



**Spectre International v Betric Kenya Limited (Miscellaneous Civil Application
247 of 2021) [2022] KEHC 14656 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 247 OF 2021**

OA SEWE, J

OCTOBER 31, 2022

BETWEEN

SPECTRE INTERNATIONAL APPLICANT

AND

BETRIC KENYA LIMITED RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated December 1, 2021. It was filed by the applicant, Spectre International, under Sections 1A, 1B, 34 and 67 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, as well as Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 for the following orders:
 - (a) Spent
 - (b) Spent
 - (c) That the Court be pleased to grant stay of execution of the decree and judgment of the Mombasa Chief Magistrate's Court (Hon. Kyambia) dated November 5, 2021 in Civil Suit No. 2051 of 2017: Betric Kenya Limited v Spectre International pending the hearing and determination of the intended appeal.
 - (d) That the costs of the application to abide the appeal.
2. The application was premised on the grounds that the applicant is gravely aggrieved by the lower court's decision and intends to appeal the same on the grounds, inter alia, that the contract giving rise to the claim was tainted with fraud. The applicant further averred that the respondent admitted in its pleadings before the lower court that it had no known assets, place of business or capacity to repay the decretal sum should the intended appeal succeed; and therefore it is apprehensive that it stands to suffer substantial loss in the event of a successful appeal unless stay of execution is granted. The applicant



- asserted that the appeal has more than a reasonable chance of success; and therefore that it is in the interest of justice that the instant application be allowed.
3. The application was supported by the affidavit of Jacob Agoch, sworn on November 20, 2021 to which was annexed a copy of the lower court's judgment dated November 5, 2021 and a draft Memorandum of Appeal.
 4. The application was opposed by the respondent *vide* a Replying Affidavit sworn by one of its directors, Beatrice Aoko Okeyo. She defended the decision of the lower court and posited that the appeal is a waste of time. She further averred that the applicant is no longer operational and that the proposed appeal is a mere ploy to deny the respondent the fruits of its judgment. Ms. Okeyo denied the applicant's assertions that the respondent has no known assets, place of business or capacity to repay the decretal sum. She asserted that the respondent is in business and therefore that the applicant failed to meet the threshold for the grant of stay pending appeal.
 5. The application was urged by way of written submissions, pursuant to the directions given herein on December 8, 2021. Thus, in his written submissions filed herein on March 7, 2022, Mr. Awele for the applicant underscored the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and urged the Court to find that the applicant has satisfied the three prerequisites for the grant of stay, namely that substantial loss may result to the applicant unless stay is given; that the application has been made without unreasonable delay; and that such security as the Court may order for the due performance of the decree or order that may ultimately be binding on the applicant has been given.
 6. Counsel also relied on *Rhoda Mukuma v John Abuoga* [1988] eKLR, *Tassam Logistics Ltd v David Macharia & Another* [2018] eKLR, *Otiso G. Otundo v Ramesh Chander Dhingra* [2006] eKLR and *Meteine Ole Kilelu & 19 Others v Moses K. Nailole* [2009] eKLR to buttress his argument that where a money decree involves a substantial amount of money, execution would in itself ruin an applicant's business or threaten its the very existence; and is therefore a relevant consideration for stay of execution pending appeal. He urged the court to find that the decretal sum of Kshs. 7,739,422/= is indeed a substantial sum of money, the loss of which would prejudice the applicant's cash flow.
 7. In addition to the foregoing, Mr. Awele submitted that, the applicant having expressed its apprehensions as to the ability of the respondent to repay the decretal sum in the event of a successful appeal, the burden shifted to the respondent to prove its continued existence as a business and its physical location. He urged the Court to find that, since the respondent utterly failed to tender material evidence to allay the applicant's concerns, a finding should be made in favour of the applicant. He added that the instant application was brought without unreasonable delay and within the 30-day window of stay granted by the lower court on November 5, 2021.
 8. The respondent's written submissions were filed on April 22, 2022 by Mr. Wameyo. On substantial loss, it was Mr. Wameyo's stance that financial ability of a decree holder is not a reason for allowing stay; and that it is enough that a decree holder is not a dishonourable individual without any form of income. In support of this argument, counsel relied on *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR and added that in an application for stay, the Court must bear in mind the overriding objective and the need to balance the interest of the parties to the suit. He accordingly submitted that a judgment debtor cannot be heard to say that he stands to suffer substantial loss from the execution of a lawful decree of the court.
 9. On security for the due performance of the decree, Mr. Wameyo urged the Court to find that the applicant has failed to indicate how it intends to satisfy the decree in the event the appeal is lost. He added that, whereas the Court has the discretion to determine the amount or nature of security for



due performance of the decree, the appellant is bound to give a commitment and expression of its willingness to furnish such security as the Court may direct.

