



Devyani Food Industries (Kenya) Limited v Epochal Limited (Civil Appeal E260 of 2022) [2022] KEHC 14607 (KLR) (Civ) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14607 (KLR)

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

**CIVIL
CIVIL APPEAL E260 OF 2022**

**JN MULWA, J
OCTOBER 27, 2022**

BETWEEN

DEVYANI FOOD INDUSTRIES (KENYA) LIMITED APPELLANT

AND

EPOCHAL LIMITED RESPONDENT

RULING

1. This ruling is in respect of the appellant/applicant's notice of motion dated April 27, 2022 brought under section 1A, 1B, 3A of the *Civil Procedure Act*, orders 42 rule 6(1) & (2) and order 51 rule 1 of the *Civil Procedure Rules*. The applicant seeks the following orders:
 1. That this matter be certified urgent and be heard ex-parte in the first instance.
 2. That pending the hearing and determination of this application inter-parties, the honourable court be pleased to issue an order of temporary stay of execution pending appeal of the orders issued on the March 28, 2022 by Hon DM Kivuti.
 3. That pending the hearing and determination of this application inter-parties, the honourable court be pleased to call for the original court file in CMCC NO E260/2022.
 4. That costs be in the cause.
2. The application is supported by the supporting and supplementary affidavits of by the affidavit of Paul Maina, the applicant's legal officer.
3. It was opposed through a replying affidavit sworn by the respondent's director Daniel Wachira.
4. It was canvassed by way of written submissions which the court has taken note of.



5. From the appellant's affidavits and submissions filed herein, it appears that the appellant is seeking a stay of execution pending the hearing and determination of the appeal. According to the respondent however, the said order cannot issue as prayer (2) which seeks the order has been overtaken by events, having been sought pending the inter partes hearing of the instant application. The respondent has thus urged that the application be dismissed as parties are bound by their pleadings.
6. I have carefully looked at prayer (2) of the application and i note that whereas the appellant's affidavits and submissions gives some clarity on the order being sought, the prayers were poorly drawn. Indeed, it is clear that the appellant sought both an interim stay pending the inter partes hearing of the application and stay pending appeal in the same prayer (2). This should not have been the case as those are two different prayers which call for different orders. In *Peter Kariuki Manthi v Attorney General & another* [2018] eKLR, Mativo J cited with approval the case of *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6] where Vickery J stated as follows on the principles of good pleading:-

“In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. ... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination. (Emphasis mine)

7. Be that as it may, section 3A of the *Civil Procedure Act*, which the appellant invoked in its application, vests in this court inherent power to make any orders as may be necessary for the ends of justice. To that end, since an interim stay had already been issued on May 9, 2022 upon the consideration of the certificate of urgency, the court will therefore proceed to consider the prayer for stay pending appeal, in the interest of justice.
8. The conditions necessary for the grant of stay of execution pending appeal are laid out in order 42 rule 6(1) & (2) of the *Civil Procedure Rules* which provides that:

“6.



- (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 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."

9. From the said provision, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
10. It is not disputed that the instant application was brought without undue delay hence this requirement has been satisfied.
11. As regards substantial loss, the appellant contended that complying with lower court's order to deposit in court the sum of Kshs 3,000,400/- as security for any judgment that may eventually be entered against it, before the suit is heard, will affect the company's operations. It stated that since it deals in the sale and processing of milk and milk products under the brand names 'DAIMA' and 'CREAM BELL', it will be unable to meet its obligations as the money is required to pay farmers and its over 500 employees. Notably, this contention was not controverted in any way by the respondent. I am therefore satisfied that the appellant stands to suffer substantial loss in the absence of an order for stay of execution.
12. On security, the appellant has indicated willingness to comply with any conditions that may be imposed by the court in that regard. The court reserves the discretion to determine the nature and extent of any security for the performance of any decree. Each case is unique and depend on its own circumstances. In the present case, I note that the suit in the lower court is yet to be heard and determined which means that there is no decree in place. The order that the appellant has appealed against required him to deposit Kshs 3,000,400/- in court as security for judgment pending the hearing and determination of case. It was issued in place of a freezing order that the respondent had sought under order 39 of the Civil Procedure Rules. In the circumstances, I hold the view that it is sufficient



that appellant is ready to provide security. The fact that it produces the brands named in its supporting affidavit herein is an indication that it is a company with substantial investments in the county and thus is able to avail any security if called upon to do so. I will therefore not impose any security on the appellant unless the circumstances change.

13. I am guided by the case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR, where it was stated that:

“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.”

14. For the foregoing, I find the appellant’s application dated April 27, 2022 meritorious and is allowed in the following terms:

- i. There shall be a stay of execution of the order issued on March 28, 2022 by Hon DM Kivuti in Milimani CMCC No E260 of 2022: Epochal Limited v Devyani Food Industries (K) Ltd pending the hearing and determination of the appeal herein.
- ii. The appellant shall file and serve its record of appeal within sixty (60) days from the date of this ruling and thereafter return to court on February 8, 2023 for mention for directions on the hearing of the appeal.
- iii. The cost of the application shall abide the outcome of the appeal.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 27TH OCTOBER, 2022.

J. N. MULWA
JUDGE.

