



**Aswa Developers and Contractors v Spire Bank Limited
(Formerly Equitorial Commercial Bank) (Civil Case 278 of 2016)
[2021] KEHC 232 (KLR) (Commercial and Tax) (28 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 278 OF 2016
WA OKWANY, J
OCTOBER 28, 2021**

BETWEEN

ASWA DEVELOPERS AND CONTRACTORS APPLICANT

AND

**SPIRE BANK LIMITED (FORMERLY EQUITORIAL COMMERCIAL
BANK) RESPONDENT**

RULING

1. Through the application dated 15th December 2020 the applicant seeks orders to stay the execution of the ruling and order delivered by this court on 19th November 2020 pending the hearing and determination of the intended appeal.
2. The application is supported by the affidavit sworn by John Wageche and is premised on the following grounds; -
 - a. On 19th November 2020, lady Justice W. A. Okwany delivered a ruling and issued an order compelling the defendant to refund the sum of Kenya shillings two million, four hundred and eighty, three hundred and Eighty-two and twenty-eight cents (2,480,382.28/=) debited from the plaintiff's bank account number 0403201601.
 - b. The thirty day of stay of execution granted by the court lapses on the 19th of December 2020 or thereabout leaving the defendant/applicant with no legal protection against the execution of the order.
 - c. The defendant shall suffer substantial loss as it has been condemned to refund the monies which will render the intended appeal nugatory



- d. There is imminent danger of execution by the plaintiff if the instant application is not allowed
 - e. The defendant/applicant is a reputable company capable of complying with directions and/or orders by this honourable court as regards security for due performance of the order.
 - f. There is no prejudice that shall be occasioned on the plaintiff if the instant application is allowed
 - g. The instant application has been made without any unreasonable delay
 - h. It is in the interest of justice that the instant application is allowed as prayed.
 - i. This honourable court has the power to grant the orders sought.
3. The respondent opposed the application through the replying affidavit of Stephen Wangombe who states that the application does not meet the conditions set under Order 42 Rule 6 of the *Civil Procedure Rules* for the granting of stay of execution pending appeal as they have not demonstrated that they will suffer substantial loss if stay is not granted. He further faults the applicant for failing to offer security for the due performance of the decree should the appeal be unsuccessful. It is the respondent's case that the it will suffer great prejudice if the orders sought are granted owing to the colossal amount of money that the applicant owes them. He contends that the respondent's deponent averred that the plaintiff is a company of means and is capable of refunding the decretal sum to the applicant should the appeal be successful.
4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of stay of execution of ruling dated 19th November 2020 pending the hearing and determination of the intended appeal.
5. Order 42rule 6(1) of the Civil Procedure Rules stipulates as follows regarding the principles governing the granting of orders for stay of execution pending appeal: -
- “No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”
6. Further Order 42, rule 6(2) states: -
- “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.”
7. In *Butt vs Rent Restriction Tribunal [1979]*, the Court of Appeal outlined the factors to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the



power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, that 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. Thirdly, that 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. Finally, that 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.

8. In the present case, the applicant states that it will suffer substantial loss as it will be condemned to refund monies which would render the appeal nugatory as there was imminent danger of execution. In a rejoinder, the respondent submitted that the defendant did not demonstrate that it will suffer substantial loss if the stay was not granted. According to the respondent, the applicant did not disclose or explain the loss to be suffered.
9. The court in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto MISC application 42 of 2012 eKLR* the court held inter alia 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. This is what substantial loss would entail.

10. From the above cited authority, it is clear that it is not enough to merely state that one would state that they are likely to suffer substantial loss should the execution take place, the applicant is expected to demonstrate how the execution will irreparably affect it. My finding is that the applicant did not satisfy this condition on substantial loss.
11. On the issue of security for the due performance of the decree, the respondent submitted that, as a prerequisite of order 42 rules 6 of the civil procedure rules, one must furnish security for the performance of the decree. The respondent submitted that the applicant failed to provide security. The applicant, on the other hand, submitted that it is ready and willing to abide by the terms of security as directed by the court.
12. In addressing the issue of security, the court in *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others [2015] eKLR*, stated that; -

“... 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.”



13. Further in *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd [2019] eKLR*, the court observed: -

“... 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.”

14. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, the court held 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.”

15. A perusal of the application reveals that the applicant did not offer any security for the satisfaction of the decree. The applicant only stated that it is a reputable company capable of complying with any directions or orders of the court. An order of stay of execution is a discretionary relief to ensure that one would not be worse off by virtue of an order of court. It is apparent that the applicant has not satisfied the conditions for granting stay of execution however this court is guided by the overriding principle that justice would be more served if the stay of execution is granted.

16. In the upshot, I hereby grant the prayer for stay of execution, but on condition that will ensure that the right of the respondent to enjoy the fruits of the decree are protected and balanced with the applicant's right to prefer an appeal against the court's decision.

17. Consequently, I allow the instant application on the following terms: -

- a) There shall be stay of execution of is a stay of execution of the ruling and order issued herein on 19th November 2020 on condition that; -
 - i) The applicant shall within 30 days from the date of this ruling, pay to the respondent half of the decretal sum being Kshs. 1,240,191.14 and deposit the balance thereof in an interest earning account to be held in the joint names of counsel for both parties in a banking institution of repute.
 - ii) That in the event of failure to comply with condition in a) i) above, the respondent shall be at liberty to proceed with the execution
- b) The costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered via Microsoft Teams at Nairobi this 28th day of October 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.



W. A. OKWANY

JUDGE

In the presence of:

Ms Diru for Kenneth Wilson for Defendant/Applicant.

Ms Wamuyu for Plaintiff/Respondent.

Court Assistant: Margaret

