



REPUBLIC OF KENYA



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**M/S Jondu Enterprises Limited v Spectre International Limited (Civil Case 52 of 2018)
[2022] KEHC 13290 (KLR) (Commercial and Tax) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 52 OF 2018
WA OKWANY, J
SEPTEMBER 22, 2022**

BETWEEN

M/S JONDU ENTERPRISES LIMITED PLAINTIFF

AND

SPECTRE INTERNATIONAL LIMITED DEFENDANT

RULING

1. This ruling is in respect to the application dated January 12, 2022 wherein the applicant seeks the following orders:-
 1. Spent
 2. Spent
 3. The court be pleased to stay these proceedings pending the hearing and determination of the appeal, *Civil Appeal E142 of 2021: Spectre International Ltd v M/S Jondu Enterprises Ltd*, from the decision/ruling of this court dated January 26, 2021 (Lady Justice Margaret Muigai) and issued on the same date.
 4. That pending hearing and determination of the appeal, *Civil Appeal E142 of 2021: Spectre International Ltd v M/S Jondu Enterprises Ltd*, filed by the defendant, the court be pleased to grant a stay of execution of the ruling dated January 26, 2021 and issued on the same date by Lady Justice Margaret Muigai
 5. The costs of this application be in the cause.



2. The application is supported by the affidavit of the applicant's Director, Mr Jacob Agoch, and is based on the following grounds:-

- 1) On January 26, 2021, the High Court, Commercial and Tax Division. learned Lady Justice Margaret Muigai (hereinafter 'the court'), delivered a ruling allowing the defendant's notice of motion application dated June 6, 2020 and effectively entered summary judgment against the plaintiff in the amount of Kshs 24,474,229.86.
- 2) So soon after the delivery of the court's decision, the defendant vide an oral application obtained 30 days stay of execution of the said ruling which stay expired on February 26, 2021.
- 3) The defendant aggrieved by the court's decision filed an application for stay of execution under rule 5(2) (b) of the Court of Appeal Rules 2010, *Civil Application E039 of 2021; Spectre International Ltd v M/S Jondu Enterprises Ltd*, and was granted stay on condition that he deposits 50% of the decretal sum within 30 days in a joint interest earning account.
- 4) On behalf of the defendant, we wrote to the plaintiff's advocates on various dates requesting them to avail their representative to open the said joint interest earning account for the purpose of depositing the 50% of the decretal sum and facilitating compliance with the court order, but to date the plaintiff has never responded and has essentially frustrated compliance with the said order.
- 5) Additionally, on behalf of the defendant, we have filed a record of appeal, *Civil Appeal No. E142 of 2021: Spectre International Ltd v M/S Jondu Enterprises Ltd*, that is pending hearing and determination before the Court of Appeal in Nairobi.
- 6) The appeal has more than a reasonable chance of success and the defendant is apprehensive that unless the orders sought herein are urgently granted, the plaintiff shall move to execute the impugned judgment including the security for judgment deposited in court and thereby render the appeal nugatory and occasion the defendant serious loss.
- 7) The defendant is extremely apprehensive that from the recent conduct of the plaintiff, the plaintiff is not desirous of prosecuting his suit to conclusion but is only desirous of executing the partial decree arising from the judgment issued and in doing so will continue taking out proclamations and warrants of attachment and proceed to attach the defendant's property in satisfaction of the decree anytime now and thereby render the appeal nugatory and occasion the defendant serious loss.
- 8) In the event that this application is not heard Urgently, the defendant's appeal and its constitutional right of appeal may be rendered nugatory and/or defeated and occasion consequently suffer serious loss.
- 9) This application has been made without unreasonable delay and the defendant is willing to deposit the requisite security in court.



