



REPUBLIC OF KENYA



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**Farm Engineering Industries Limited v Patel Kalyanji Premji &
Company & another (Miscellaneous Application 270 of 2018)
[2021] KEHC 79 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 79 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 270 OF 2018
MW MUIGAI, J
SEPTEMBER 23, 2021**

BETWEEN

FARM ENGINEERING INDUSTRIES LIMITED APPLICANT

AND

PATEL KALYANJI PREMJI & COMPANY 1ST RESPONDENT

UPSTATE KENYA AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant filed Notice of Motion Application dated 23rd March 2021 for orders; -
 1. A temporary injunction be granted restraining the Respondent's herein by themselves or their employees, servants, agents, assigns, auctioneers or any other person whomsoever from proclaiming, attaching, removing, selling, auctioning or dealing adversely in any way whatsoever with any of the Applicant's property pending the hearing of this Application.
 2. In the alternative to the above, stay of execution of the purported Decree issued on 26th January 2021 for Kshs.15, 176, 882 be granted pending the hearing of this Application.
 3. this Court on 26th January 2021 and the resultant decree be granted pending the hearing and determination of the Applicant's intended Appeal.



2. Which Application was supported by the sworn Affidavit of Gurprith Bhurji dated 23rd March 2021 and based on the grounds that; -

1. The 1st Respondent appointed the 2nd Respondent to execute the decree issued on 26th January 2021 for the alleged sum of Kshs.15, 176, 882. The auctioneer wrongfully and unlawfully issued a proclamation of attachment of movable property purporting to claim the Applicant's alleged movable property described in the schedule included therein.
2. The Auctioneer threatens to remove to its premises and sell by auction the Applicant's movable property at the expiry of 7 days from the said 18th March 2021 unless the Applicant pays the sum of Kshs.17, 102, 007.96.
3. The Applicant has not been served with the purported Decree. The decretal amount is inclusive of the amount due to the 1st Respondent of Kshs.10, 113, 903 and the Arbitrator's fee of Kshs.552, 500. The Respondent is however seeking to recover the sum of Kshs.15, 176, 882 from the said unlawful execution process. The amount is inflated.
4. No proper proclamation took place since the movable assets were not in the Applicant's premises on the date of the purported proclamation 18th March 2021. In particular motor vehicles registration number KHMA 611L, KHMA 610L and KHMA 609L were improperly listed among the proclaimed assets.
5. The Applicant has filed a Notice of Appeal and is yet to receive the certified typed proceedings and Ruling of the Court to lodge its Appeal at the Court of Appeal. The execution of the resultant decree will render the appeal nugatory and a mere academic exercise.
6. The Auctioneer did not conduct a proper proclamation and the purported proclamation of the motor vehicles offends the provisions of the [Auctioneers Act](#).
7. The Applicant is willing to deposit in court security for the principal decretal sum or as will be directed by the court.
8. The Respondent shall not suffer prejudice if the orders sought are granted.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of Patel Kalyanji Premji dated 3rd May 2021 and stated that; -

1. The Court delivered its Ruling on 26th January 2021 and the Applicant was represented. Through its Counsel Ms. Kirundi she prayed for the stay of execution for 30 days which Application was granted.
2. The Decree issued on 10th March 2021 was extracted pursuant to the said Ruling of 26th January 2021 and the Decree was served upon the Applicant's Advocates. The 30 days of execution lapsed on 25th February 2021 and no further application for stay extension was sought by the Applicant.



3. The Respondent has only been served with the Notice of Appeal and is yet to be served with a Memorandum of Appeal.
4. The Auctioneer executed its instructions and proclaimed the Applicant's goods having complied with all the legal requirements.
5. The appeal has no chance of success since the Applicant failed to furnish proof to the court that the Arbitral Award was contrary to Section 37 of the *Arbitration Act*.
6. If the court is inclined to grant a stay then it should direct half of the decretal amount be paid to the Respondent and the other half deposited in a joint interest earning account within 30 days from the date of the order.
7. The Respondent is able to refund the decretal sum if and when the appeal succeeds.
8. The Application is a delaying tactic aimed at denying the Respondent the fruits of the ruling.

APPLICANT'S SUBMISSIONS

4. The Applicant submitted that the Application meets the threshold laid out under **Order 42 Rule 6 of CPR** and that the Applicant is exposed to insurmountable substantial loss if the Application is not allowed and the orders sought herein not granted.
5. The Applicant also argued that if stay of execution is not granted the intended Appeal shall be rendered nugatory. On this ground the Applicant relied on the case of *James Wangalwa & Another V Agnes Naliaka Cheseto*[2012] eKLR where the court posited that; -

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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

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.”

6. It was the Applicant's submission that the Auctioneer did not conduct a proper proclamation since he did not gain access to the workshops and/or stores thus illegal, null and void. The Applicant added that the Auctioneer would not have assessed and valued the assets they had not seen or properly proclaimed. This is contrary to **Rule 12(1)(b) of the Auctioneers Rules 1997** which provides that; -

Movable other than perishable goods and livestock

- (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—



- (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.

