



REPUBLIC OF KENYA



**KENYA LAW**  
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**Patel Kalyanji Premji & Co Ltd & another v Farm Engineering  
Industries Ltd (Miscellaneous Application 270 of 2018)  
[2023] KEHC 3799 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3799 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION 270 OF 2018  
FG MUGAMBI, J  
APRIL 28, 2023  
IN THE MATTER OF THE ARBITRATION ACT, 1995 AND  
THE ARBITRATION RULES 1997  
AND  
IN THE MATTER OF  
ENFORCEMENT OF THE ARBITRATION AWARD**

**BETWEEN**

**PATEL KALYANJI PREMJI & CO LTD ..... 1<sup>ST</sup> APPLICANT**

**UPSTATE KENYA AUCTIONEERS ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FARM ENGINEERING INDUSTRIES LTD ..... RESPONDENT**

**RULING**

1. This ruling determines the Notice of Motion application dated May 27, 2022. The application, under Certificate of Urgency, was brought under Order 42 rules 1, 2,10(1), 10(2) as well as Order 51 rules 1 & 3 of the [Civil Procedure rules 2010](#) and sections 1A,1B and 3A of the [Civil Procedure Act](#) and all enabling provisions of the Law. The application seeks the following orders;
  - i. Spent
  - ii. That the Honourable court be pleased to set aside and/or discharge the Orders of Stay of Execution in terms of Prayer 7 of the notice of motion filed on March 23, 2021 and granted vide a ruling dated September 23, 2021 in this suit.



- iii. That half of the decretal amount of Kshs 5,056,951.50 held at SBM Bank of Kenya Account Number 00xxx in the joint names of the 1<sup>st</sup> applicant and respondent Advocates be released to the law firm of Kipyator Kibet & Associates Advocates on behalf of the 1<sup>st</sup> applicant Patel Kalyanji Premji & Company.
  - iv. That the 1<sup>st</sup> applicant through the 2<sup>nd</sup> applicant be allowed to execute the decree dated March 10, 2021 to recover half of the decretal amount and the sum of Kshs 552,500/= plus interest and other costs.
  - v. That the costs of this application be borne by the respondent.
  - vi. That the Honourable Court be pleased to grant any further orders as it deems fit.
2. The said application is premised on the grounds on the face of it and is supported by the affidavit sworn by Patel Kalyanji Premji. Both the supporting affidavit and the submissions by the applicant buttress the same issues. Firstly, it is the applicant's case that a stay of execution was granted on September 23, 2021. Apart from filing a Notice of Appeal on October 7, 2019 and thereafter a letter requesting for typed proceedings on November 8, 2019, the respondent had failed since then to make a follow up on the proceedings and had done nothing to prosecute the appeal for a period of two years from the time of filing the Notice of Appeal.
3. It was further averred by the applicant that the appellant had neither filed a Memorandum of Appeal nor had the appeal fixed for directions. This state of affairs, it is submitted, had denied the applicant its rights to enjoy the fruits of their judgment for a period of over 2 years. Counsel submitted that the respondent continued to enjoy the stay orders and failed to comply with the procedure for prosecuting the appeal.
4. The application was opposed for reasons explained in the replying affidavit dated June 27, 2022 sworn by Swarnjit Bhurji, the executive chairman of the respondent company as well as by the respondent's rival submissions. The respondent denied that he had not done anything to prosecute the appeal since the stay of execution order was granted. In particular, it was submitted that the respondent had requested for proceedings vide letters dated 27/9/2019 and 29/1/2020. It was further stated that the respondent's advocates had on several occasions made email follow up and visited the registry to confirm the status of the proceedings.
5. The respondents further contend that it was difficult to obtain typed proceedings since the matter was still active in court and the court file moved back and forth from court to the registry. This is because even after the prosecution of the stay application, there remained another pending application filed by the 1<sup>st</sup> applicant herein, dated June 13, 2018. This may have protracted the delay in getting the proceedings done. The respondent therefore expresses a desire to pursue the appeal and submits that this delay has not been intentional.
6. In buttressing the point that the applicant would suffer no prejudice, the respondent argues that he had already deposited security in a joint interest earning account as directed by the court. It was averred that if the orders sought were granted the respondent would suffer loss since the decision that the respondent seeks to appeal is an award against it. The respondent urges that it would not be in the interest of justice to dismiss the appeal.



