



Wachaga v Wakhungu t/a Diwawe Construction Company (Civil Appeal E304 of 2022) [2022] KEHC 16557 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16557 (KLR)

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

**CIVIL
CIVIL APPEAL E304 OF 2022**

**DO CHEPKWONY, J
NOVEMBER 24, 2022**

BETWEEN

ALICE WANJIRU WACHAGA APPLICANT

AND

**EMMANUEL WAKHUNGU T/A DIWAVE CONSTRUCTION
COMPANY RESPONDENT**

RULING

1. Before court for determination is a Notice of Motion application dated May, 30, 2022, expressed in terms of order 42 rule 6, order 10 rule 11, order 22 rule 22, and order 51, all of the [Civil Procedure Rules](#) and sections 1A, 1B, 3A and 63 (e) all of the [Civil Procedure Act](#), the applicant sought for the following orders:
 - a. Spent;
 - b. Spent;
 - c. That a stay of execution of the judgment and decree in SCCCOMM No E895 of 2022 and all consequential orders thereto be granted pending hearing and determination of this appeal;
 - d. That any other or further orders the court may deem fit and just to grant;
 - e. That costs be in the cause.
2. The application is premised on the grounds on its face and those sets out in the annexed affidavit of Christopher Chengecha, sworn on May 30, 2022. In summary, the grounds are that;
 - a. the appellant/applicant has a good and arguable appeal with very high chances of success.



- b. the respondent's goods have since been proclaimed, hence the applicant's appeal shall be rendered nugatory and a mere academic exercise should execution proceed as chances of recovering the said amount is very slim since the respondent's economic status is unknown and precarious.
 - c. the respondent is minded to proceed with execution of the judgment/decree and hence the applicant will suffer substantial and irreparable loss should execution go on and the appellant/applicant succeeds in the appeal.
 - d. the respondent has never served a decree upon the appellant/applicant or her advocate.
 - e. the appellant has moved the court without unreasonably delay.
 - f. the appellant/applicant is ready and willing to give security and comply with any orders the court may deem fit and just in the interest and balance of justice of the parties herein and for the due performance of the decree in the unlikely event the appeal fails.
 - g. it is only just and equitable that a stay of execution of the judgment and decree in SCCCOMM No E895 of 2022 granted pending hearing and final determination of this application and thereafter final determination of this appeal.
3. In opposition to the application, the respondent filed a replying affidavit dated June 15, 2022 and sworn by Emmanuel Wakhungu. In the affidavit, the said Emmanuel Wakhungu deposes that the applicant seeks that:-
- a. stay of the judgment and decree in SCCCOMM No E895 of 2022 and she has not demonstrated what prejudice she will suffer if the orders sought are not granted.
 - b. that a decree was extracted and duly served upon the applicant.
 - c. the application is an afterthought and only aimed at delay this matter as judgment was delivered on April 11, 2022 and the applicant granted 30 days stay of execution.
 - d. the applicant having failed to pay the decretal sum, counsel instructed an auctioneer to execute and the said auctioneer proceeded as instructed, so that and it is only after a proclamation Notice had been served that the applicant moved the court with the current application.
 - e. the application is not brought in good faith as the applicant failed to obey a court order for paying the decretal sum.
 - f. the memorandum of appeal filed by the Applicant does not raise any triable issues and or any chances of success.
 - g. in the event that the court allows the application, the court needs to strike a balance in the interest of the respective parties by ordering the applicant to deposit the decretal sum in court or joint interest earning account.
4. On June 10, 2022, this court issued directions that the application be canvassed by way of written submissions. To that end, the applicant's submissions are dated July, 25, 2022 while the respondent's submissions are equally dated July 25, 2022.

Analysis and determination

5. I have considered the application for stay before court, the response thereto and the submissions by both counsel for the parties alongside the cited authorities.



6. The main issue for determination by this honourable court is whether or not the applicants have met the threshold for the grant of the orders of stay of execution pending the hearing and determination of an appeal.
7. The principles guiding Courts on applications for stay of execution pending appeal are now well settled and provided for under order 42 rule 6(1) and (2) of the Civil Procedure Rules, 2010, it is provided 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.
8. It should be noted that orders of stay of execution may only be granted upon the court being sufficient reasons. And in considering whether or not to grant stay of execution, the court is called upon to give effect to the provisions of sections 1A and 1B of the Civil Procedure Act, in other words termed as the overriding objectives (O² rule)
9. Accordingly, an applicant seeking for an order of stay of execution pending appeal is under an obligation to satisfy the conditions as set out under order 42 rule 6(2) of the Civil Procedure Rules, which include;
 - a. That substantial loss may result to the applicant;
 - 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.
10. On the issue of substantial loss, I am guided by the Court of appeal decision in the case of Kenya Shell Ltd vs Kibiru & Another (1986) KLR 410, where it was held that;

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay”.
11. Further, on the same issue, the Court in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto & another (2012) eKLR, observed 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. In the instant case before court, the applicant has averred that she stands to suffer substantial loss of KShs 349,870/= since the respondent has already extracted the decree and instructed an auctioneer who has proclaimed the applicant’s goods in execution of the decree, which the respondent confirms. According to the respondent, the applicant has not demonstrated the prejudice she will suffer if the orders are not granted and or the chances of the appeal succeeding.
13. In the case of *RWW vs EKW* (2019) eKLR, the court in considering a stay of execution pending appeal stated as follows;

“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.”
14. The respondent has not given any material of its ability to repay the decretal sum in the event that it is paid and the applicant’s appeal is successful. Accordingly, I am convinced the applicant has demonstrated the substantial loss she is likely to suffer if the appeal is not granted.
15. On the question of whether the application has been made without unreasonable delay, I note that the judgment in the trial court was delivered on April 11, 2022 while the application for stay of execution was made on May, 30, 2022 which is almost 50 days with a delay of about 20 days. In my considered view, this delay is not so inordinate as to deny the appellant her right of appeal.
16. As regards security for costs for due performance of the decree, in her affidavit, the applicant has stated that she is willing to provide security for due performance of the decree. On the other hand, the respondent submitted that if the court is minded to grant the orders for stay of execution, then the applicant be ordered to deposit the decretal sum in court or in a joint interest earning account in the names of both counsel for the parties. It is worthy of note that there is willingness on the part of the applicant to offer security, which is a welcome proposal by the respondent.
17. It is important to note that the power of the court to grant or not to grant stay of execution is discretionary. The Court of Appeal in the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417, held that;
 - a. 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.
 - b. 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.



- c. 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.
 - d. 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. 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.
 - e. 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.”
18. Therefore, the application dated May 30, 2022, the applicant has satisfied the necessary conditions required for grant of stay of execution pending hearing and determination of an appeal.
19. Accordingly, the applicant’s application dated May 30, 2022 is hereby allowed and the applicant granted stay of execution of the decree Milimani SCCCOM No E895 of 2022, pending hearing and determination of the appeal in the following terms:
- a. The applicant shall deposit the entire decretal sum into a joint interest-earning account to be held by both advocates for the parties to this appeal within 45 days of this ruling;
 - b. The applicant to file and serve a record of appeal within 30 days of this ruling;
 - c. Costs of this application shall await the outcome of the appeal.
 - d. Failure to comply with these orders, the order of stay of execution shall automatically lapse.
 - e. The appeal shall be mentioned on February 9, 2023 for purposes of taking directions regarding the hearing of the appeal.

Orders accordingly

RULING DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

D O CHEPKWONY

JUDGE

In the presence of:

Mr Nyabena counsel for respondent

No appearance for and by applicant

Court assistant - Simon

