



**Direct Assurance Company Limited v Gachuhi (Civil Appeal
E320 of 2022) [2023] KEHC 18418 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E320 OF 2022
PM MULWA, J
MAY 30, 2023**

BETWEEN

DIRECT ASSURANCE COMPANY LIMITED APPLICANT

AND

EPHANTUS IRUNGU GACHUHI RESPONDENT

RULING

1. By a Notice of Motion dated March 14, 2023, the Applicant sought the following orders:
 - a. Spent
 - b. The court grants a stay of execution of the ruling, judgment, decree, and execution of all the consequential orders arising from the Thika chief magistrate's court civil case no 144 of 2022.
 - c. The court grants a stay of sale by public auction of the applicant's goods and or properties proclaimed by the Respondent.
 - d. An order omitting the computation of 21 days from the period between December 21, 2022 and October 13, 2023 directed by the court on December 20, 2022.
 - e. An order declaring the applicant has complied with the orders of this court having deposited the decretal amount of Kshs. 418,918 on January 20, 2022.
 - f. In the alternative an order to enlarge the time within which to comply with the orders of December 20, 2022.
2. The application is supported by the annexed affidavit of Kelvin Nguni.



3. The applicants' case is that it is aggrieved by the decision of the court in Thika CMCC No. 144 of 2022, which it intends to appeal. In compliance with this court's directions on December 20, 2022, it deposited the decretal amount of Kshs. 418,981/= in the court and the evidence confirming the same was communicated to the respondent's counsel on January 25, 2023. On March 3, 2023, the respondent sent its auctioneers in an attempt to proclaim Kshs 702,056 together with the auctioneer's fees of Kshs. 186,000/=. Unless a stay of execution is issued the applicant is apprehensive the respondent will proceed with the sale of the proclaimed goods thus crippling the business operations of the applicant.
4. The applicant further avers that as per Order 50 Rule 4 of the Civil Procedure Rules the period between the twenty-first day of December in any year of the month and the thirteenth day of January in the next year both dates inclusive of time are exempted from the computation of time.
5. In opposing the application for stay of execution pending appeal the respondent Ephantus Irungu Gachuhi through his counsel Lestins & Smith, filed a replying affidavit sworn on March 21, 2023 and filed on March 22, 2023. He contends that the application is brought in bad faith and purely aimed at frustrating his rights of enjoying the judgment. The applicant failed to honour the judgment on behalf of its client prompting the respondent to file a declaratory suit and a summary judgment was entered on November 17, 2022. The prayer for a stay of execution was determined by the orders of December 20, 2023 and thus it is *res judicata*. The deposit of the decretal sum into the court was done outside the time frame of the court.
6. Directions were given that the application to be heard by way of written submissions.

Applicant's submissions

7. On behalf of the applicant, counsel filed submissions on March 27, 2023 in which it was submitted that the issue in contention is whether depositing the decretal sum in court on January 20, 2023 the applicant complied with the orders of the court of December 20, 2022.
8. The argument of counsel is that computation of time does not run from the twenty-first day of December in any year of the month and the thirteenth day of January in the next year both dates inclusive. That period of time is exempted from the computation of time as per order 50 Rule 4 of the Civil Procedure Rules. Counsel submits that the security was deposited within the stipulated time frames. He cited the case of Maesk Kanya Limited v Murabu chaka Tsuma [2017] eKLR where the court stated: "we respectfully adopt those observations for the purpose of this case. Order 50 Rule 4 makes it clear that the rule applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order or the court"
9. Counsel urged the court to allow the appeal.

Respondent's submissions

10. Counsel for the respondent filed submissions dated March 27, 2023 in which it was submitted the orders of the court of December 20, 2022 lapsed on January 9, 2023 and as such the applicant having deposited the amount of Kshs 418,982 on January 20, 2023 was outside the stipulated timelines.
11. Further counsel submits the decretal amount is Kshs. 500,981/= and not 418.982/= which has been deposited. He urged the court not to assist an indolent person.



