



**Simitei & another v Prion Limited; Upstate Kenya Auctioneers (Interested Party)
(Civil Appeal E047 of 2021) [2022] KEHC 10806 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E047 OF 2021
SN MUTUKU, J
MAY 25, 2022**

BETWEEN

JOSEPH OLE SONKORE SIMITEI 1ST APPELLANT

KEVIN SAITOTI SAMOIRE 2ND APPELLANT

AND

PRION LIMITED RESPONDENT

AND

UPSTATE KENYA AUCTIONEERS INTERESTED PARTY

RULING

The Notice of Motion

1. This ruling relates to the notice of motion (the application) dated September 27, 2021 brought by the applicants herein under various provisions of the law as shown on the face of that application. The application seeks the following orders:
 - i. (spent)
 - ii. That the firm of A. A. Mudanya & Co. Advocates be granted leave to formally come on record as Advocates for the appellants/applicants herein in place of S.B Mbeche & Co. Advocates.
 - iii. That pending hearing and determination of this application inter partes, this honourable court be pleased to stay the proclamation of attachment notice dated September 21, 2021.
 - iv. That there be an order of stay of execution of the judgment, decree and all consequential orders herein pending the hearing and determination of this application inter partes.



- v. That there be an order of stay of execution of the judgment, decree and all consequential orders herein pending the hearing and determination of the appellants/applicants' appeal.
 - vi. That the costs of this application be provided for.
2. Prayers 2, 3, and 4 have been granted. Pending determination are prayers 5 and 6. These are the prayers subject of determination in this ruling.
 3. The application is supported by the affidavit dated September 27, 2021 sworn by Joseph Ole Sonkori Simatei in which he has deposed that he is dissatisfied with the judgement and decree of the lower court and intends to appeal against it. He is apprehensive that if formal orders of stay pending appeal are not granted, the respondent is likely to proceed with execution. He has stated that if the decretal sum is paid to the respondent's directors, they will be unable to refund the same in the event the appeal is successful as he doubts their financial capability.
 4. He further stated that he stands to suffer irreparable loss, damage and substantial loss unless execution is stayed; that the appeal shall be rendered nugatory as the amounts involved in the Decree and proforma invoice are substantial; that the application has been made without undue or unreasonable delay and that he believes no prejudice will be suffered by the Respondents if the application is allowed as he is willing to abide by any reasonable condition that the court may direct.
 5. The application is opposed by the respondents through a replying affidavit dated November 12, 2021 sworn by Robert Kioko. It is the case for the respondents that Heritage Insurance Company Limited had issued a comprehensive insurance policy over the respondent's Motor Vehicle number KBX 678Z. That pursuant to the Company's right of subrogation under the insurance policy, the company filed Ngong SPMCC No. 6 of 2019 seeking special damages Kshs 2,447,380/-. That they were unsuccessful in serving the summons on the appellants and that they sought and were granted orders to use alternative ways of service, being through registered post.
 6. They stated further that, despite service the appellants failed to enter appearance or file defence; that an interlocutory judgement was entered on November 27, 2019; that the matter went to formal proof leading to a judgment in their favour; that they subsequently obtained a decree and attached the 1st appellants vehicle prompting the application by the Applicant to set aside the judgement; that a ruling was delivered on September 2, 2021 whereby the trial court dismissed the appellants' application on the grounds that service had been effected and that the draft defence did not raise triable issues.
 7. It is their argument that mere apprehension of financial position of the Respondent is not a sufficient to prove substantial loss. Further that through the principle of subrogation, the beneficiary of the judgment of the lower court is Heritage Insurance Company. They argued that the company is reputable and capable of honoring the award that this Honourable Court may ultimately find binding upon it hence no undue prejudice will be suffered by the Appellants; that the Appellants have not provided any security and that their Memorandum of Appeal does not raise any triable issues.

Submissions

8. The matter was canvassed by way of written submissions. The applicants filed their submissions dated March 22, 2022. They submitted that the amount subject to execution is Kshs. 2,891,469.65/- and that they are apprehensive that if the amount is paid out, the respondent may not be in a position to refund the same once the appeal is determined; that the purpose of stay pending appeal is to preserve the substratum of the case. They cited the case of *RWW -vs- EKW* (2019) eKLR to support that position. They urged this court to adopt the reasoning in *HGE -vs- SM* [2020] eKLR in which several authorities



including *Butt v. Rent Restriction Tribunal* are cited on the subject of stay of execution and grant them the prayers they are seeking.

