



REPUBLIC OF KENYA



KENYA LAW
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**DL Koisagat Tea Estate Limited v Long'ore (Civil Appeal
26 of 2021) [2022] KEHC 14069 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL 26 OF 2021
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

DL KOISAGAT TEA ESTATE LIMITED APPELLANT

AND

JACKSON LOSKE LONG'ORE RESPONDENT

RULING

Coram: Hon. Justice R. Nyakundi

S.K Kitur & CO. Adv

M/S Alwanga & CO. Adv

1. The applicant approached this court by way of Notice of Motion dated November 2, 2015 seeking the following orders;
 1. Spent
 2. That, there be an interim order of stay of execution of decree issued in Kapsabet Civil suit no 76 of 2013 pending the hearing and determination of an appeal against ruling delivered by HN Watimah on October 30, 2015 in Civil Suit no 76 of 2013 Jackson Losike Longore vs PL Koisgat Tea Estate Limited.
 3. That, there be stay until the hearing and determination of the appeal herein.
 4. That, costs be provided for
2. The application is based on the grounds contained therein and the deponements in the supporting affidavit.



3. The applicant was the defendant in Kapsabet Civil Suit no 76 of 2013 where the trial court delivered a ruling on October 30, 2015 setting aside an application seeking to set aside the *ex parte* judgment against the applicant herein.
4. The applicant being dissatisfied with the decision of the trial court lodged an appeal against the ruling of the trial court and stated that it was in the interest of justice that the application is allowed.
5. The respondent opposed the application vide a replying affidavit dated November 15, 2015. The respondent contends that upon the decision of the trial court, the respondent filed an application dated October 30, 2015 seeking to stay the ruling of the court and the same is yet to be heard. Before the said application could be heard and determined, the defendant filed this instant application seeking similar orders of stay of execution. Since this instant application is seeking the same orders as the application dated October 30, 2015 in the trial court he prayed that the interim orders that have been granted be vacated and the same be dismissed for duplicity.
6. The respondent submitted that the applicant, in his affidavit, has not demonstrated that he is a man of straw and will be unable to refund the amount if the appeal succeeds. It is his case that the applicant has not demonstrated to the court what loss he will suffer if the application is not allowed.
7. The respondent deposed that application does not meet the requirements for grant of stay pending appeal in that; -
 - a) The applicant has not put facts in the affidavit to show that he will be unable to pay the decretal sum on conclusion of the appeal if successful.
 - b) There is no credible evidence or sufficient cause to enable the court to reach a conclusion that the applicant will suffer substantial loss if the decretal sum is paid.
 - c) The refusal of stay of execution will not render the appeal nugatory as the case involves a money decree capable of being repaid.
 - d) The applicant is relying on mere apprehensions which cannot be a basis of grant of stay of execution without proof that he is impecunious.
8. Upon considering the pleadings and responses contained therein, I have identified the following issues for determination;

Whether the orders for stay of execution should be granted

9. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
10. The upshot of the foregoing is that an applicant for stay of execution of a decree or order pending appeal is required to satisfy the conditions set out in order 42 rule 6(2), aforementioned being;
 - (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given

Substantial loss

11. It was held in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
12. The applicant has not stated what substantial loss that will be suffered if the orders for stay are not granted. It is not enough to merely state that substantial loss will be suffered, the applicant must demonstrate what that substantial loss is.

Whether the application was made without unreasonable delay

13. The ruling the applicant seeks stay of was delivered on October 30, 2015. The application was filed on November 2, 2015. It is my view that the same was filed timeously.

Security

14. The applicant has not provided any security. Further, he has not mentioned anything about security in any way whatsoever including any indication of abiding by any conditions on security imposed by the courts.
15. The upshot of the foregoing is that this application does not satisfy the requirements of order 42 for orders of stay to issue. In the premises the application is dismissed with costs to the Respondent.



DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

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R NYAKUNDI

JUDGE