12. According to counsel, the prayers seeking validation the orders of December 20, 2022 are untenable as the orders ceased to exist due to lapse of time. No reasons have been adduced as to why the applicant failed to comply with the court orders. Counsel urged the court to dismiss the application.

Analysis and determination

13. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made. The issues for determination are:
- a. Whether the application is *res judicata*
 - b. Whether stay pending appeal is merited
 - c. Whether the court should extend the time within which to comply with the orders of December 20, 2022

Whether the application is *res judicata*

14. The respondent's counsel submits that the current application for stay of execution is *res judicata* as the court determined on a similar application dated December 19, 2022 seeking stay of execution.
15. Section 7 of the [Civil Procedure Act](#) states "No court shall try any suit or issue which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom that or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
16. The above section stipulates the issues must be similar, between parties and must have been determined by a court of competent jurisdiction. The application dated December 19, 2022 seeks a stay of execution of the judgment, decree of Thika CMCC no. 144 of 2022. On the gist that the suit was not heard and determined conclusively, it was brought under a certificate of urgency and only a conditional stay was issued. The court was yet to ventilate on the merits and demerits of the application before the current application dated March 14, 2023 was filed which was prompted by the proclamation of the applicant's goods.
17. The court thus finds that the current application is not *res judicata*.

Whether stay pending appeal is merited

18. The operative law on stay of execution pending appeal is pegged on Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:
- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 the 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 the application being made, to consider such application and to make such order thereon as may to it seems 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.



- (2) No order for stay of execution shall be made under sub-rule (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.”

19. An applicant for a stay of execution of a decree or order pending appeal must 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.
20. In the case of *RWW v EKW* [2019] eKLR, the purpose of a stay of execution order a pending appeal was considered as follows:

“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.

Indeed, to grant or refuse an application for a 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.”

Substantial loss

21. The applicant submits that unless stay orders are issued the respondent will proceed to sell the proclaimed goods of the applicant which will cripple its business. Counsel for the applicant submits the respondent on 3rd March sent its auctioneers to proclaim the sum of Kshs 702, 056 together with the auctioneer’s fees of Kshs 186,000/=.
22. The applicant has demonstrated execution will create a state of affairs that will affect its business. I, therefore, agree with the opinion expressed in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & another v Agnes Naliaka Cheseto* that: “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. This is what substantial loss would entail.”
23. The impugned ruling of the trial court was made on November 17, 2022, while the application seeking stay of execution was made on November 19, 2022, which was then enforced by the current application dated March 14, 2023. The court finds there was no inordinate delay in bringing the application.

Security

24. As to the security the applicant has deposited the sum of Kshs 418,982, even if the respondent disputes the same as the decretal sum it alleges that the decretal sum is Kshs. 500,981/=. The respondent submits the deposit was made past the timelines set by this court on December 20, 2022.



25. The orders of the court of December 20, 2022 directing the decretal amount to be deposited ought to have been complied within 21 days from the 20th day of December 2022.

26. In this regard, the 21 days' period within which to comply with the court order started running from December 20, 2022 to February 3, 2023. This period was within the Christmas vacation, the following days as stipulated under Order 50 Rule 4 shall be excluded from the computation of time:

Order 50 Rule 4 of the [Civil Procedure Rules](#) provides –

(4) Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

27. Further Rule 2(2)(b) of the High Court Practice and Procedure Rules, made pursuant to section 10 of the Judicature Act, provides that the Christmas vacation shall commence on 21st December and shall terminate on 13th of January.

28. Therefore, going by the above provision, the payment of the decretal sum of Kshs 418,982 was made on January 20, 2023 I find it was within the stipulated timelines of 21 days. I further find that the applicant has furnished security as a condition for a stay of execution.

29. The court having considered the deposit was made within the stipulated timelines opines there is no need to extend the orders of December 20, 2022.

30. In the circumstances, the application dated March 14, 2023 has merit and succeeds. The applicant fully met the conditions set by the court through the order of December 20, 2022. Stay of execution is granted pending the hearing and determination of the appeal.

31. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 30TH DAY OF MAY, 2023.

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua/Duale – Court Assistants

Mr. Awino - for the appellant/applicant

Mr. Mbanda - for the respondent

