



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kalyan t/a Ferrari Tours v Ecobank Kenya Limited (Civil Appeal  
E211 of 2022) [2022] KEHC 15624 (KLR) (Civ) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15624 (KLR)

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

**CIVIL**

**CIVIL APPEAL E211 OF 2022**

**JN NJAGI, J**

**NOVEMBER 24, 2022**

**BETWEEN**

**RATTAN SINGH KALYAN T/A FERRARI TOURS ..... APPELLANT**

**AND**

**ECOBANK KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The appellant/applicant has filed an application dated April 6, 2022 seeking for orders that there be an order for stay of execution of the Ruling and all consequential orders in Nairobi Chief Magistrate's Court Civil Suit No.2660 of 2016 pending the hearing and determination of the appeal filed herein.
2. The application is premised on grounds on the face of the application and supported by the affidavit of the applicant. The applicant deposed in his supporting affidavit that the respondent through his auctioneers attached his household goods in execution of a decree obtained by the respondent against the applicant. That he filed an application dated April 1, 2022 seeking to stay the proclamation of attachment notice dated 29<sup>th</sup> March 2022. That the trial court vide orders issued on 5/4/2022 declined to grant the orders for stay.
3. That he was aggrieved by the order and filed an appeal against it. He contends that the warrants of attachment and subsequent proclamation notice were obtained irregularly and on false information. That unless the execution is stayed he stands to suffer irreparable loss and damage. That the amount involved in the decree is substantial. That the application has been made without undue delay and is bona fide. That the respondent will not suffer prejudice if the application is allowed. That he is willing to abide by any reasonable conditions that the court may direct for due performance of the decree.
4. The application was opposed by the respondent through the replying affidavit of one Edith Wanjiku sworn on the May 11, 2022 in which she deposes that she is an employee of the respondent. That the



appeal by the applicant is seeking to challenge the orders of the trial magistrate where the magistrate declined to grant orders of stay of execution ex parte. That the applicant has not disclosed to the court that vide a ruling delivered on 30/6/2021 the trial court gave the applicant six months within which to prosecute his suit failure to which the ex parte judgment that had been entered against him and all the consequential orders were to be restored. That the applicant failed to comply with the orders and the court re-issued the warrants of attachment and sale of the applicant's property. Therefore, that the warrants of attachment were lawfully obtained.

5. The respondent contended that the application has not met the threshold for granting orders of stay of execution pending appeal. That the application was made with inordinate delay and no security has been offered for the due performance of the decree. That the applicant omitted relevant information in the application hence the application is lacking in bona fide. That the application lacks merit and has no chance of success. That the grant of the prayers sought will greatly prejudice the respondent as the decretal sum remains unsettled.
6. The application was canvassed by way of written submissions. The advocates for the applicant, A.A. Mudanya & Co. Advocates, submitted that the applicant has annexed the memorandum of appeal that demonstrates that the application raises arguable issues. That the amount that is the subject of the decree is Ksh.3,497,286.60/= which is a substantial amount by any standards. That the applicant is apprehensive that if the amount is paid to the respondent they may not be in a position to refund the money once the appeal is determined.
7. The applicant submitted that the court has discretion on whether or not to grant an application for stay pending appeal. They cited the case of *Butt vs Rent Restriction Tribunal* (1982) KLR where the Court of Appeal held that:
  1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. 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 that appeal court reverse the judge's discretion.
  3. 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.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
8. It was further submitted that the applicant has a constitutional right to be heard and in that respect the applicant cited the case of *Richard Murigu Wamai v Attorney General & another* (2018) eKLR where the court held that:

Every person has a constitutional right to be heard and that parties should not be deterred from approaching the seat of justice.



