



Davis Kipyegon Rono t/a Clenclaid Creation v Shah & another (Environment and Land Miscellaneous Application E003 of 2022) [2023] KEELC 18180 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2022**

MC OUNDO, J

JUNE 15, 2023

BETWEEN

DAVIS KIPYEGON RONO T/A CLENCLAID CREATION APPLICANT

AND

BHAVIN HARILAL SHAH 1ST RESPONDENT

JYOTI GIRISH SHAH 2ND RESPONDENT

RULING

1. The Applicant herein has filed his Application by way of Notice of Motion dated 9th March 2022 under the provisions of Section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and 3, Order 40 Rule 1, 2, 3 & 4 of the *Civil Procedure Rules*, and all enabling provisions of the law wherein he seeks the following orders:
 - i. Spent
 - ii. That this Honourable Court be pleased to order a stay of execution of the condition for the stay orders issued by the Kericho Magistrate's Court on 21st December 2021 and dated 4.03.2022 the condition being that the Applicant do deposit the decretal sum in court pending hearing of the application for review and setting aside it's ex-parte Judgment in the matter of Kericho CMCC No. 26 of 2019: Bhavin Harilal Shah and Another versus Davis Kipyegon Rono T/A Clenclaid Creation pending the hearing and determination of this application.
 - iii. That this Honourable Court be pleased to order a stay of execution of the condition for the stay orders issued by the Kericho Magistrate's Court on 21st December 2022(sic) and dated 4th March 2022 the condition being that the Applicant do deposit the decretal sum in court pending hearing of the application for review and setting aside it's ex-parte Judgment in the matter of Kericho CMCC No. 26 of 2019: Bhavin Harilal Shah and Another versus



Davis Kipyegon Rono T/A Clenclaid Creation pending hearing and determination of the Memorandum of Appeal.

- iv. That this Honorable Court be pleased to grant the Applicant leave to file an appeal out of time against the order of the trial court issued on 21st December 2021 and dated 4th March 2022 only to the extent of the condition for grant of the order.
 - v. Cost of this application be provided for.
2. The said Application is supported by the grounds thereto and a Supporting Affidavit sworn on 9th March 2022 by Davis Kipyegon Rono Applicant herein to the effect that, he was aggrieved with the decision of the Magistrate's court that he deposits the decretal sum of Ksh. 912,650.54/= in court, as a condition for stay of an ex-parte judgment, pending the hearing and determination of his application seeking stay orders. That the said conditional ruling was not known in law since the stay of an ex-parte judgment could not be granted on condition that the person seeking the stay deposits the decretal sum in Court. That the order offended his fundamental rights and freedom to access justice and to have a fair hearing.
 3. The application was opposed by the 1st Respondent's Replying Affidavit sworn on the 22nd November 2022, in which the 1st Respondent deponed that the orders sought were discretionary and the court should be guided by the provisions of the law. That the Applicant had neither demonstrated why he should not deposit security as ordered by the court nor how his appeal would be rendered nugatory were the funds deposited in court. That the Applicant had further not annexed his Memorandum of Appeal so as to guide the court on whether or not the appeal was arguable and therefore the court could not proceed to imagine that the appeal was arguable. That the application was made in bad faith and intended to delay the finalization of the matter.
 4. There was no response from the 2nd Respondent.
 5. On the 12th May 2022, the court directed that the parties dispose of the application by way of written submissions.

Applicant's submissions.

