



REPUBLIC OF KENYA



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**Mega Transporters Co. Ltd v Rage (Civil Appeal E005 of 2022)  
[2022] KEHC 15573 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15573 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E005 OF 2022  
FN MUCHEMI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**MEGA TRANSPORTERS CO. LTD ..... APPLICANT**

**AND**

**ABDI ALI RAGE ..... RESPONDENT**

*(Stay of execution of the judgment delivered in CMCC No. 23 of 2020 on 14th May 2022)*

**RULING**

**Brief facts**

1. The application dated June 2, 2022 seeks for orders of stay of execution of the judgment delivered in CMCC No 23 of 2020 on May 14, 2022 pending the hearing and determination of the appeal.
2. The respondent filed a replying affidavit dated June 21, 2022 in opposition to the application.

**Applicant's Case**

3. It is the applicant's states that judgment was delivered on May 14, 2022 where the court awarded the respondent special damages of Kshs 7,330,350/- together with costs and interest. Being aggrieved by the said judgment the applicant states that he lodged an appeal. The applicant avers that his appeal has high chances of success as it is grounded on matters of law and fact being that the respondent had filed his suit out of time without examining the merits of leave granted to file the suit out of time and the trial court failed to appreciate the appellant's evidence. The applicant further contends that he stands to suffer irreparably if compelled to pay the colossal sum as contained in the decree and further the issue of interest has not been properly computed. The applicant urges the court to grant the orders sought in her application to maintain the substratum of the appeal.



### **The Respondent's Case**

4. The respondent opposes the application and states that he has never been served with the memorandum of appeal or the letter applying for proceedings. The respondent deposes that the applicant has not made any proposal for security and he is apprehensive that if no security is deposited his judgment will be rendered nugatory as he will have nothing to hold on since the applicant directors are currently selling out all known company assets.
5. The respondent contends that the application has been filed too late as the auctioneers have proclaimed and attached the applicant's motor vehicles which were already advertised for sale before the court issued interim orders. Moreover, the allegation that the interest on the decree is wrong is baseless as the claim in the primary suit was for special/material damages and as such interest runs from the date of filing and thus the decree is properly drawn. In any event, the respondent contends that the applicants has not offered to pay for the principal award and then do appeal on the issue of interest. The respondent avers that his claim emanates from a material damage claim where he lost his commercial lorry and further delay is highly prejudicial to him.
6. The applicant filed a supplementary affidavit dated July 12, 2022 and states that the claim is large with an amended decretal sum of Kshs 7,403,653/- and costs of Kshs 386,133/-. The applicant further contends that the motor vehicle was insured by Amaco Insurance on third party cover and the insurance shall settle the claim in the event the appeal fails and thus no loss shall be suffered by the respondent.
7. Parties herein disposed of the application by way of written submissions.

### **The Applicant's Submissions**

8. The applicant submits that his appeal has high chances of success as his appeal raises a question of proof that the motor vehicle belonged to the respondent and whether leave to file the suit out of time was merited and proper in law. The applicant further submits that they filed the application without undue delay and they shall file the record of appeal timeously as the judgment and decree are ready. The applicant states that no prejudice shall be occasioned to the respondent if the court grants unconditional stay pending appeal. In the event the court grants conditional stay, the applicant prays that they are granted 30 days to enable them obtain a financial/bank guarantee for half of the decretal sum and deposit the same in court.

### **The Respondent's Submissions**

9. The respondent submits that the applicant has not satisfied the requirements of order 42 rule 6 of the *Civil Procedure Rules*. Judgment in the trial court was delivered in early April 2022 and the applicant did not apply for stay until the respondent commenced execution and had its lorries attached. The respondent submits that the delay by the applicant before filing the application for stay until he incurred further costs in execution constitutes unreasonable delay which should suffice to deny the applicant favourable exercise of the court's discretion.
10. The respondent submits that the applicant did not offer security in his supporting affidavit but he offered it in passing in his supplementary affidavit. The respondent contends that he has a judgment in his favour and in the event the appeal fails there is a likelihood that he stands to lose the well-deserved fruits of his judgment. The respondent submits that the nature of security to be offered is discretionary upon the court and he urges the court to order that security be secured by depositing the full decretal



sum in court or a joint interest earning account of the parties' advocates within 14 days in the event the court grants the orders of stay.

**Whether the applicant has satisfied the conditions set out in order 42 rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

11. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under order 42 rule 6(2) *Civil Procedure Rules*. Order 42 rule 6 of the *Civil Procedure Rules* stipulates:-

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 orders 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 1<sup>st</sup> 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.

12. Thus under order 42 rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

13. These principles were enunciated in *Butt v Rent Restriction Tribunal [1979]* the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
2. Secondly, 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 the appeal court reverse the judge's discretion.
3. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

### **Substantial loss**

14. Substantial loss was clearly explained in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto \[2012\] eKLR](#):-

“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.

15. The respondent states that execution has already commenced which the respondent has not disputed. The position from the evidence is that the vehicles of the applicant have been attached or proclaimed to be sold. The attachment by the respondent was not unlawful since no stay order had been granted by the time of such attachment. If the said vehicles are sold, the applicant will suffer loss though the execution is lawful. The applicant said he was aggrieved by the entire judgement and that he intends to appeal against it. It is my considered view that the applicant has demonstrated that it will suffer loss if stay is not granted.

### **Has the application has been made without unreasonable delay.**

16. Judgment was delivered on April 14, 2022 and the applicant has brought the present application on June 15, 2022. This is around 1 month out of the statutory period for filing the application. The applicant has explained in his supplementary affidavit that the delay in filing the instant application was occasioned by the online filing system using a wrong email address. It is my considered view that the duration of 1 month does not amount to unreasonable delay and therefore the application has been brought timeously.

### **Security of costs.**

21. The purpose of security was explained in the case of [Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others \[2014\] eKLR](#) the court stated:-

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the [Civil Procedure Rules](#) acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

17. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant in his supplementary affidavit has offered to deposit half the decretal amount in court within 30 days. The respondent is of the opinion that the applicant deposit the full decretal amount in court



or a joint interest earning account in the names of both parties' advocates within 30 days. The applicant has demonstrated that it is willing to give security for judgement.

18. The court has a duty to balance the applicant's right of appeal with the right of the respondent to enjoy the fruits of its judgement. It was stated in the case of *Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR* that:-

“The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

19. The issue herein is whether there is just cause for depriving the respondent his right of enjoying his judgment. The respondent states that the applicant has not satisfied the conditions to warrant him stay of execution. The applicant on the other hand states that his appeal has high chances of success and if the orders sought are not granted, the appeal shall be rendered nugatory. I have perused the grounds of appeal and noted that they raise a question of law on the leave given to the respondent to file his suit out of time. Without going to the merits of the appeal, it is my considered view that the appeal raises arguable points of law and it is in the interests of justice for the intended appellant to be given his right.
20. Having considered all the foregoing issues, I am of the considered view that this application has merit.
21. The application is hereby allowed in the following terms:-
- a. That orders for stay pending appeal are hereby granted on condition that the applicant do deposit half of the decretal amount in an interesting earning account in the joint names of the counsels on record for the parties within forty-five (45) days.
  - b. That in default of the deposit within the period given, the stay orders to be vacated automatically.
  - c. That costs to abide in the appeal.
22. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**F MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 23<sup>RD</sup> DAY OF NOVEMBER , 2022**

