



Hardi Enterprises Limited v Nairobi City County Government (Civil Case E140 of 2020) [2022] KEHC 309 (KLR) (Commercial and Tax) (21 April 2022) (Ruling)

Neutral citation: [2022] KEHC 309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E140 OF 2020**

A MSHILA, J

APRIL 21, 2022

BETWEEN

HARDI ENTERPRISES LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY GOVERNMENT DEFENDANT

RULING

1. The Notice of Motion dated 31st August 2021 was brought under Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A and 2A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya. The Application was supported by the grounds on the face of it and by the Sworn Affidavit of Lydia Kwamboka and the applicant sought orders that;
 - a. Pending the hearing and determination of this Application the Court do issue an order of stay of the Orders issued herein on 24th June, 2021 by the Hon. Lady Justice M. Muigai, striking out the Defendants Defence and entering Judgment in favour of the Plaintiff with costs.
 - b. Pending the hearing and determination of the intended appeal the Court do issue an order of stay of the Orders issued herein on 24th June 2021 by the Hon. Lady Justice M. Muigai, striking out the Defendants Defence and entering Judgment in favour of the Plaintiff with costs.
 - c. The Court do grant an order of Stay of proceedings in this suit pending the hearing and determination of the intended appeal against the ruling of Hon. Lady Justice Margaret Muigai delivered on 24th June 2021.
 - d. The Court do grant the Applicant leave to lodge a Notice of Appeal, and subsequently a Memorandum of Appeal out of time against the decision delivered on 24th June, 2021 by the



Hon. Lady Justice M. Muigai, striking out the Defendants Defence and entering Judgment in favour of the Plaintiff with costs.

- e. Upon grant of leave to appeal out of time, the Notice of Appeal and Memorandum of Appeal annexed hereto herein be deemed as duly/ properly filed and served.
 - f. The Court do issue any Order it deems fit and just in the circumstances.
2. The Applicant deponed that on the 24th June 2021, the Court delivered a ruling in favour of the Plaintiff against the Defendant which ruling struck out the Defendant's statement of defence and entered judgment in favour of the Plaintiff.
 3. Thereafter, the Defendant was granted 30 days stay of execution pending the filing of formal application seeking leave to appeal. However, the said stay orders have since lapsed since the Defendant had not issued instructions as to whether its advocates should pursue the appeal.
 4. The Plaintiff already filed its bill of costs dated 5th August 2021 which was scheduled for taxation on 2nd September 2021; which bill of costs arises from the ruling that the defendant intends to appeal against.
 5. That without orders for stay of execution and leave to appeal out of time, the Applicant is apprehensive that the Respondent may begin execution against the Appellant/Applicant anytime right now, despite the Applicants intent to file an Appeal challenging the judgment of the Court.

Applicant's Case

6. The Applicant submitted that it had shown sufficient cause to be granted a stay of execution and that the Court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.
7. On whether the Application was made without unreasonable delay, the Applicant argued that the judgment was delivered on 24th June 2021 and vide a letter dated 24th June 2021 the Applicant requested for copies of the Ruling and proceedings to be able to file the appeal. The Application for stay of execution was filed within 67 days which period is a reasonable time and there was no delay therein. Further, that it was not possible for the Defendant to have given instructions to its Advocate on record to file the Notice of Appeal and Memorandum of Appeal before looking at the said Ruling.
8. The Applicant relied on the case of *John Gateri Kimani & Another versus Nderitu Thatbua* [2017] eKLR where the Court held that a delay of three months was not unreasonable.
9. Further to the above, it was the Applicant's submission that the subject of the appeal herein being the KShs.358, 844,975.58/= which is yet to be paid to the Plaintiff; the Court should exercise its discretion and give orders as to what the security in this matter should be for the due performance of the ruling being appealed against. Unless the orders herein are granted, the Defendant stands to suffer substantial loss as they may never recover the decretal sum should the intended appeal succeed.
10. The decretal amount if released to the Plaintiff might as well never be recovered since it is a very huge amount of money. Without orders for stay of execution and leave to appeal out of time, the Applicant is apprehensive that the Respondents may begin execution against the Appellant/Applicant anytime right now, despite the Applicants intent to file an Appeal challenging the ruling of the Court.
11. The Defendant is apprehensive that it stands to suffer irreparable harm/loss if the above sought orders are not granted as it may never recover the decretal sum herein if paid to the Plaintiff should their intended appeal be allowed and the intended appeal will be rendered nugatory.



12. Further, the Applicant submitted that the Plaintiff has not demonstrated that it is capable of refunding the decretal amount if the same is paid to it in the event that the appeal succeeds. The defendant is likely to go through further hardship in recovering the decretal sum if paid to the plaintiff which includes instituting legal proceedings. It is therefore only just and fair that the Court grants the orders sought in order to preserve the substratum of the appeal.
13. On whether the Applicant has an arguable Appeal, it was the Applicant's contention as per the memorandum of appeal that the trial Court erred in law and in fact in drawing conclusive adverse inferences against the Defendant herein without granting it opportunity to test the veracity and bonafides of the evidence giving rise to the plaintiffs claim. Therefore, the appeal raises arguable issues and therefore ought to be allowed to proceed and a cursory look at the Applicant's Memorandum of appeal shall reveal that the same raises legitimate points that ought to be determined.

