



Shelter Construction Limited v Adhiambo & another (Legal Administrator of the Estate of the Late Joseph Ogutu Atom) (Miscellaneous Civil Application E133 of 2023) [2023] KEHC 17905 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E133 OF 2023**

HM NYAGA, J

MAY 31, 2023

BETWEEN

SHELTER CONSTRUCTION LIMITED APPLICANT

AND

LEAH ADHIAMBO & ANOTHER RESPONDENT

**LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH OGUTU
ATOM**

RULING

1. By a Notice of Motion dated April 17, 2023 brought pursuant to Section 1A,1B & 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#), the Applicant seeks the following orders: -
 1. Spent
 2. That the Honourable court be pleased to issue an order staying the execution of the Judgement delivered and dated April 4, 2023 in Nakuru CMCC No 377 of 2012 *Leah Adhiambo Okoth & Another (Legal Administrators of the Estate of the late Joseph Ogutu Atom) Versus Kariu Nyange Estate & Another* pending the hearing and determination of the intended Appeal
 3. Spent
 4. That the Costs of this Application be provided for.
2. The Application is premised on the grounds that: -
 1. The Applicant has brought this Application without delay.
 2. The intended Appeal raises triable issues, is arguable and has very high chances of success.



3. The intended Appeal stands to be rendered nugatory if stay of execution is not granted.
 4. The stay of execution is necessary since the ability of the Respondents to refund the decretal amount in case the Appeal succeeds is unknown.
 5. The Applicant is ready and willing to provide such security that this Honourable Court may order for stay of execution pending the determination of the Appeal.
 6. No prejudice will be occasioned to the Respondents if stay is granted.
3. The Application is supported by affidavit of Silas Nganga Gachoya sworn on April 17, 2023. He has basically reiterated the grounds set out on the application.
 4. The Respondent, Leah Adhiambo Okoth opposed the Application through her Replying Affidavit sworn on May 19, 2023. She deposed that the Application is incompetent, vague, ambiguous and otherwise an abuse of the court process.
 5. She averred that the Judgement in the Lower Court was delivered on April 4, 2023 and the Applicant is only out to frustrate her from enjoying the fruits of her judgment.
 6. She deposed that the firm of Gachimu, Githaiga & Company Advocates is not properly on record since it is the firm of Hari Gakinya & Co Advocates that is on record for the Applicant.
 7. It was her deposition that there is no demonstration of good faith on the part of the Applicant or explanation given why no appeal has been filed in accordance with the Law.
 8. She contended that when judgement was delivered in the Lower Court, 30 days stay of execution was granted and therefore this Application is superfluous, and that the conditions for granting stay of execution have not been met.
 9. She prayed that this Application be disallowed.

Issues for Determination

10. After careful analysis of the above application and the Supporting & Replying affidavits, in my view the main issues for determination are:
 - i. Whether the firm of M/S Gachimu Githaiga & Company Advocates is properly on record
 - ii. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal.

Issue No.1

11. The firm which has filed the instant Application is the firm of M/s Gachimu Githaiga & Company Advocates. The Respondent avers that the firm on record is that of Hari Gakinya & Co Advocates however she has not adduced any proof. In absence of proof thereof this court cannot hold otherwise. It would have been ideal for the pleadings in the lower court to be availed in order to establish this fact.

Issue No.2

12. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:

“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 orders set aside.”

13. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
 - a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

14. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
 1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, 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 the appeal court reverse the judge’s discretion.
 3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

15. Under the head of substantial loss, an applicant must clearly state what loss, if any, it stands to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

16. The learned judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare



case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

17. The Applicant in this matter contends that it stands to suffer irreparable damages if stay is not granted since the ability of the Respondent to refund the decretal amount in case the Appeal succeeds is unknown.
18. It is important to note that no Appeal has been lodged in the instant matter. The applicant seeks stay orders pending an intended appeal. I have also not seen any prayer for leave to file an appeal out of time. Without an appeal, or an application for leave to file an appeal out of time, the application lacks the solid foundation it needs to warrant the grant of the orders sought. This would have enabled the court to determine if there is any merit in the appeal. This is a crucial ground for consideration in an application of this nature.
19. In the circumstances, I find that the applicant has failed on this particular limb.
20. On whether the application has been made without unreasonable delay, I have noted from the annexed Judgment that it was delivered on April 4, 2023 and this Application was filed on April 17, 2023. It is clear therefore that this application was filed timeously.
21. Regarding the issue of security for costs, the applicant has stated in his supporting affidavit that it is willing to provide such security that this Honourable Court may order.
22. The determination of what amounts to a suitable security is a matter of court’s discretion. In [*Focin Motorcycle Co Limited vs Ann Wambui Wangui & another*](#) [2018] eKLR, the court stated that:

“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....”
23. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The Applicant herein has only succeeded on two limbs of its application, that of filing an application without undue delay and offering security. The court in [*Trust Bank Limited vs Ajay Shah & 3 Others*](#), [2012] eKLR at page 23 stated that: -

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated April 24, 2012 it without merit.”
24. Although the applicant has filed this Application without undue delay and offers security, the question is, what is being litigated upon, since as I stated earlier, there is no appeal before the court. The lack of that foundation leaves the timeous filing of the Application and an offer of security in the high seas, so to speak, with no hope of reaching the harbour, which is the determination of the appeal itself.
25. I find that this application is founded on very unstable grounds that cannot hold it afloat.
26. In the end, I find that the application fails in its entirety and is hereby dismissed with costs.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jennifer

Mr. Githaiga for applicant

Mr. Mboga for 1st Respondent

