



**Khalsa Motors (2005) Ltd & another v Pravinkant Vadgam (Civil Appeal E041 of 2021)
[2022] KEHC 25 (KLR) (Commercial and Tax) (14 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 25 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E041 OF 2021
A MABEYA, J
JANUARY 14, 2022**

BETWEEN

KHALSA MOTORS (2005) LTD 1ST APPELLANT

HEMAL KISHOR KOTECHA 2ND APPELLANT

AND

PRAVINKANT VADGAM RESPONDENT

RULING

1. This is a ruling on the appellants' application dated 31/5/2021. The same was brought under Order 42 Rule 6 and 7 of the [Civil Procedure Rules 2010](#) and it seeks a stay of execution of the ruling and decree of Hon. M. W. Murage, SRM issued on 20/5/2021 pending the hearing and determination of the appeal.
2. It is contended that the trial court delivered a ruling on 20/5/2021 striking out the appellants' defence dated 6/11/2020 and entered judgment in favor of the respondent. That the appellants being aggrieved by the said ruling have lodged the appeal herein.
3. They are apprehensive that the respondent will proceed to execute against them which will render the appeal nugatory. That the respondent will not be able to refund the decretal sum if the appeal is successful. That the appellants will suffer irreparable harm to its business and reputation unless the orders sought are granted.
4. The respondent oppose the application vide a replying affidavit sworn on 9/6/2021. It is contended that the appellants have not demonstrated that they will suffer substantial loss, that sufficient cause for the stay to be granted has not been demonstrated and that the appellants have not provided any security.



5. The respondent contends that he loaned the appellants a substantial amount of money therefore if they were to settle the decretal amount, he would be able to refund the money back and is willing to sign an undertaking regarding the same; that in the event the court grants a stay of execution, the appellants should be compelled to deposit the decretal amount in a joint account or to pay half of the decretal amount to the respondent and the balance deposited in Court.
6. The Court has considered the averments and pleadings of the parties. This is a stay of execution pending appeal application.
7. The principles applicable are well settled. The application must be made timeously, the applicant must demonstrate that he will suffer substantial loss if the stay sought is not granted and security for the due performance of the decree that would ultimately be binding must be offered.
8. On the first principle, the ruling of the lower court was made on 20/5/2021. The present application was lodged on 31/5/2021. There was only a passage of 9 days only. As such there was no inordinate delay in lodging the present application.
9. The second limb for consideration is substantial loss. The appellants submitted that the decretal sum is substantial and that the respondent will not be in a position to reimburse the same should the appeal succeed. On the other hand, the respondent averred that since it is the appellants who borrowed money from him, then he is the one who should be concerned about repayment.
10. In *Antoine Ndiaye v African Virtual University* [2015] eKLR, it was held: -

“So the Applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back”.
11. In order to prove this second limb, all that an applicant has to state or show is that if the monies are paid over and the appeal succeeds, the applicant will be unlikely to recover the same. In other words, the monies would be beyond reach. That is what substantial loss is.
12. Once an applicant swears to that fact, it behooves a respondent to demonstrate that if the monies are paid over to him, he has the capability to refund the same.
13. In the present case, the applicants swore that the respondent would not be able to refund the same. All the respondent did was to state that he had loaned the appellants the said monies and he will therefore be able to refund the same. I think that is not the way to do it. Respondent has to prove his capability to refund the money. That is not the case here. The second limb has also been established.
14. On security for due performance, the appellants swore that they are willing to offer the same.
15. Bearing in mind that the appellants have a right of appeal which they have exercised, and, on the other hand the respondent has a right to enjoy the fruits of a favorable decision, it would be in the interest of justice to grant the stay of execution.
16. However, the same would be on condition that the appellants deposit half of the decretal sum in a joint interest earning account. The account will be in the names of the advocates for the appellants and respondent. The costs will be in the appeal.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

