The Respondent opposed the application through the Replying Affidavit of Gu Lele who avers that the application is incompetent and is based on unconfirmed allegations and fears. He further states that the money deposited before the Lower Court is not available as security for the appeal since the Respondent is not aggrieved by the impugned judgment.
7. The Respondent's deponent states that the money deposited before the Lower Court was a condition precedent to setting aside the *ex-parte* judgment pending the hearing and determination of the suit which suit was determined in the Respondent's favour.



8. He further avers that it will be unfair to compel a successful litigant to provide security yet it is the Appellants who should furnish security for the due performance of the decree.
9. He further states that the amount in question was deposited in court more than five years ago and its continued withholding will continue to burden the Respondent who is now entitled to access it.
10. It was the Respondent's case that the Applicants have not demonstrated that there is any danger of execution and that the application does not meet the threshold set for the granting of orders for stay of execution.
11. Parties canvassed the application by way of written submissions which I have considered.
12. The main issue for determination is whether the Applicants have made out a case for the granting of the orders sought in the application.
Deposit of Kshs 3,534,359/=
13. The Applicants prayer is that the money deposited by the Respondent before the Lower Court, as a condition for setting aside the default judgment, do remain deposited pending the hearing and determination of the appeal. In essence, the money was deposited as a penalty for the delay in filing of the defence and as security for the Appellants who had at the time obtained interlocutory judgment against the Respondent.
14. It was not disputed that the Appellants' case before the Lower Court was dismissed. My take is that upon the dismissal of the Appellants' suit, the reason for the deposit of the money was spent. The Appellants could only have laid a claim to the money if they had won the case before the lower court in which case it would be the Respondents filing the appeal and asking that the money remains in court until the appeal is heard and determined.
15. I am not persuaded that the Applicants have made out a case for the continued withholding of the Respondent's money deposited before the Lower Court.

Stay of Execution Pending Appeal

16. The principles governing the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - “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.
17. In addition to the above provision, stay may only be granted for sufficient cause and the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
18. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding



objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

19. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
20. What amounts to substantial loss was discussed in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, as follows: -

“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.”
21. In the instant case, the applicants aver that they stand to lose the money that was deposited in court if the same is released to the Respondent as the Respondent is a foreign company which is likely to fold up and leave the court’s jurisdiction. My finding is that the claim that the Respondent might leave the court’s jurisdiction is speculative and is not backed by any tangible proof. I also note that the Applicants have not stated that the Respondent will not be in a position to pay the decretal sum should they succeed on appeal.
22. It also noteworthy that the Appellants lost their case before the Lower Court and cannot be seen to state that they stand to suffer any loss if stay is not granted.
23. On the requirement for an applicant for stay of execution to file the application without unreasonable delay, I note that the impugned judgment was rendered on January 11, 2023 and the instant application filed on January 26, 2023. I am satisfied that the application was filed without unreasonable delay.
24. Turning to the requirement that an Applicant furnishes security for due performance of the decree, I note that the Applicants did not offer any security for costs save for a suggestion, off the record and at the tail end of their oral submissions in court during highlighting, that they will offer a title deed whose particulars was not disclosed, as security. I find that the Applicants did not satisfy the condition for the provision of security for costs.
25. I further find that having been the successful party before the Lower Court, the Respondent herein is entitled to access the money it had deposited before the said court as a condition for the late filing of the defence. I further find that the application does not meet the threshold set for the granting of orders for stay of execution pending appeal.



26. Having regard to the findings and observations that I have made in this ruling, I find that the application dated January 26, 2023 is not merited and I therefore dismiss it with costs to the Respondent.

27. It is so ordered

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 29TH DAY OF MARCH 2023.

W A OKWANY

JUDGE

