



**Tulsi Construction Ltd v Tron Enterprises Limited (Civil Appeal
E076 of 2022) [2022] KEHC 13399 (KLR) (Civ) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13399 (KLR)

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

**CIVIL
CIVIL APPEAL E076 OF 2022**

**JN MULWA, J
SEPTEMBER 29, 2022**

BETWEEN

TULSI CONSTRUCTION LTD APPLICANT

AND

TRON ENTERPRISES LIMITED RESPONDENT

*(Being an Appeal against the Ruling and Order of Hon. H. M.
Nyaga, Chief Magistrate, Delivered on 2nd February, 2022 at
Chief Magistrate's Court at Nairobi in civil Suit No. 2104 of 2019)*

RULING

1. This ruling is in respect of the applicant's (Tulsi Construction Limited) application dated February 2, 2022 in which it seeks orders of stay of execution of the trial court's ruling issued on the February 2, 2022 in which the applicant's earlier application dated October 29, 2021 was dismissed.
2. Briefly, the application before the trial court dated October 29, 2021 was filed by the same applicant herein, seeking an order of injunction on the then intended sale of its property upon failure to pay an interlocutory judgment in the sum of Kshs 5,808,710/= entered by the court.
3. The applicant sought to pay the interlocutory judgment sum in installments but the trial court found no merit in the application and dismissed the application.
4. Being aggrieved by the said ruling, the applicant moved to this court by the instant application brought under provisions of section 79G of the Civil Procedure Act, and order 22 rule 22 as well as order 42 rule 6 of the Civil Procedure Rules; seeking an order for;



Stay of execution of the ruling issued on the February 2, 2022 pending hearing and determination of this application, and an order allowing the applicant to appeal against the said ruling.

5. The application is grounded on grounds stated thereunder and supporting affidavit sworn by Suryakant Bhailalbhair Patel, the Managing Director of the applicant, on the February 21, 2022.
6. On the February 24, 2022, the court granted the applicant a conditional stay of execution upon depositing Kshs 1 million into court which was done albeit outside the 21 days granted.
7. In opposing the application, a director of the respondent company, Yvonne Ndeti swore the affidavit which was filed on the April 10, 2022. The application was argued orally before me on the June 7, 2022.
8. In its oral submissions, Mr Ochola Advocate for the applicant stated that the applicant would suffer loss and damage if the orders of stay of execution are not granted, further stating that the applicant has complied with conditions set under order 42 rule 6 of the Civil Procedure Rules (CPR).
9. For the respondent, Mr Biko Advocate argued that there was no appeal filed against the ruling delivered on the February 2, 2022, and that the applicant had a right of appeal under order 43 of the CPR.
He further submitted that the conditional orders of stay of execution were not complied with at the period granted, but thereafter out of time, and therefore, as a result, the applicant ought not be granted orders sought in the application
10. On the substantive prayers the respondent argued that the interlocutory judgment in the trial court has not been settled and therefore the respondent ought not to be denied enjoyment of its fruits of judgment.
I have considered the parties affidavits in support and in opposition to the application, as well as the trial court's ruling subject of these proceedings.
11. In the first instance, order 43, rule 1 provides for appeals that are ... as of right from orders and provisions of section 75(1) (h) of the act. Among them:-Order 22 rules 25, 57, 63(3) and 73 (orders in execution), Order 26, rule 1 and 5(2) (security for costs), Order 40 rules 1, 2,3,7 and 11 (temporary injunctions).
12. The application dated October 29, 2021 from which the impugned ruling of February 2, 2022 was one for stay of execution and therefore no leave was or is necessary to file an appeal against a dismissal of the application. The appeal, subject of this ruling having been filed on the February 22, 2022 within the 30 days period by dint of section 79G Civil Procedure Act, the memorandum of appeal dated February 21, 2022 is thus properly filed and therefore no leave of court is necessary.
13. On the substantive prayer No 2 for stay of execution, a conditional stay was granted, which condition was complied with, though out of time as earlier on stated.
14. Upon application to the trial court to pay the interlocutory judgment by instalments, the trial court dismissed the application, as it was premised on a consent letter to settle the full claim, not just the interlocutory judgment sum, and which had no blessings of the respondents advocates, and that the said consent dated July 16, 2021 had not been adopted as a court order.
15. In my view, there are only two issues that this court ought to determine;
 1. Whether a stay of execution order of the partial decree ought to be granted to the applicant, and if in the affirmative,
 2. Whether the applicant may be allowed to pay the partial decretal sum in instalments.



