



Meridian Acceptances Limited & 2 others v Cargil Enterprises Limited (Civil Appeal E376 of 2022) [2022] KEHC 12285 (KLR) (Civ) (24 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E376 OF 2022

JK SERGON, J

AUGUST 24, 2022

BETWEEN

MERIDIAN ACCEPTANCES LIMITED 1ST APPELLANT

SPANKEN LIMITED 2ND APPELLANT

GERALD M. THUITA T/A STARTRUCK AUCTIONEERS 3RD APPELLANT

AND

CARGIL ENTERPRISES LIMITED RESPONDENT

(Being an application for stay of execution of the judgment entered on May 6, 2022 and the resulting decree and certificate of costs dated May 23, 2022.)

RULING

1. The subject matter of this ruling is the motion dated June 14, 2022 taken out by the appellants whereof they seek for the following orders:
 - i. That this application be certified urgent and service be dispensed with in the first instance.
 - ii. That the honourable court be pleased to issue a temporary stay of execution pending the inter partes hearing on the instant application.
 - iii. That pending the hearing and determination of this application, the honourable court grants a stay of execution of the judgment entered on May 6, 2022 and the resulting decree and certificate of costs dated May 23, 2022.
 - iv. That the honourable court be pleased to stay the execution of judgment entered on May 6, 2022 pending the hearing and determination of the appeal in Milimani HCCA No E376 of 2022.



- v. That the honourable court be pleased to set aside the certificate of stated costs dated May 23, 2022.
 - vi. That costs of this application be in the cause.
2. The appellants filed the affidavit of Suarabh Mhala in support of the application. The respondent filed the replying affidavit of Robert Matagaro Nyakundi to oppose the motion.
 3. I have considered the grounds set out on the face of the motion plus the facts deponed in the rival affidavits. I have further considered the rival oral submissions of learned counsels.
 4. It is the averment of the appellants that on May 6, 2022 the trial court entered judgment in the sum of Kshs 1,700,000/= in favour of the respondent and against the appellants. The appellants are aggrieved hence they filed this appeal to challenge the aforesaid decision.
 5. It is the submission of the appellants that the respondent has extracted a certificate of costs without notice to them. It is said that the appellants obtained from the trial court a temporary order for stay of execution of the decree to last for 30 days which order lapsed on June 8, 2022. It is stated that the respondent has caused to be extracted warrants of attachment and sale of the appellants goods.
 6. The appellant also aver that unless the order for stay of execution is granted they will suffer substantial loss in that if the decretal sum is paid to the respondent the appellants are apprehensive that the respondent will not be able to make a refund should the appeal turn successful. The appellants offered to provide a bank guarantee for the decretal sum as security for the due performance of the decree.
 7. The respondent opposed the motion stating that it was filed as an afterthought with the intention of denying the respondent the fruits of its judgment. The respondent accused the appellants of filing a similar application before the trial court before rushing to this court. The respondent further stated that the appellants have failed to show the substantial loss they would suffer if the order for stay is denied.
 8. It is the respondent's averment that it is a going concern hence it is capable of making a refund of the decretal if the appeal turns successful. The respondent further stated that if this court is inclined to grant the order for stay then the appellants should be ordered to deposit the entire decretal sum.
 9. The principles to be considered in determining an application for stay are well settled. First, is that an application for stay must be made without unreasonable delay. Judgment in this matter was delivered on May 6, 2022 and the appeal and the instant application was filed in the month of June 2022. I am satisfied that the application was filed without unreasonable delay.
 10. The second principle is to the effect that an applicant must show the substantial loss he would suffer if the order for stay is denied. In this case the appellants have stated that if the decretal sum is paid to the respondent, they will suffer substantial loss in that the respondent is not capable of making a refund.
 11. The respondent merely stated that it's a going concern hence it is in a positon to refund. The moment the appellants alleged that the respondent was not able to make a refund, the burden to prove that the respondent is capable of making a refund shifted to it. The respondent failed to discharge the burden. I am therefore satisfied that the appellants have shown the substantial loss they would suffer if the order for stay is denied.
 12. The final principle is the provision for security for the due performance of the decree. The appellants have offered to provide a bank guarantee for the entire decretal sum. I find the proposal to be plausible.



13. In the end, the motion dated June 14, 2022 is found to be meritorious. It is allowed. Consequently an order for stay of execution of the decree is granted pending appeal on condition that the appellants provides a bank guarantee for the decretal sum of Kshs 1,700,000/= within 45 days. In default, the order for stay shall automatically lapse and the respondent will be at liberty to execute the decree. Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF AUGUST, 2022.

.....

JK SERGON

JUDGE

In the presence of:

..... for the applicant.

..... for the respondent.