## Analysis and Determination

7. I have considered the pleadings and the submissions on record. The main issue for determination is whether the applicant has made out a case for grant of the orders sought. More particularly for the orders of stay of execution granted in the ruling of September 23, 2021 set aside. The applicant also sought to have half of the decretal amount of Kshs 5,056,951.50 released to the firm of Kipyator Kibet & Associates Advocates, being a condition of the stay orders of September 23, 2021. The main contest between the parties was whether the appellant/respondent was actively pursuing the appeal.
8. The purpose of an application for stay of execution pending appeal is to preserve the subject matter which is in dispute so as to safeguard the rights of the intending appellant. On the same vein, it is not in the province of the court to deny a successful litigant the fruits of his litigation or lock up funds to which he is prima facie entitled to. An order for stay of execution does not entitle a party to sleep on their rights to prosecute an appeal. For this reason, the party that enjoys the stay must proceed expeditiously to prepare the Record of Appeal and have the same filed in the registry.
9. In the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR the Supreme Court held that a ground of delay in getting typed proceedings is not a *prima facie* panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.
10. I have seen the correspondence dated January 29, 2020, February 1, 2021 and December 21, 2021 written by the respondent's advocates to the Deputy Registrar requesting for the proceedings. With respect, these letters are spaced at intervals of almost 12 months each. The time in between the letters is not explained. I also note that it is only the email of December 21, 2021 that was written after the stay order had been granted. The previous correspondence had been written prior to the order. Other than the one email of December 2021, there is no more evidence of the 'numerous emails' or evidence of the 'numerous visits' by the appellant's advocates to the registry in a bid to follow up the proceedings. The respondent does not state whether there was any response from the registry for the more than 2 years' delay in typing the proceedings.
11. In the circumstances, I find that the degree of diligence exercised by the appellant in pursuing the appeal is wanting. This state of affairs may be presumed as a possible apathy to actively pursue the appeal once he had obtained a stay of execution. It is against the interest of justice to allow the appellant/respondent to continue to enjoying stay orders indefinitely to the detriment of the applicant.
12. The respondent further submits that he has an arguable appeal which will be rendered nugatory if this application is allowed. By way of rival submissions on this ground, this court has been referred by the applicant to a ruling in *Flamingo Towers Limited & another vs Homeland Media Group Ltd* [2021] eKLR where a similar issue was presented by the parties in that case. This court is invited to make a decision which touches on the arguableness of an intended appeal yet the court has no indication of the decision that the respondent is aggrieved of. The respondent has not assisted the court because the Memorandum of Appeal was not filed for the court's benefit. Apart from the fact that the Memorandum of Appeal is not dependent on the proceedings, the claim by the respondent that they have an arguable appeal is therefore devoid of material facts.

## Disposition and orders

13. In the premises I find merit and I grant the application dated May 27, 2022 in the following terms:



- i. That the stay of execution order in terms of Prayer 7 of the Notice of Motion application filed on March 23, 2021 and granted vide a ruling dated September 23, 2021 be and is hereby set aside and/or discharged;
- ii. That half of the decretal amount of Kshs 5,056,951.50 held at SBM Bank of Kenya Account Number 00xxxx in the joint names of the 1<sup>st</sup> applicant and respondent Advocates be released to the law firm of Kipyator Kibet & Associates Advocates on behalf of the 1<sup>st</sup> applicant Patel Kalyanji Premji& Company;
- iii. That the 1<sup>st</sup> applicant through the 2<sup>nd</sup> applicant be allowed to execute the decree dated March 10, 2021 to recover half of the decretal amount and the sum of Kshs 552,500/= plus interest and other costs.
- iv. The costs of this application be borne by the respondent.

**SIGNED, DATED AND DELIVERED AT NAIROBI VIA VIRTUAL PLATFORM**

**THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**F. MUGAMBI**

**JUDGE**

