



**Kenya Literature Bureau v MFI Documents Solutions Ltd (Civil Appeal E047 of 2021)  
[2022] KEHC 10786 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10786 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E047 OF 2021  
WA OKWANY, J  
JUNE 23, 2022**

**BETWEEN**

**KENYA LITERATURE BUREAU ..... APPELLANT**

**AND**

**MFI DOCUMENTS SOLUTIONS LTD ..... RESPONDENT**

**RULING**

1. The appellant/applicant herein, Kenya Literature Bureau, filed the application dated 24<sup>th</sup> August 2021 seeking orders, inter alia, to stay the of execution of the judgment delivered herein on 8th of June 2021, pending the hearing and determination of Nairobi High Court Civil Appeal no E047 of 2021 Kenya Literature Bureau V Mh Documents Solutions Ltd.
2. The application is supported by the affidavit sworn by Audrey Cheruto and is based on the following grounds:-
  1. The Appellant herein being aggrieved by the judgment which was delivered herein on 8<sup>th</sup> June 2021 have consequently filed an appeal herein; the Appellant filed its Memorandum of appeal on 23<sup>rd</sup> June 2021, which is within the period allowed to file an appeal.
  2. The Appellant herein applied for proceedings, to enable them to lodge the record of appeal; they have not obtained those proceedings and is in the process of following up on the same; for the purposes of Order 42 Rule 6 of the Civil Procedure Rules, they have filed their appeal; further the appellants have an automatic right of appeal conferred on them by Section 75 of the *Civil Procedure Act*.
  3. Unless the stay sought is granted, the Appellants herein will suffer substantial loss in that the Respondents will execute the said judgment delivered on 8<sup>th</sup> June 2021, to their detriment;



in an application for a stay of execution, this Honourable Court has discretion to make such orders as will serve the ends of justice after delivery of the judgment herein.

4. Substantive justice demands that this Honourable Court preserves the subject matter of the suit by staying the execution of the judgment delivered on 8<sup>th</sup> day of June 2021, hence this application for a stay of execution of that judgment.
5. The Appellants' right of appeal will be rendered nugatory if the Respondents execute the judgment during the pendency of this application and the hearing and determination of the intended appeal.
6. The object of the stay like that for the injunction is to keep things in status quo so that if after the hearing of the appeal, the appellants obtain a judgement in their favour, the respondents will have been prevented from dealing with the subject matter in such a way as to make the judgment ineffectual
7. The Appellants are ready and willing to abide by the conditions that may be set by this Honourable court to ensure justice prevails.
8. The Respondent herein shall suffer no prejudice if the application is allowed
9. Unless the orders sought are granted the intended appeal will be rendered nugatory in that: -
  - i. The Appellant is a public commercial entity receiving no exchequer support and will suffer irreparable loss and damage should the Respondents choose to execute the order by way of attachment of its moveable assets during the pendency of the appeal, due to their nature of service.
  - ii. The decretal sum is colossal and the Appellant will experience hardship as their financial capacity is greatly constrained.
3. The respondent opposed the application through the Grounds of Opposition dated 8<sup>th</sup> November 2021 wherein it lists the following grounds: -
  1. That an appeal does not operate as a stay of execution of proceedings and is not itself a reason for an order for such stay.
  2. That the application does not meet the requirements for granting of an order for stay of execution.
  3. That the Appellant has failed to demonstrate that it is likely to suffer substantial loss if stay of execution of the decree is not granted.
  4. That the Application is an attempt to deny the Respondent's its entitlement to the fruits of its judgement.
  5. That furthermore, the Respondent has the means to satisfy the decree if set aside on appeal.
  6. That the Respondent should not be kept out of its lawfully adjudicated judgment debt for reason only of the appeal.
  7. That the application is an abuse of the court process. The Appellant has filed a similar application dated 8<sup>th</sup> September 2021.
4. The respondent also opposed the application through the replying affidavit of its Financial Controller Mr. Sachin Mittal who states that the application does not meet the threshold set for the granting of the



orders for stay of execution. It is the respondent's case that it is a large company carrying out business globally with the means to refund the decretal sum should the appeal be successful.

5. Parties canvassed the application by way of written submissions, which I have considered. The main issue for determination is whether the court should grant an order of stay of execution pending appeal.
6. Order 42 Rule 6(1) of the Civil Procedure Rules empowers this court to grant order to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:-

“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.”

7. The applicant's case is that it will suffer substantial loss if the respondent executes the impugned judgement and further, that the appeal will be rendered nugatory if the application is not allowed. The applicant urged the court to preserve the subject matter of the suit pending the appeal.
8. In rejoinder, the respondent contended that the application falls short of the threshold set for the granting of orders of stay of execution pending appeal.
9. In *Butt vs Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal held that: -
  1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. 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 that appeal court reverse the judge's discretion.
  3. 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.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
10. *RWW v EKW* [2019] eKLR, the court observed that:-

“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.



9. 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.”

11. Then principle that emerges from the above-cited cases is that an applicant seeking orders to stay execution pending appeal is required to satisfy three conditions, namely; that the application was filed without undue delay, that he would suffer substantial loss if the stay is not granted and that he is ready and willing to abide by the order for security for the due performance of the decree.

12. In *Tabro Transporters Ltd v Absalom Dova Lubasi* [2012] eKLR the court held that: -

“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.”

13. In this instant case, the applicant argued that it will suffer substantial loss if the application is not allowed. I however note that the applicant did not demonstrate that the respondent will not be in a position to refund the decretal sum should the appeal be successful. My finding, is that the applicant has not established that it will suffer substantial or irreparable loss in the event that it succeeds in the appeal. I am guided by the decision in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* MISC application 42 of 2012 eKLR where it was held 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. This is what substantial loss would entail.

14. On security of costs, I note that the applicant did not state the specific amount of money that it is willing to deposit as security but merely stated that it is willing to abide by any condition given by the court. In *Absalom Dova v Tarbo Transporters* [2013] eKLR, the court stated that: -

“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...”

15. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, it was stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine



the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

16. The above decisions are clear that the issue of security to be provided as a condition for stay is at the court’s discretion depending on the circumstances of each case. I am of the view that the applicant has not made a formidable case for the granting of the orders sought in the application, this court still has the discretion to make orders that have the effect of balancing the right of the applicant to appeal and the respondent, to the fruits of the decree.
17. Consequently, and in a bid to balance the rights to the parties herein, I hereby grant the orders for stay of execution pending the hearing and determination of the appeal, but on condition that the applicant pays half of the decretal sum to the respondent and deposits the balance thereof in a joint interest earning account in the names of the advocates for the parties within 60 days from the date of this ruling. In the event of failure to comply with the conditions for the stay issued hereinabove, the stay orders shall automatically lapse/be vacated without any reference to this court.
18. The costs of this application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Omoiti for Kethi Kilonzo for Respondent.

Mr. Nashali for Cheruto for Applicant/Appellant.

Court Assistant- Sylvia