16. There is an appeal filed by dint of the memorandum of appeal filed on the February 22, 2022. The partial decree is a money decree. The applicant due to reasons stated in his supporting affidavit is unable to pay the full decretal sum at once, as his business had gone down due to the effects of Covid-19 pandemic, among other stated reasons.

17. Whether to allow a party to pay in instalment is a matter of discretion of the court. The applicant must satisfy the court that it deserves the exercise of discretion in its favour.

Order 21 rule 12 CPR grants the court such powers to a deserving party.

It provides:

“where and in so far as the decree is for the payment of money, the court may for sufficient reason at the time of passing the decree order that the payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable”

18. The court is enjoined to consider each case upon its peculiar circumstances in exercise of its judicial discretion, upon sufficient cause being shown.

19. I fully agree with the decree holder that it is entitled to enjoy the fruits of its judgment. However, if the Judgment Debtor is unable, for sufficient reasons, to pay the full amount at once, he should not be condemned and his tools of trade attached and auctioned, as is the case in this matter.

20. From the record before me, I am satisfied that the judgment debtor has shown seriousness by making payments stated at 2,800,000/= by the time this matter came up for hearing, leaving a balance of Kshs 3,008,710/= unpaid. For that reason, the applicant is called upon to show good faith by making suitable and reasonable payment proposals to liquidate the balance of the decretal sum as held in numerous decisions among them Hildegard Ndelut v Letkina Dairies Ltd & another [2005] e KLR, Mohamed Akbar Khan v Kasturchand Daga cited in Keshavju Jethabhai & Brothers Ltd v Salch Abdula [1959] EA 260, KTK Advocates v Baringo County Government [2018] e KLR.

21. Having perused the reasons as to why the trial court dismissed the impugned ruling, being procedural and technical issues, that ought not prevent a court from dispensing substantive justice so long as the procedural and technical matters do not go into the merit of the application/case before the court.

22. I agree with the respondent and the trial court’s ruling that the application dated October 29, 2021 and an earlier one dated August 13, 2021 were dismissed for same errors, as the prayers sought therein were all made “pending hearing and determination” of the application, meaning that the orders if granted would lapse upon the determination of the application.

It seems that that the applicant’s advocates did not read and consider the rulings in the two applications, because once again, this error is also repeated in the application before me.

Unfortunately, to deny the applicant the orders though with the same error, as would have read “pending hearing and determination of the appeal”, would be punishing the applicant unfairly, for errors and mistakes of it’s advocates.

23. This is a wakeup call to the advocates on record to wake up; and once a court issues a ruling or order, to take time to read and understand why the orders sought are denied or allowed.

It is now settled that a litigant ought not be punished unfairly for mistakes of their advocates and without interrogating the merits of the appeal. I find no sufficient reasons to deny the applicant the orders sought.



I shall not go into matters of what type of instalments the applicant ought to pay towards liquidation of the decretal sum. That is a matter not now before me, but may be explored by the parties at their convenient time.

24. In the end therefore, I shall allow prayer No 2 of the application, having determined that there is already on record a competent appeal by the memorandum of appeal filed on the February 22, 2022.

Consequently, an order of stay of execution of the trial court's ruling dated February 2, 2022 is hereby granted pending the hearing and determination of the appeal, upon conditions that the applicant shall file the record of appeal within 60 days of this ruling.

25. The matter shall be listed for mention for directions and compliance on the December 8, 2022.

Costs shall abide the outcome of the appeal.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022.

J.N. MULWA

JUDGE