10. Counsel relied on *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR and urged that, in balancing the interests of the parties, the Court ought not to lose sight of the fact that the winner of the litigation should not be denied the opportunity to enjoy the fruits of its judgment should the appeal fail. He consequently proposed that, should the Court find it reasonable to allow the application, then it should be on condition that the applicant pays the decretal sum of Kshs. 7,739,422.01 by depositing the same in a joint interest earning account in the names of the advocates for the parties.
11. I have given careful consideration to the application, the averments set out in the parties' respective affidavits as well as the written submissions filed on their behalf by learned counsel. The single issue that presents itself for determination herein is whether sufficient cause has been made for the grant of stay of execution of the decree issued in Mombasa CMCC No. 2051 of 2017 pending hearing and determination of the applicant's proposed appeal. There is no dispute that the subordinate court entered judgment in the respondent's favour on the November 5, 2021 in the sum of Kshs. 7,739,422/= plus interest and costs. A copy of the judgment of the lower court was annexed to the applicant's Supporting Affidavit and marked Annexure JA-1.
12. Stay of Execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules, 2010* which states thus in part: -
 - (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”.
13. Hence, for the Court to grant stay of execution pending appeal, it must be convinced that the applicant will suffer substantial loss; that the application has been brought without undue delay and that the applicant is willing to comply with any order of payment of security as may be imposed by court. In this instance, the parties appear to be in agreement that, upon delivery of the lower court's judgment, the applicant applied for and was granted stay of execution for 30 days with effect from November 5, 2021. Accordingly, there can be no doubt that the instant application was timeously brought; having been brought within that 30-day stay window.
14. On substantial loss, the appellant is apprehensive that if stay is not granted the respondent may be unable to pay back the decretal sum as there is no proof that it is a going concern. It is now settled that execution per se is not a valid ground for the court to grant a stay of execution because execution is by itself a lawful court process intended to safeguard the right of a successful litigant to enjoy the fruits of his or her judgment. In *James Wangalwa & Another v Agnes Naliaka Cheselo* [2012] eKLR, for instance, it was held 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silvester –vs- Chesoni* [2002] 1 KLR 887, and also in the case of *Mukuma –vs- Abwoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule S (2)(b) of the court by Appeal Rules respectively emphasized the centrality of substantial loss thus: -

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss of what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

(also see *Rhoda Mukuma v John Abuoga* (*supra*))

15. Although counsel for the respondent pitched the argument that what is in issue is a money decree and that no substantial loss was demonstrated by the applicant, it is now settled that substantial loss can ensue even in the case of what is purely a money decree. In *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd* the Court of Appeal held that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

16. Accordingly, I agree with the position taken in *Tassam Logistics Ltd v David Macharia & Another* (*supra*) that:

“...where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence...”

17. Thus, at paragraph 5 of the supporting affidavit, the applicant averred that the respondent had, in its pleadings before the lower court, admitted to having no known assets, place of business or capacity to repay the decretal sum should the intended appeal succeed. At paragraph 7 of the said affidavit, the applicant likewise averred that the applicant expressed its apprehension that it stands to suffer irreparable loss and substantial hardship in recovering the decretal sum from the respondent in the event of a successful appeal. The applicant having taken that posturing, it was for the respondent to disclose its resources and ability to repay. The Court of Appeal made this clear in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it held that: -

“...This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them.



Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya...”

18. There appears to be no indication in the Replying Affidavit as to the resources of the respondent other than a general assertion that the respondent is in business. I am therefore of the view that the applicant has demonstrated that it stands to suffer substantial loss for purposes of Order 42 Rule 6(2) of the *Civil Procedure Rules*.

19. On the third condition of security, the applicant has not explicitly offered security, but as correctly pointed out by learned counsel, what amounts to suitable security is in the discretion of the Court. In this regard, Hon. Nyakundi, J. had the following to say in *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* (*supra*), which I entirely agree with:

“...The objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for the due performance of decree is not a matter of willingness by the applicant but for the court to determine.”

20. In the result, it is my finding that the applicant has made out a good case to warrant the issuance of the orders prayed for in its application dated December 1, 2021. Hence, the orders that commend themselves to me, and which I hereby grant are as follows:-

- (a) That the applicant’s Notice of Motion dated December 1, 2021 be and is hereby allowed;
- (b) That an order of stay of execution be and is hereby granted in respect of the judgment and decree delivered and issued against the applicant in Mombasa CMCC No. 2051 of 2017 on November 5, 2021, pending the hearing and final determination of the applicant’s proposed appeal on condition that the applicant deposits the entire decretal sum in a joint interest earning account in the names of counsel for the parties within 45 days from the date hereof.
- (c) Costs of the application be costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF OCTOBER 2022

OLGA SEWE

JUDGE