7. The Ruling was delivered on 26th January 2021, the Applicant submitted that if filed a Notice of Appeal on 29th January 2021 and filed the Application herein on 23rd March 2021 without any delay after it received the purported proclamation notice on 18th March 2021.

8. The Applicant submitted that its willing to deposit in court the principal amount as security for costs or as the court may direct. That the Application meets the conditions set out in **Order 42 Rule 6(2)** and should thus be granted. The position was held in the case of ***Focin Motorcycle Co. Limited versus Ann Wambui Wangui & another [2018] eKLR*** where it was stated that; -

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.***//

1ST RESPONDENT'S SUBMISSIONS

9. The 1st Respondent submitted that the injunctive orders sought in the Application are no

10. The Respondent also submitted that on the likelihood of substantial loss, the Applicant has not demonstrated that by way of evidence how the Respondent will not be able to refund the decretal sum in the event the appeal is successful. The Respondent submits that its able and in a position of making good the decretal sum if the Appeal succeeds. The Respondent relied on the case of *Nesco Services Limited versus Cm Construction (Ea) Limited [2019] eKLR* where the court stated; -

19. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See *Caneland Ltd. & 2 Others vs. Delphis Bank Ltd.* Civil Application No. Nai. 344 of 1999.

20. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success since lack of means per se is not necessarily a ground for granting stay. As was held in *Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991*, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

21. In this case none of the parties has exhibited the proceedings to show the nature of the evidence adduced in order for the court to determine the chances of success of this appeal.



22. In this application however, I agree with the respondent that the applicant was very economical with in terms of material. Nowhere in the affidavits filed has it shown the manner in which it stands to suffer substantial loss. It is not for example contended that the Respondent's position is so precarious that he is unlikely to refund the decretal sum once the same is paid over to her."

11. The Applicant only filed a Notice of Appeal and no Memorandum of Appeal. It was the Respondent's submission that the Applicant is determined to frustrate the Respondent from enjoying the fruits of the judgment. The Respondent is yet to pay the Arbitrator's fees of Kshs.552, 000. The Applicant has not given an assurance of its willingness to abide by any orders as to security that the court may issue. In the case of *Gianfranco Manenthi & another versus Africa Merchant Assurance Company Ltd* [2019] eKLR the court stated; -

Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security.

****In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.****//

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

DETERMINATION

12. After considering the application and the submissions by the parties, the issue for determination, and that is whether the order of stay of execution should be granted. Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**, the relevant part of which states as follows:

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

13. An application for stay of execution of a decree or order pending appeal should satisfy the conditions set out in Order 42 Rule 6(2) CPR, aforementioned:
 - 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

14. The Applicant argued that it will suffer substantial loss and irreparable damage if execution of the Decree is not stayed and the Auctioneer proceeds with the intended proclamation of the Applicant's property. The sale by auction of its movable property as proclaimed at a fraction of their actual value would result in substantial loss to the Applicant.

Application made without unreasonable delay

15. The Ruling was delivered on 26th January 2021 in the presence of both parties and the Applicant sought 30 days stay of execution. The 30 days of execution lapsed on 25th February 2021. The Applicant expressed its apprehension that it is yet to receive the certified copies of proceedings and Ruling of the Court to lodge its Appeal at the Court of Appeal. The Auctioneer's Proclamation of Attachment of Movable Property was issued on 18th March 2021. The present Application was filed on 23rd March 2021. In these circumstances, the delay cannot be said to be inordinate.

Security

16. The Applicant indicated that it is willing to deposit in court security for costs as will be directed by the Court. It was also the Applicant's concern that should the decretal amount be paid to the Respondent; it does not have the capacity to repay such amount should the appeal succeed.
17. In the case of *National Industrial Credit Bank Ltd versus Aquinas Francis Wasike and Another* [2006] eKLR the Court of Appeal stated:

This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what



resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”**//

18. In response to the Applicant’s concern, the Respondent proclaimed that it is a construction company with sound liquidity and is therefore able and in position of making good the decretal sum if the appeal succeeds.

DISPOSITION

Considering all the relevant matters, the Court is persuaded to grant an Order of Stay of Execution in terms of prayer 7 of the Notice of Motion filed on 23rd March 2021 stay pending right of appeal on condition that the Applicant deposits half the decretal amount into a joint interest earning account in the names of the respective parties’ advocates on record within 90 days of the date of this Ruling.

The issue of whether an appeal lies or not is not pursued and therefore the matter can only be considered by Court of Appeal in line with the Supreme Court recent binding authorities of Nyutu & Synergy cases.

DELIVERED SIGNED & DATED IN OPEN COURT ON 23rd SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

M. M. GITONGA ADVOCATES FOR THE APPLICANT

KIPYATOR KIBET & ASS. ADVOCATES FOR THE RESPONDENT

COURT ASSISTANT - TUPET

