



REPUBLIC OF KENYA



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Safina Transporters Limited v Shreeji Enterprises (K) Ltd (Civil Appeal E019 of 2022) [2022] KEHC 12753 (KLR) (24 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E019 OF 2022
JN ONYIEGO, J
AUGUST 24, 2022**

BETWEEN

SAFINA TRANSPORTERS LIMITED APPELLANT

AND

SHREEJI ENTERPRISES (K) LTD RESPONDENT

RULING

1. Before this court is a Notice of Motion application filed on May 23, 2022 under Certificate of Urgency and supported by the supporting affidavit of Mohamed Ali Islam sworn on May 20, 2022. The application seeks the following orders;
 - (a) Spent
 - (b) That this honourable court be pleased to grant an interim order of stay of execution of the decree entered at Voi CMCC No 131 of 2018 on October 12, 2020 pending the hearing and determination of this application *inter partes*.
 - (c) That the honourable court be pleased to grant an order of stay of execution of the decree entered at Voi CMCC No 131 of 2018 on October 12, 2020 pending the hearing and determination of the appellants intended appeal.
 - (d) That the costs of this application be in the cause.
2. The applicant's case is that the respondent filed Civil Suit No 313 of 2018 in the Chief Magistrate's Court at Voi recovery of damages as a result of a road traffic accident which occurred on January 11, 2016. That the matter was heard *ex parte* on October 12, 2021 due to the former counsel's failure to attend court and to inform the appellant of the hearing date resulting to issuance of an *ex parte* judgement by the trial court. That it filed an application to set aside the *ex parte* judgement but the court dismissed the same through its ruling of April 25, 2022.



3. Aggrieved by the said decision, the applicant filed the instant application stating that; the appeal has high chances of success; the appeal will be rendered nugatory if the orders sought are not granted and the respondent proceeds to attach and sell the appellant's property in execution of the decree; if the orders sought are not granted, the applicant stands to suffer substantial loss; it is ready to provide security for the due performance of the decree pending the hearing and determination of the appeal and that the application has been brought within reasonable time.
4. In response to the application, the respondent filed a replying affidavit on June 8, 2022 sworn by Dhaval Soni. The respondent stated that the applicant has not satisfied the mandatory conditions for grant of stay as set out under Order 42 rule 6 of the Civil Procedure Rules 2010, *inter alia*; proof of Substantial loss; Application has been filed without unreasonable delay and furnishing of such security as the court orders for due performance of such decree or orders
5. The respondent stated that in dismissing the application for setting aside the *ex parte* judgement the court noted that there was a delay of 9 months in filing the said application. He further averred that there is nothing wrong with the respondent executing a lawful judgement and decree if the applicant fails to settle the decretal sum. That the security offered by the applicant would amount to further delay of the respondent's pursuit of the fruits of its judgement which was delivered way back on October 12, 2020. That to balance the rights of both parties, the applicant should pay half of the decretal sum to the respondent and the other half deposited in an interest earning account in the names of both advocates. Further, that the respondent is a reputable company specializing in transport, among other businesses, and therefore capable of refunding the decretal amount in the event the applicant's appeal succeeds.
6. The deponent further stated that the application for setting aside was filed a month after the ruling and no explanation was given by the applicant for the delay. He urged the court to dismiss this application with costs for lack merit.
7. When the matter came up for directions, parties agreed to canvass the same through oral submissions. The applicant through its advocate Mr Muma basically adopted the content contained in the affidavit sworn by Mohamed Ali on May 20, 2022 in support of the application. Counsel submitted that the applicant's bank gave a guarantee of Kshs 3,000,000 while the *ex parte* judgement was in the sum of Kshs 7 million. That the security offered is adequate. Further, counsel contended that if execution was to succeed, the applicant would suffer irreparable loss. It was Counsel's further submission that the applicant was let down by his former advocates who failed to inform it of the hearing date and urged the court to exercise its discretion.
8. Mr Mwinyi appearing for the respondent adopted the averments contained in the replying affidavit sworn and filed on June 8, 2022 by Dhaval Soni. Counsel submitted that this application was filed within reasonable time. That the applicant was not clear on what will happen to the balance of the decretal sum from the bank guarantee of Kshs 3 million as the decretal sum is Kshs 7,116,250 and security must be for the full amount. In his view, the security proposed was not sufficient.
9. To support his submission, Counsel relied on two authorities namely; Antoine Ndiaye v African Virtual University [2015] eKLR and Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR to express the position that for a court to grant stay of execution orders, the applicant seeking such orders must satisfy the requirements under order 42 rule 6 (2) of the CPRS and that a successful litigant should not be hindered from enjoying the fruits of his judgment.
10. In his rejoinder, the applicant's counsel submitted that the question of how the matter was handled was a question of appeal and that the appeal was meritorious. In conclusion therefore, counsel urged the court to find merit in the applicant's application.