9. While citing *Philip Mutinda -vs- Lady Lori (K) Limited* [2021] eKLR, they argued that it is a matter of judicial discretion to grant or decline granting stay of execution which discretion must be exercised in the interest of justice.
10. The applicants cited article 159 2(a) and (d) of *the Constitution* and section 1A (1) and 1B(1)(a) of the *Civil Procedure Act* to emphasize the point that regardless of the technicalities herein, justice in this matter is not to unfairly dismiss the applicant's right to be heard and that dismissing the said notice of motion will result in condemning the applicants unheard.
11. The respondents filed their submissions dated March 18, 2022. It is their case that the law relating to grant of stay pending appeal pursuant to the provisions of order 42 of the *Civil Procedure Rules* is well settled; that the same has been interpreted in the case of *Tabro Transporters Ltd -vs- Absalom Dova Lumbasi* [2012] eKLR to the effect that granting of stay of execution pending appeal by the High Court is governed by order 42 rule 6 of the *Civil Procedure Rules* and that it is granted at the discretion of the court when sufficient cause has been established by the applicant, on whom the incidence of the legal burden of proof lies.
12. Relying on the *Tabro Transporters Ltd* case, the respondent argued that sufficient cause is established when the applicant proves that substantial loss may result unless the order is made; that the application has been made without unreasonable delay and that such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
13. The respondent identified two issues for determination, firstly, whether the appellants will suffer substantial loss unless the orders sought are granted, and secondly, whether the appellants are willing to deposit such security as may be ordered. On the first issue, it is their submission that the appellants need to show that payment of the decree would cause the appellant substantial loss; and that the respondent would not be in a position to refund the decretal sum in the event that the Appeal eventually succeeds.
14. They argued that the allegations by the appellants that the respondent is not able to refund the decretal sum is unsubstantiated in that the beneficiary of the funds is Heritage Insurance Company, which commenced the lower court suit pursuant to their right of subrogation, and that Heritage Insurance Company is a financially stable and reputable insurance company able to refund the decretal sum in the event the appeal succeeds.
15. They argued that the burden of proof of financial means is on the Appellants as was stated in the case of *Andrew Okoko -vs- Johnis Waweru Ngatia & another* [2018] eKLR where the court observed that:

“Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree.”
16. On the second issue, the respondent relied on *Mwaura Karuga t/a Limit Enterprises -vs- Kenya Bus Services Ltd & 4others* [2015] eKLR, where the court stated that:

“...the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the



presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted, which is seldom. The security to be given is measured on that yardstick.”

17. It is their submission that, should the court allow the appellant’s application, it should order the applicant to deposit the entire decretal sum plus costs and interest thereon in a joint interest account held in both names of the advocates within 14 days because there is no proof that the appellants will suffer irreparable loss. They urged that this court dismisses the application for lack of merit.

Determination

18. I have read the application, the affidavits and rival submissions. The main concern is whether the applicants have met the threshold for grant of stay of execution pending appeal. To me, this is the central issue that this court ought to determine.

19. Stay of execution pending an appeal is governed by order 42 rule 6 of the *Civil Procedure Rules*, the relevant part of which reads 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 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.

18. In *Butt vs. Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse to grant stay of execution pending appeal. The court stated that the power of the court to grant or refuse an application for a stay of execution is discretionary, and that, that discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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. 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. 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.

20. As to what constitutes substantial loss, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case



here, does not in itself amount to substantial loss under order 42 rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

21. In this instant case the appellants argued that they should be granted stay pending appeal for the reason that the substratum of this case which is fair hearing shall be extinguished if stay is declined. The respondents on the other hand argued that the appellants did not demonstrate how they will suffer substantial loss. Further, the appellants argued that if the payment of the decree was to be made to the respondent, they would be unable to refund the same as they are not financially capable and that the appeal would be rendered nugatory. This was opposed by the Respondents who argued that these allegations are unsubstantiated and further that the beneficiary of the funds is Heritage Insurance Company Limited, which is financially stable and a reputable insurance company.
22. I have considered this issue and it is my considered view that the respondent is in a position to pay the applicant should the appeal succeed. As the respondent has stated, it is my belief that it is a reputable company with resources and I have no reason to doubt their capacity to refund the funds should this become necessary. My determination of this issue is that the applicants have not provided sufficient evidence to establish that they stand to suffer substantial loss unless the order is made.
23. On the issue of security, the case of [Absalom Dova vs. Tarbo Transporters](#) [2013] eKLR, [supra] stated:

“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...”
24. Further, in [Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd](#) [2019] eKLR, the court observed that:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.....”
25. I have noted that the appellants are willing to abide by any conditions set by this honourable court for the grant of stay of execution. The respondent urged the court to order the Applicant to deposit the entire decretal sum plus costs and interest thereon in a joint interest account held in both names of the advocates on record within 14 days.
26. I have given this matter considerable thought. While relying on the reasoning in the case of *Butt v. Rent Restriction Tribunal* and in order to balance the rights of the parties herein in a way that does not deny



the respondent the fruits of the judgment and that does not prevent this appeal, or render it nugatory, it is my finding that there is no overwhelming hindrance to grant a stay in this matter.

27. However to strike a balance, it is my considered view that the applicants ought to deposit security for due performance of the decree. I therefore make the following orders:
- i. That an order of stay of execution of the judgment, decree and all consequential orders issued in Ngong SPMCC No. 6 of 2019 is hereby granted pending the hearing and determination of the Appellants/Applicants' Appeal.
 - ii. That the appellants/applicants are hereby ordered to deposit the half of the decretal sum in a joint interest earning account in the names of both firms of advocates in a reputable bank within 60 days from today's date.
 - iii. The appellants/applicants shall file and serve a record of appeal within 60 days from today's date, failing which the appeal shall stand automatically dismissed and the respondents shall be at liberty to proceed with execution.
 - iv. The appellants/applicants shall pay the costs of this application to the respondent in any event.
28. Orders shall issue accordingly.

SIGNED, DATED AND DELIVERED THIS 25TH DAY OF MAY 2022.

S. N. MUTUKU

JUDGE

