



REPUBLIC OF KENYA



KENYA LAW
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**Wachira & another v Pwani Oil Products Limited (Civil Appeal
149 of 2022) [2023] KEHC 27609 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 27609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 149 OF 2022**

**F WANGARI, J
JULY 28, 2023**

BETWEEN

MARGARET WARIGA WACHIRA 1ST APPELLANT

ROBERT MUTITU 2ND APPELLANT

AND

PWANI OIL PRODUCTS LIMITED RESPONDENT

RULING

1. The Applicant filed an application for stay of execution of the decree in Mombasa CMCC No. 1279 of 2015 pending hearing and the determination of the appeal. The Applicant states that they have high chances of success of the appeal on the liability and quantum, and the appeal would be rendered nugatory if the stay is not granted.
2. The application was opposed through filing Grounds of Opposition dated 25th October, 2022 stating that the Application does not meet the threshold of Order 42, Rule 6 of the Civil Procedure Rules.
3. The application was disposed of by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.
Analysis and Determination
4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellants have made out a case for grant of orders of stay pending hearing and determination of appeal they have preferred. Corollary to this finding is the issue of costs.
5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - (2) 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...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 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...”

7. Having settled on the principles, an interrogation of whether the Applicants have met the tests above is imperative. On substantial loss, the Applicants submit that though the Respondents are likely to be kept away from the fruits of judgment, the Applicants risk falling into bankruptcy. They have however not demonstrated how they would suffer financially to a point of filing for bankruptcy proceedings.
8. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes



full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

9. It is my considered view that were this court to deny the Applicants an order for stay of execution, no prejudice shall be suffered by the Applicants. On the issue of delay, I note that the application was filed timeously and I need not say more on this limb.
10. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

11. The Applicants have offered security of the decretal sum as per the lower court judgment of Ksh. 1,644,294. In the event the appeal is successful, there is no evidence that the respondent will not refund the decretal sum if it is paid. I am comforted that it is a claim for subrogation and should the appeal be successful, the Respondent’s insurer will refund.
12. In the circumstances, I am not convinced that the applicant is deserving of the orders sought as execution is a lawful process and stay cannot be issued unless irreparable loss can be incurred. The Application dated 15/9/2022 lacks merit and is consequently dismissed.

Determination

13. The upshot is that I make the following orders: -
 - a. The application dated 15/9/2022 has no merit and is hereby dismissed.
 - b. Costs to the Respondent
 - c. I shall issue directions on hearing of the Appeal forthwith.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

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F. WANGARI
JUDGE

In the presence of: -

Ngechu Advocate for the Appellants

Ajigo Advocates for the Respondents

Abdullahi, Court Assistant