11. I have considered the application herein, the response thereof and the rival submissions by both counsel. The only issue that emerges for determination is; whether the orders sought should be granted. The applicant herein has sought an order of stay of execution of the decree entered in respect of Voi CMCC No 313 of 2018 on October 12, 2020 pending the hearing and determination of the appellant's intended appeal. The law governing stay of execution is provided for under Order 42 rule 6(1) and (2) of the Civil Procedure Rules 2010 which provides;

- (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.

12. The first element and or ground for consideration by a court before issuing an order of stay of execution is proof of substantial loss. In this case, the applicant has argued that he will suffer substantial loss if the orders sought are not granted. While discussing substantial loss, the court in the case of *Premier Industries Limited v Stephen Kilonzo Matiliku* [2021] eKLR held as follows;

“...Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of *Kenya Shell Kenya Ltd v Kibiru & Another* [1986] KLR 410 cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:

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2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”



The decision of Platt Ag JA, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated *inter alia* that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts...”

13. My understanding of the applicant’s argument and or submission is that substantial loss will arise as a result of execution of the decree. It is trite that execution is a lawful process and does not on its own amount to substantial loss. In this regard I am guided by the holding in the case of [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) (2012) eKLR where the court stated 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.”

14. Accordingly, it’s my finding that the applicant has not satisfied this crucial ground. The second ground for consideration is that the application has been filed without unreasonable delay. This ground has not been disputed and thus it’s my finding that the applicant has satisfied this requirement under the law.
15. The third issue for consideration is furnishing such security as the court may deem fit for the due performance of such decree or order. The applicant has submitted that it is willing to provide security pending hearing and determination of the appeal. The respondent on the other hand has submitted that the security offered by the applicant in form of a bank guarantee is not sufficient.
16. In discussing the issue of security, the court in the case of [*Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd*](#) [2019] eKLR had this to say;

“Thirdly, 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 decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the



appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”

17. Similarly, the court in the case *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR had thus;

“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.”

18. The respondent has urged the court to direct the applicant to deposit or pay half of the decretal sum to them and the other half deposited in an interest earning account in the names of both advocates in ensuring that the rights of both parties are balanced. On the other hand, the applicant is willing to execute a bank guarantee worth Kshs 3,000,000. It is incumbent upon the court to balance both parties’ interest.

19. It is trite that determination of security is at the discretion of the court and it is not intended to punish a judgment debtor. However, the court must also not lose sight of the fact that a successful party must not be unnecessarily curtailed from realizing and enjoying the fruits of his or judgment. At the same time, the right to exhaust every legal avenue in search of legal redress should not readily be hindered. In view of the fact that this is a money decree and both parties are agreeable to the applicant depositing security save for the dispute on the amount to be deposited and to who, I find it persuasive in order to balance the interest of both parties.

20. In that regard, I am inclined to grant stay of execution orders on condition that the applicant deposits the full decretal amount in an interest earning account jointly held by the advocates of both parties or upon executing a bank guarantee in favour of the respondent (decree holder) for the full amount within 30 days from the date of delivery of this ruling.

21. Regarding the question whether the appeal has high chances of success, the applicant submitted that the appeal has high chances of success and it would be rendered nugatory if the orders sought are not granted. The court in the case of *Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another* [2020] eKLR in dealing with a similar issue held that;

“There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. In the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held by the Court of Appeal in the case of *Bhutt v Rent Restriction Tribunal* (1982) KLR 417. The Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of execution maybe stated to be a measure to prevent the subject matter so that the right of appeal can be exercised without any prejudice to the applicant as the appeal would be rendered nugatory if stay is not ordered. An applicant in this kind of application invokes the discretionary powers of the court.”



22. Considering the grounds cited for the applicant's non-attendance in court, a prima facie case capable of argument on appeal has been laid hence the appeal is not frivolous and therefore deserves an opportunity for interrogation subject to fulfilment of the conditions stipulated above. In conclusion therefore, stay of execution is granted for 30 days pending deposition of the decretal sum in the manner directed above in default execution to continue before the lower court. Costs shall be in the cause. Parties to expedite the appeal.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 24TH DAY OF AUGUST, 2022

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JN ONYIEGO

JUDGE

