



**Anthony Kiai t/a High Flyer Services And Publishers & another v Peter Mwangi Gichuki t/a High Flyer Services And Publishers & another (Civil Suit 45 of 2011) [2022] KEHC 13085 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 13085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 45 OF 2011  
A MABEYA, J  
AUGUST 31, 2022**

**BETWEEN**

**ANTHONY KIAI T/A HIGH FLYER SERVICES AND PUBLISHERS ..... 1<sup>ST</sup> PLAINTIFF**

**HIGH FLYER SERVICES & PUBLISHERS LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PETER MWANGI GICHUKI T/A HIGH FLYER SERVICES AND PUBLISHERS ..... 1<sup>ST</sup> DEFENDANT**

**FORTUNE PRINTERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling on an application dated September 15, 2021 by the plaintiffs. The same was brought under sections 1A, 1B, 3A, 63(e) and 80 of the [Civil Procedure Act](#), order 45 rule 1 of the [Civil Procedure Rules](#) and article 159 of the [Constitution](#).
2. In the motion, the plaintiffs sought to vary the conditional stay orders issued on September 2, 2021. The said orders had directed a deposit of the decretal sum in a joint interest earning account within 30 days but the plaintiffs sought that instead they should be allowed to deposit the title to LR No 7022/103, as security.
3. The grounds thereof were that in its ruling of September 2, 2021 this court delivered a ruling on September 2, 2021 the court granted a stay on condition that the entire decretal sum be deposited in an interest earning account in the joint names of the advocates of the parties within 30 days. That the



plaintiffs had been unable to obtain the amount of Kshs 20 million within the 30 days ordered due to various reasons.

4. They pleaded that they were only able to obtain Ksh 2 million which is insufficient to satisfy the security ordered by the court. That however, to ensure compliance, they were willing to deposit as security the title for LR number 7022/10 located in Kiambu road ('the property') and registered in the name of the 1<sup>st</sup> plaintiff. That the property was valued at Kshs 28 million.
5. The application was opposed vide the 1<sup>st</sup> defendant's replying affidavit sworn on September 28, 2021. It was averred that, the failure by the applicants to meet the conditions set by the court, nullifies the stay. That the 2<sup>nd</sup> plaintiff had not applied for any stay therefore the orders issued on September 2, 2021 should not be set aside or varied as applied for by the 1<sup>st</sup> plaintiff.
6. That in the application for stay, the plaintiffs had submitted that they were willing to provide security for due performance of the decree. That the plaintiffs have the means to deposit the entire decretal sum of Kshs 46,200,000/- that is currently due as per the court ruling. That the title offered does not secure the decretal sum which is up to Kshs 46,200,000/- excluding the cost of the suit and is not in any way acceptable as security.
7. The plaintiffs swore a further affidavit on October 21, 2021 in response to the replying affidavit. They contended that the court had not given any specific rate of interest in its judgment of November 20, 2019. In the premises, interest of Kshs 26,200,000/- claimed by the defendants was without basis.
8. The issue for determination is whether the conditional stay given by this court of September 2, 2021 should be varied.
9. In paragraph 13 of the subject ruling, the court stated: -

“On the issue of security for due performance, the applicants averred that they are willing to provide security for the decretal sum and to abide by any conditions set by the court.”
10. Thereafter the court found in its opinion that the security should be the entire decretal sum. The plaintiffs want that condition varied and instead use the 1<sup>st</sup> plaintiff's property found along Kiambu road as security for due performance.
11. The court has seen annexure 'AK-2' in the plaintiff's supporting affidavit of September 15, 2021. It is a conveyance of the property from a vendor to the 1<sup>st</sup> plaintiff. The conveyance is dated May 3, 2010. Page 9 thereof shows that the property was purchased by the 1<sup>st</sup> plaintiff for a consideration of Kshs 4,500,000/-. On the other hand, the valuation report dated September 13, 2021, shows that the property is valued at a market value of Kshs 28,000,000/-.
12. Order 42, rule 6(2)(b) of the *Civil Procedure Rules* gives the court the discretion to order such security for the due performance of such decree/order as may ultimately be binding on a judgment debtor.
13. In *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR, it was held: -

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment-debtor.”
14. The security is to guarantee the due performance of the decree. The title may have been clean. However, considering that this is a claim that has been pending for over 10 years, the security referred to in order



42, rule 6(2)(b) should be one that is quickly realizable. It would be untenable to subject a successful litigant to subsequent lengthy proceedings in realizing the security.

15. Further, when the plaintiffs applied for stay and stated that they were prepared to give any security, they never indicated the sort of security they were prepared to give. In this regard, for the court to vary its order, the plaintiffs should have demonstrated that the court made an error in imposing the condition or the condition given was onerous. This they never did.
16. In the view of this court therefore, there is no compelling reason why the order of September 2, 2021 should be varied.
17. Accordingly, the application September 15, 2021 is without merit and is hereby dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