Respondent's Case

14. It was the Respondent's submission that for the court to grant a stay of execution, the applicant must satisfy the conditions set out under Order 42 Rule 6 (a) and (b) of Civil Procedure Rules before it can be granted orders for stay. The Applicant herein has not demonstrated or shown what substantial loss it stands to suffer nor shown consequences it is likely to suffer if a stay of execution is not granted to it.
15. The Respondent argued that it is trite law that for the court to extend time the following conditions laid down by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others* must be met.
16. The Applicant has not explained how it will suffer the irreparable loss or harm if the orders sought are not granted and also the inability of the Respondent herein to refund the Decretal sum in case the Appeal is allowed has not been explained. The Respondent is an institution of means and well able to refund the Decretal sum in case the Appeal by the Defendant is allowed, the intended Appeal will therefore not be rendered nugatory.
17. In addition, the Applicant has not raised any single valid ground against the Ruling by the Court. Thus, the intended Appeal by the Defendant is not arguable.
18. The Respondent prayed that in case the court is inclined to issue stay of execution orders in favour of the Defendant /Applicant, the Applicant be ordered to deposit the full decretal sum in of Kshs.358, 844,975.58/= in a joint interest earning account held in the names of the Applicant and the Respondent's advocates within 15 days.
19. In *Antoine Ndiaye vs African Virtual University* (2015] eKLR the court ordered deposit of the decretal sum in a joint interest earning account held in the names of the Applicant and the Respondent advocates.
20. Further the Respondent submitted that it is not true that the Applicant herein will be condemned unheard contrary to Article 50 of *the Constitution* of Kenya. Contrary to the Applicant's allegations of denial of the right to be heard, the Applicant herein was served with summons to enter appearance, the plaint and its accompaniments on the 27th May, 2020, it however entered appearance on the 22nd July, 2020 way after the prescribed time in law had lapsed. Further, the Defendant filed its Statement of Defence on 22nd July 2020 consisting of mere denials without raising any triable issue. The Applicant in this suit has shown a lot of laxity on how it conducts this suit with an aim to frustrate the Plaintiff / Respondent herein from the time of filing it.



21. The Applicant herein has not met the requirements in law to be granted an order for stay of proceedings, the Respondent will be highly prejudiced if the orders sought by the Applicant herein will be granted as the Respondent is currently undergoing some financial constraints.

Issues For Determination

22. The Court has considered the Application, Response to the Application and the rival submissions by the parties herein and the following issues are for determination;
- a. Whether the application was brought without undue delay;
 - b. Whether the applicant has an arguable case; whether the Applicant should be granted leave to appeal out of time; whether an order of stay of proceedings pending appeal should issue;

Analysis

Whether the application was brought without undue delay;

23. One of the factors that the Court considers in whether or not to grant stay of proceedings is that the Application must be made without unreasonable delay.
24. Notably, a perusal of the proceedings showed that after the delivery of the said Ruling the Defendant was granted 30 days stay of execution in the above mentioned suit pending the Filing of the formal application seeking leave to appeal. The stay of execution granted by the Court lapsed on the 24th July 2021 without the Defendant herein filing the said Application.
25. The Applicant reason as to the cause of delay is that vide a letter dated 24th June 2021 the Applicant requested for copies of the Ruling and proceedings to be able to file the appeal. The 30-day stay of execution having lapsed on 24th July 2021 and the present Application filed on 31st August 2021, The Applicant herein filed the present Application after 67 days and having considered the circumstances given by the Applicant this court is satisfied that the period cannot be deemed to be an inordinate delay.

Whether the applicant has an arguable case; whether the Applicant should be granted leave to appeal out of time; whether an order of stay of proceedings pending appeal should issue;

26. The conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the Civil Procedure Rules;

“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 order set aside.

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.”
27. It was the Applicant’s case that if the Application is disallowed it will suffer grave disruption of its affairs and it may never recover the decretal sum should the intended appeal succeed. The Applicant will thus suffer substantial loss.
28. Whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Further, the aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful.
29. Ringera J in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”
30. The Court of Appeal also held in the case of *UAP Insurance Company Ltd vs Michael John Beckett* [2004] eKLR, that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.
31. The same position was reiterated by the Court of Appeal in *Wachira Waruru & Another vs. Francis Oyatsi* Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664 which held that:
- “In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”
32. The import of the above mentioned case law is that for this court to grant stay of proceedings, the Applicant must show that it has an arguable appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory.
33. The Applicant’s intended appeal is premised on the grounds that it was condemned unheard and that its pleadings raise triable issues. It is the court’s view that on this ground alone the Applicant has satisfied this court that it has an arguable appeal and hereby accords it leave to appeal out of time.
34. The court is inclined to allow the stay of the proceedings related to the decree pending the hearing and determination of the intended appeal. However, granted that justice should be accorded both ways, the Respondent should not be denied the right to enjoy the fruits of its judgment.



35. In the premises the Court will grant stay of further proceedings on the decree on condition that the Applicant deposits half of the decretal sum (half of Kshs.358, 844,975.58/=) in an interest earning account in the joint names of the advocates of the parties within 45 days from the date hereof. In default the order for stay of proceedings to automatically lapse.

Findings and Determination

36. In the light of the foregoing this court makes the following findings and determinations;
- i. This court finds the application has merit and it is hereby allowed.
 - ii. Leave is hereby granted to the applicant to lodge its Notice of Appeal within thirty (30) days from the date hereof.
 - iii. The stay of further proceedings on the decree is hereby granted on condition that the applicant deposits half the decretal sum in an interest earning account in the joint names of the advocates of the parties within 45 days from the date hereof.
 - iv. In default the order for stay of proceedings to automatically lapse.
 - v. The applicant to bear the costs of this application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21ST DAY OF APRIL, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Miss Apolot for the Defendant/Applicant

No appearance for the Respondent

Lucy -----Court Assistant

