



**Sheth & another t/a Harit Sheth Advocates v NIC Bank Limited (Civil Suit 280 of 2010)  
[2023] KEHC 26532 (KLR) (Commercial and Tax) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 280 OF 2010  
A MABEYA, J  
DECEMBER 19, 2023**

**BETWEEN**

**HARIT SHETH AND RICHARD KARIUKI T/A HARIT SHETH  
ADVOCATES ..... PLAINTIFF**

**AND**

**NIC BANK LIMITED ..... DEFENDANT**

**RULING**

1. This ruling is with respect to the application dated 31/7/2023 by the defendant. The application is brought under Order 42 rule 6 and 7, Order 51 rule 1 of the *Civil Procedure rules* 2010, section 3 and 3A of the *Civil Procedure Act*. It seeks stay of execution of the judgment of this Court delivered on 26/6/2023 pending appeal.
2. The application was premised on the grounds on the face of it and the supporting affidavit sworn by stephen atinya on 31/7/2023. the applicant contended that its intention was to appeal against that judgment and that it will be greatly prejudiced and suffer substantial loss if the decretal sum of Kshs 66,335,282/- is paid out to the plaintiffs. That the defendant was willing to provide a bank guarantee as security for the performance of the said decree.
3. The application was opposed by the respondent vide a replying affidavit sworn by harit sheth on 31/8/2023. it was contended that any money paid to the plaintiffs would be refunded if the appeal was successful. that he personally owned assets well in excess of Kshs 66,335,282/- and was in a position to refund the decretal sum. That the bank guarantee was no security since a bank stood the risk of collapse therefore the guarantee would not be sufficient security.
4. Parties canvassed the application by way of written submissions. The defendant submitted that it would suffer substantial loss since the decretal amount was colossal and there was no guarantee that



- the same would be repaid if the appeal was successful. That the plaintiffs had not provided evidence to show that they had funds in their possession equivalent or in excess of the decretal amount.
5. For the plaintiff, it was submitted that the application was brought after 32 days which was inordinate delay. That the defendant had not proved substantial loss and the decretal amount could be refunded. That the plaintiff had produced evidence showing two parcels of land whose value was Kshs 533,600,000 and the 50% share of the plaintiff Kshs 266,800,000/-. It was submitted that the defendant did not face any risk of non-payment of the decretal sum in the event the appeal was successful.
  6. I have considered the pleadings and the submissions by Learned Counsel. The main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
  7. The principles guiding the grant of a stay of execution pending appeal are well settled. These provided for under Order 42 rule 6(2) of the Civil Procedure Rule. These are that; the application should be made timeously, that substantial loss must be demonstrated and offer of security.
  8. In Butt v Rent Restriction Tribunal [1979], the Court of Appeal set out the following as the considerations for grant or refusal of stay of execution pending appeal.
    - “i) The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
    - ii) 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.
    - iii) 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.
    - iv) Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
  9. In the present case, the application was made after 32 days. I do not consider that to be inordinate. The application was made timeously.
  10. The defendant contended that it stands to suffer substantial loss as the decretal sum is colossal and there is no guarantee that the same would be recovered if the appeal succeeds. On their part, the plaintiffs produced evidence of their ability to repay the decretal sum. They provided a valuation report from Redfean Valuers Limited for the two suit properties which had been valued at Kshs 533,600,000/-. The Court is satisfied that they had demonstrated that they are not men of straw.
  11. In RWW v EKW [2019] eKLR, the court considered the purpose of stay of execution order pending appeal, in the following words: -
    - “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.”

12. In applying the above principles to the present case, the Court has to balance the two competing interests of the parties to satisfy itself that no party would suffer undue prejudice. The defendant is entitled to its undoubted right to appeal and that the same should not be rendered nugatory in the event it succeeds. On the other hand, the plaintiffs have demonstrated that they are not men of straw. They gave evidence to show that they own assets that far mush exceed the decretal sum
13. In the circumstances, the plaintiffs having demonstrated that they can refund the decretal sum if the same is paid over and the appeal succeeds, the cornerstone of stay, substantial loss, has not been demonstrated.
14. Accordingly, the Court finds the application to lack merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**