- 10) This court has unfettered original jurisdiction to grant the orders sought in the interest of justice. It is only just and fair in the circumstances that the orders be granted and that the applicant/defendant is given a fair chance to exhaust their constitutional right of appeal.
3. The respondent opposed the application through the replying affidavit of its Director Mr Johnson Ndungu Njau who states that the 30 days stay of execution granted upon the delivery of the impugned ruling expired on February 26, 2021 and was not extended. He states that the respondent is not under any obligation to agree to the opening of a joint account upon the expiry of the stay period. It is the respondent's case that it is entitled to commence the execution process in view of the expiry of the stay of execution orders.
4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders for stay of these proceedings and execution pending appeal.
5. Order 42 rule 6(1) of the *Civil Procedure Rules* provides that:-

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”
6. Further Order 42, rule 6(2) states:-

“No order for stay of execution shall be made under sub-rule (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. In order to succeed in an application for stay of execution pending appeal, the applicant is required to demonstrate that the application was filed without undue delay, that he or he would suffer substantial loss if the stay is not granted and that he is ready and willing to abide by the security for the performance of the decree issued by the court.
8. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal stated the conditions to be considered in determining whether or not to grant stay of execution pending appeal. The court held that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and that the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's decision. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

9. 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.”
10. In the present case, the applicant states that the court of appeal granted it stay of execution on condition that 50% of the decretal sum is deposited in a joint interest earning account but that the respondent’s advocates did not avail a representative for the purposes of opening the said account.
11. The respondent, on the other hand, stated that even though the applicant had on two occasions been granted conditional orders for stay of execution, the applicant did not comply with the said conditions thus making the current application for stay an abuse of the court process.
12. A perusal of the court record reveals that on February 26, 2021, the applicant made an oral application for stay of execution and the same was granted for a period of 30 days. The applicant further applied for stay of execution before the Court of Appeal and through a ruling delivered on May 21, 2021, the said court allowed the application for on condition that the applicant deposits 50 percent of the decretal amount in the joint interest earning account in the names of both counsels within a period of 30 days.
13. The applicant herein blames the respondent for frustrating the account opening process. The record shows that the applicant wrote to the respondent on two occasions on September 17, 2021 and September 27, 2021 over the issue of account opening. I note that by the time the applicant was writing to the respondent to facilitate the opening of the account the time within which the account ought to have been opened had already lapsed.
14. I find that, in the circumstances of this case, the applicant has not satisfactorily explained the reasons why the conditions for stay granted by the court were not complied with. My finding is that, in the circumstances of this case, a fresh application for stay case is equivalent to taking court orders for granted thus amounting to an abuse of the court process. It is clear that the court has on two occasions granted the applicant orders for stay of execution which orders the applicant has not complied with. I find that allowing the application under the current circumstances would occasion the respondent great injustice by subjecting it to numerous applications over the same subject matter.
15. The applicant also sought orders to stay these proceedings pending the hearing and determination of the appeal. Courts have taken the position that stay of proceedings is a grave judicial action as it seriously interferes with the right of a litigant to conduct his litigation and should not be confused with stay of execution pending appeal. (See *Kenya Wildlife Service v James Mutembei* [2019] eKLR). Stay of proceedings has the effect of hampering a litigant’s right of access to justice, right to be heard without delay and overall, right to fair trial. For the above reasons, the threshold for the granting of orders to stay of proceedings is high and stringent.
16. In *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000 Ringera J* (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order



a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

17. The threshold for stay of proceedings is explained in the following passages in *Halsbury's Law of England, 4th Edition Vol 37* page 330 and 332, thus: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

18. In the instant case, summary judgment was on January 26, 2021, entered against the applicant for the sum of Kshs 24,474,229.86 after which the applicant was granted 30 days stay of execution. I note that it is now almost 2 years since the said summary judgment was entered and the said judgment had the effect of finalizing the case before this court as what is currently outstanding is the appeal that the applicant lodged against the impugned ruling on summary judgment. Strictly speaking, I find that there are no active proceedings before this court that would necessitate the granting of an order for stay of proceedings.
19. My above finding on the issue of stay of proceedings notwithstanding, I find that, even assuming, for arguments sake, that there are still some proceedings pending before this court, I am not persuaded that this is the kind of case where an order to stay proceedings is merited. My position is informed by my earlier findings that the applicant did not comply with the conditions set by the Court of Appeal for the granting of orders to stay the execution.
20. In the upshot, I find that the applicant has not satisfied the conditions for the granting of orders for stay of proceedings and execution. I therefore dismiss the application dated January 12, 2022 with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Nderitu for Awele for Defendant/Applicant

Mr. Gikandi for plaintiff.