6. In support of his application, the Applicant relied on the decision in *Kenya Power & Lighting Co Ltd v Abdulkakim Abdulla Mohamed & another* [2017] KLR where the Court of Appeal had held that an order that demanded a party to pay substantial sums of money in a claim which was yet to be proved and respect of which the court had found that there was an arguable defence raising triable issues, was not an order that facilitated or advanced the just proportionate, affordable and resolution of disputes as demanded by the overriding objectives.
7. That in the case of *Pilot Technical Services Ltd vs. Amenan Electrical Services Ltd* [2011] eKLR, the Court of Appeal had also held that the issue of a decretal sum did not arise where a case was to be proved afresh as the sum could change.
8. The Applicant then framed his issue for determination as to whether there would be substantial loss on his part to which he proceeded to submit that the purpose of stay of execution was to preserve the substratum of the case as was held in the case of *Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi).
9. He contended that he would suffer substantial loss were the stay not granted and proceeded to rely on the decision in the case of *Mukuma v Abuoga* [1988] KLR 645 where the Court of Appeal had



defined the meaning of substantial loss before submitting that one of the fundamental principle of natural justice was that a party must be heard before being condemned.

10. That where an ex parte judgment was set aside, the impact was that the suit is re-opened for hearing and prosecution as was held in the case in *One Way Cleaning Services Limited v Sirak Builders Limited* [2019] eKLR and therefore should this application not be allowed, the whole appeal would be rendered nugatory.
11. Further submission was to the effect that he had a short time within which to comply with the said adversarial orders and if stay was not granted he stood to lose his fundamental right of access justice and fair hearing and therefore he would suffer irreparably as execution would ensue. This, he submitted, was against the rules of natural justice.
12. On the second issue as to whether he should be granted leave to file out of time, the Applicant submitted while relying on the provisions of Section 79G of the *Civil Procedure Act*, that the law gave an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court (read Land and Environment Court.)
13. That in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the court had held that it was clear that the discretion to extend time was unfretted and that it was incumbent upon the Applicant to explain the reasons for delay in making the Application for extension.
14. His submission was that he had indulged the Magistrate's Court seeking stay of execution of the judgment *vide* an application dated 20th December 2021 only for the court, on 4th March 2022 to give its order for a temporary stay of execution of the said judgment on condition that he deposited the entire decretal amount. That by the time the said orders were issued, the period to lodge an appeal had already lapsed which then necessitated him to file the current application seeking leave to file an appeal out of time.
15. That he (Applicant) in seeking the said orders had come to court with clean hands and therefore sought that the court exercises its discretion upon considering all circumstances of the case. That he had demonstrated to the highest standard that where an interlocutory Judgment and decree had been set aside, the Magistrate's court, by ordering that a decretal sum be paid, had condemned him without being heard and therefore this court should grant stay orders to enable him ventilate his appeal without any encumbrance.

1st Respondent's submissions.

16. The 1st Respondent's submissions in opposition of the application was that in the trial court, the Applicant had filed his defence where he had participated in the pre-trial and had taken a date for hearing of the suit. His contention in the present application was that since he had filed an appeal there ought to be stay of execution. That for the Applicant's application to succeed he ought to have shown/demonstrated that his intended Appeal was arguable and would be rendered nugatory should the orders sought not be granted. The Applicant in the present case had not attached his Memorandum of Appeal and therefore the court would be lost as to whether the appeal was arguable or not.
17. That the order by the Court for the Applicant to deposit the decretal sum in court, as security was a good discretion and was in furtherance of the provision espoused in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
18. That the Applicant had not demonstrated that he would be prejudiced should the money decreed be deposited in court as security and that it would render the appeal nugatory. That the Applicant had



also not shown/demonstrated which of his rights would be infringed should security be deposited in court. The trial court therefore did not misdirect itself as it had properly applied the principles of law applicable in the circumstance.

Determination.

