



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E484 OF 2021

JOYCE NDUNGE NDUYA MUTHAMA.....1ST APPELLANT/APPLICANT

AGNES KAVINDU.....2ND APPLICANT/APPELLANT

-VERSUS-

TEA TOT HOTEL LIMITED.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 31st January, 2022 taken out by the 1st and 2nd appellants/ applicants herein, in which they sought for an order for stay of execution of the judgment delivered on 9th July, 2021 in Civil Case No. 7630 of 2018 pending the hearing and determination of the appeal and warrants of attachment dated 11th January 2022 be set aside.
2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of Joyce Ndunge Nduya Muthama, the 1st applicant/appellant.
3. In opposing the said Motion, the respondent filed the replying affidavit of Joyce Mwikali Nyamai, to which Joyce Ndunge Nduya Muthama and Agnes Kavindu rejoined with their supplementary affidavits sworn on 16th March, 2022 followed by the further affidavit sworn by Joyce Mwikali Nyamai on 17th March, 2022.
4. The instant Motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the averments of their respective affidavits.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion.
6. A brief background of the matter as set out by the parties is that sometime back in the year 2016, the 1st applicant explained to the director of the respondent herein to finance a purchase of gemstones for export to the tune of 13 million and on 2nd July 2016 they travelled to Voi in the company of the two appellants and met gemstone experts and whom confirmed that the gemstones were of good quality.
7. Having been convinced of the viability of the business, the respondent entered into an oral agreement with the appellants and advance a total of Kenya shillings thirteen million(Kshs.13 million) but the appellants failed to deliver on the part of the bargains and this pushed the respondent to move to court to have her money back because the appellants were not delivering the gemstones as promised.
8. That on 9th of July 2021 ,4 years after the respondent moved court, the court delivered its judgment in favour of the respondents and that none of the appellants have repaid a single cent of the decretal sum.
9. The guiding provision in considering an application seeking an order for a stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay:
 - i. The application should have been brought without unreasonable delay;*
 - ii. The applicant must demonstrate the substantial loss to be suffered; and*
 - iii. There must be provision of security for the due performance of the decree or order being appealed against.*
10. On the first condition, the appellants aver that the Motion has been timeously filed. From my study of the record and the impugned judgment, I note that it was delivered on 9th July, 2021 which is one (6) months prior to the filing of the instant Motion. The appellants on

their part explained that the delay was occasioned by the fact that they had made a proposal to settle the decretal sum and the respondent was reviewing the same for specific performance and therefore parties were negotiating.

11. Upon my consideration of the explanation given above and the passage of time in between, I am of the view that while there has been a delay in bringing the Motion, I do not find the delay to be inordinate.

12. Under the second condition on substantial loss, according to the appellants, if the stay is set aside and the respondent executes the decree, the applicants shall suffer irreparable loss and the appeal will be rendered nugatory if it succeeds because the respondent shall auction the properties in question and she has not proved to this court that she has the ability to repay the decretal amount if the appeal succeeds. On the other hand the respondent stated that they have suffered loss as a result of the appellants action or omission to pay back the sum of thirteen million which was due on the 28th July 2016.

13. In the case of **Butt v Rent Restriction Tribunal [1979] eKLR** when it held that in considering an application for a stay of execution, the courts ought to exercise their discretion in a manner that will not render the appeal in question nugatory, if successful.

14. I am also alive to the reality that unless the appellants are granted an opportunity to defend its case, they stand to be condemned unheard, thereby undermining the dictates of substantive justice and violating the appellants' constitutional right to be heard.

15. From the foregoing, I am convinced that the appellants have reasonably shown the substantial loss it may suffer should the order for a stay of execution be denied.

16. In respect to the third and final condition, the appellants have expressed its willingness to deposit the subject matter of the suit with the court. On the other hand the respondent has stated that is no longer interested with the gemstones but the judgment debt together with the interest and costs.

17. In the end therefore, the Motion dated 31st January, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:

i. There shall be a stay of execution of the judgment delivered on 9th July, 2021 pending appeal and that the warrants of attachment dated 11th January 2022 be set aside on the condition that the applicant deposits the sum of Kshs.6,000,000/= in court within 45 days from today, failing which the order for stay shall automatically lapse.

ii. Costs of the Motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Applicant

..... for the 2nd Applicant

..... for the Respondent