9. The applicant submitted that dismissing the application will result into condemning the applicant unheard.
10. The advocates for the respondent, Kale Maina & Bundotich LLP, on the other hand submitted that the application has not satisfied the requirements for grant of stay of execution as provided under order 42 rule 6(1) and (2) of the Civil Procedure Rules, 2010, which are that it has to be demonstrated that the applicant will suffer substantial loss; that the application is made without delay and that the applicant must provide security for due performance of the decree.
11. It was submitted that substantial loss must be proved and not merely stated. In support of this proposition the respondent cited the case of Machira & Co. Advocates v East African Standard (2002) eKLR where it was held that:
 

“In this kind of applications for stay, it is not enough for the Applicant to merely state that substantial loss will result, he must prove specific details and particulars....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay..”
12. It was submitted that the applicant in this case merely stated that he will suffer substantial loss but has not demonstrated the particular loss that he will suffer.
13. On the issue of security for the due performance of the decree the respondent cited the case of Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others (2015) eKLR where the court stated as follows:
 

“.....the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.
14. The applicant submitted that the applicant is not entitled to an order for stay as he has not provided security.
15. On the third issue of whether the application has been made without unreasonable delay the respondent submitted that the applicant waited until the respondent had obtained a proclamation notice to institute the instant application. That he has not explained the delay.
16. The respondent submitted that the appeal herein has no arguable chance of success in that the applicant was offered a chance to prosecute the suit when the judgment was set aside but failed to do so. They urged the court to dismiss the application with costs.

### **Determination**

17. I have considered the application, the pleadings, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The application is brought under order 42 rule 6 of the Civil Procedure Rules, 2010 which sets out the conditions for grant of stay of execution to be:
  - (a) That substantial loss may result unless the order is made.



- (b) That the application has been made without unreasonable delay.
- (c) Such security as the court orders for the due performance of the decree has been given by the applicant.
18. The power of the court to grant stay of execution pending appeal is discretionally and like the exercise of every discretionary power it has to be done judicially - see *Butt -v- Rent Restrictions Tribunal* (supra).
19. In the first place an applicant for stay of execution has to demonstrate that the application was made without unreasonable delay. The application herein was filed on the 7/4/2022 and the order that the applicant is challenging was made on 5/4/2022. The application was therefore made without undue delay.
20. An applicant for stay of execution pending appeal has also to demonstrate that he will suffer substantial loss unless stay is granted. It has been severally held that in an application of this nature what the court has to prevent is a party suffering substantial loss. In the case of *Shell Ltd vs Kiburu and another* (1986) KLR Platt JA stated as follows:
- “ .....If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.
21. The issue of substantial loss has to be shown through affidavit evidence or some other ways. In *Machira t/a Machira & Co. Advocates v East African Standard* (supra) the court stressed that:
- “In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties’ positions so regulated and ordered that injustice is averted.
22. In the instant case the applicant merely stated that he will suffer substantial loss if stay is not granted. He did not substantiate the kind of loss that he may suffer if stay is not granted. It was observed in the case of *James Wangalwa & another -vs- Agnes Naliaka Cheseto* (2012) eKLR that execution is a lawful process and does not amount to substantial loss. An applicant is required to 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 him as the successful party in the appeal. Therefore, a party does not suffer loss by mere act of execution of a decree. The applicant herein has not demonstrated that he will suffer any loss and therefore this condition has not been met.
23. The third condition is that an applicant must provide security for due performance of the decree. The applicant herein has not offered any security but has deposed that he is willing to abide by any reasonable conditions that the court may direct.
24. It is the duty of the court in an application for stay of execution pending appeal to balance the interests of the two parties where on one hand there is a respondent who has a judgment in his favour and



an applicant intending to exercise his right of appeal. The court in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal and stated that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary.

The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

25. In the instant matter, there is a large amount of money involved. I am of the view that I should not deny the applicant his right of appeal if he can provide security for due performance of the decree. In the premises I do grant the prayers sought for stay of execution on condition that the applicant deposits into court within two months of the date hereof, the entire decretal sum as contained in the decree less what has been paid to the auctioneer, failure to which the stay orders will stand vacated.
26. Orders accordingly. Costs of the application to abide by the outcome of the appeal.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**J. NYAGA NJAGI**

**JUDGE**

**In the presence of:**

Mr. Mudanya for Appellant/Applicant

Miss Obiri holding brief Mr. Budotich for Respondent

Court Assistant - Ubah

**30 days R/A.**