19. I have considered the Applicant's application, Supporting affidavit and submissions thereto as well as the cited authorities in contrast to the 1st Respondent's opposition here to.
20. From the Applicant's application, what comes out clearly was that he was seeking for orders of stay of execution of the Magistrate's order seeking that he deposits the decretal sum pending the hearing of his application for review and setting aside of that court's judgment.
21. I have considered the fact that the matter in Kericho CMCC No. 26 of 2019: Bhavin Harilal Shah & Another v Davis Kipyegon Rono T/A Clenclaid Creation had proceeded for hearing ex-parte on the 7th October 2021, after the Applicant had failed to turn up to defend the same wherein Judgment had been passed on the 11th November 2021 in favour of the Plaintiffs/Respondents herein for a claim of Ksh 912,620.54/= . That after the passing of the said Judgment, the Applicant herein had filed an application dated 20th December 2021 seeking to review, vary and/or set aside the said judgment to which the learned Magistrate *vide* an order dated the 4th March 2022 had stayed execution of the Judgment on condition that the Defendant /Applicant deposits the entire decretal amount in court, pending the hearing and determination of the Application. The Applicant has now filed the present application seeking stay of the said court's order pending the hearing and determination of his intended Appeal, citing that those orders were not known in law and that he would be prejudiced were stay orders not issued.
22. The Applicant further sought for leave to file his Appeal out of time against the order of the trial court issued on 21st December 2021 and dated 4th March 2022 only to the extent of the condition for grant of the order, citing that the delay was caused when he had awaited the delivery of the court's decision on his application for stay of judgment *vide* an application dated 20th December 2021. That by the time the said orders were issued, the period to lodge an appeal had already lapsed.
23. I find the issues for determination arising therein as namely:
 - i. Whether the Applicant has satisfied the court on conditions for grant of stay of execution pending appeal.
 - ii. Whether the court should extend time for the Applicant to file his Appeal.
 - iii. What orders this court should make.
24. On the issue of whether the Applicant is deserving of the orders of stay of execution pending the hearing and determination of the appeal herein, the law applicable is Order 42 Rule 6 of the [Civil Procedure Rules](#) which stipulates as follows:

"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.”
25. There are three conditions for granting of stay order pending an intended appeal under Order 42 Rule (6) (2) of the *Civil Procedure Rules* to which :
- (a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - (b) The application is brought without undue delay and
 - (c) 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.
26. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicants to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour.
27. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
28. The Applicant herein contends that he would suffer irreparable loss if stay was not granted as he was required to pay the decretal amount of Ksh 912,620.54/= security as a condition for stay pending the hearing and determination of his application to review, and/or set aside the trial court’s ex-parte judgement of which, judging from the authorities herein cited, the Applicant is under mistaken view that the said application has been allowed and the impugned judgment set aside.
29. Platt, Ag JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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 corner stone of both jurisdictions for granting a 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”.
- On the part of Gachuhi, Ag JA (as he then was) at 417 held:
- “It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be” In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding” On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”



30. In the application before me, the Applicant has pleaded that he would suffer substantial loss if the application for stay of execution, of the Magistrate's order to deposit Ksh 912,620.54/= as a condition for stay pending the hearing and determination of his application to review, and/or set aside the trial court's ex-parte judgement is not granted. It is trite law that the monetary loss could not amount to substantial loss since it was capable of being quantified and could be recovered by the Applicant in the event that the Appeal succeeded. I find that even if orders sought herein are not granted, there is no evidence that the Applicant will suffer substantial loss. I make this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of their Judgment.
31. On the second condition, there is no dispute that the impugned ex-parte judgment was delivered on the 11th November 2021 wherein the Applicant had sought for stay of execution in the trial Court. The application was granted a conditional stay *vide* an order of 4th March 2022 wherein the present application as well as the Notice and Memorandum of Appeal were subsequently filed on the 9th March 2022. I find that the said application is brought without undue delay.
32. On the last condition as to provision of security, the Applicant in the present application has not offered or indicated his willingness to furnish security for a grant of the order for stay of execution which is mandatory as per the wording of Order 42 Rule 6 92) (b) of the Civil Procedure Rules, and therefore having found that all the three conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Applicant and further, having regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this Court is not inclined to grant the order of stay of execution so sought as the said order would not serve any purpose and therefore I find as follows;
- i. Prayers (ii) and (iii) sought in the Applicants' application have automatically failed.
 - ii. Since the Memorandum of Appeal has already been filed, the Applicant shall prepare, file and serve his Record of Appeal within 45 days from the date of this ruling.
 - iii. Costs be in Cause.

**DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 15TH DAY OF JUNE
2023**

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

