



Shah v Centre Park Plaza Limited & another (Environment and Land Appeal E080 of 2022) [2023] KEELC 19295 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E080 OF 2022
OA ANGOTE, J
JULY 27, 2023**

BETWEEN

REENA SHAH APPELLANT

AND

CENTRE PARK PLAZA LIMITED 1ST RESPONDENT

JAPANESE VEHICLE SERVICE CENTRE LIMITED 2ND RESPONDENT

(An application for stay of execution of the Judgment of the Chief Magistrates Court at Nairobi dated September 16, 2022 in Nairobi Chief Magistrates Civil Case No E071 of 2021, Centre Park Plaza Limited & Anor v Reena Shah)

RULING

1. Before this court for determination is the appellant/applicants' notice of motion dated September 22, 2022 brought pursuant to the provisions of order 42 rule 6, order 22 rule 22, order 51 rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) seeking the following reliefs;
 - a. That this Honourable Court be pleased to grant a stay of execution of the Judgement and Decree issued in NRB CMCC No E071 of 2021, Centre Park Plaza Limited & Anor vs Reena Shah pending the hearing and determination of this Appeal.
 - b. That the costs of this Application be in the cause.
2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Reena Shah, the Appellant herein of an even date, who deponed that by a Judgement dated and delivered without notice to her Advocates on September 16, 2022 in NRB CMCC No E071 of 2021, the learned Magistrate partly allowed the Respondents suit.



3. According to the Appellant, the Judgement was scheduled to be delivered on September 2, 2022 but the same was not ready and was deferred to September 9, 2022; that on the 9th September, a notice was issued informing the parties that the Magistrate was bereaved and the Judgement would be delivered on September 13, 2022; that she is aware that September 13, 2022 was gazetted as a Public Holiday for the swearing in of the new President and that there was no notice thereafter to indicate when the judgement would be delivered.
4. The Appellant deposed that to her surprise, on September 19, 2022, she received a message from the Judiciary's case tracking system indicating that the Judgement was delivered on September 16, 2022; that she informed her Counsel who was equally surprised by the same but managed to obtain a handwritten copy of the Judgement and that she perused the Judgement and is dissatisfied with the same and has to that end proceeded to file the present Appeal.
5. The Appellant deposed that she is apprehensive that the Respondents will levy execution against her; that the decretal sums are substantial and it would be in the interest of justice to grant a stay of execution to enable the hearing and determination of the Appeal and that there is a real threat of execution by the Respondent who has already written a letter threatening to execute.
6. It is the Appellant's case that if the orders for stay of execution are not granted, her assets will be sold and the intended Appeal rendered nugatory; that she is willing to abide by any condition by this Court, including depositing the decretal amount in court or as the court may direct.
7. In response to the application, the Respondents, through the 1st Respondents' Director deposed that upon conclusion of the hearing and subsequent confirmation of filing of submissions before the Trial Court on the June 27, 2022, the Magistrate directed that Judgement in the matter would be delivered on September 2, 2022 and that the aforesaid directions were given in the absence of their Counsel, but Counsel for the Appellant served them with the Judgement Notice.
8. The Respondent's director deposed that on September 2, 2022, Counsel for the Appellant was absent and the Court indicated that the Judgement was not ready and would be delivered on September 9, 2022; that their Counsel duly served the Appellant's Counsel with the Judgement notice and that vide a notice dated September 6, 2022 posted on the Kenya Law Report website, it was indicated that the Magistrate was bereaved and as such the judgements that were to be delivered on September 9, 2022 were rescheduled to September 13, 2022;
9. It was deposed that September 13, 2022 was subsequently declared a public holiday for purposes of the presidential swearing in ceremony and as such all matters for the day were set to be mentioned the following day; that their Counsel informed the Appellants' Counsel of the same vide an email sent on September 14, 2022 at 8:18 am and that on the aforesaid date, the Court noted that the Judgement was not ready but undertook to deliver the same on the September 16, 2022, on which date the Court delivered the Judgement in the absence of the Appellant.
10. It was deposed that it is only after the issuance of the Judgement Notice that they were served with this Courts' orders of interim stay dated September 26, 2022; that the application is an afterthought made with the sole intention of delaying execution; that the fact that execution has been put in motion or is likely to be put in motion does not by itself amount to substantial loss as the process of execution is legal and that the application has not met the threshold for the grant of stay as no substantial loss has been demonstrated.
11. According to the Respondents, the Appeal is not arguable and does not raise any issue worthy of consideration by the Court; that as advised by Counsel, it is trite that the general principle is that a successful party is entitled to the fruits of their judgement and that when deciding whether or not to



issue a stay of execution, the Court should weigh it against the success of a litigant who should not be deprived of the fruits of his/her judgement.

12. In conclusion, the Respondents' Director deposed that without prejudice to the foregoing, if the Court deems it fit to allow the application, the Applicant must be compelled to deposit an aggregate amount of Kshs 3, 807,875.66/= in a joint interest earning account held jointly by their Advocates.
13. The Appellant filed a Supplementary Affidavit on 26th October, 2022 denying that the application is an afterthought and asserted that the same is made pursuant to her legal right to appeal the judgement of the Court; that the application was made immediately her Counsel obtained and reviewed the handwritten judgement for purposes of filing an Appeal and that contrary to the Respondents' assertions that the decision is well reasoned, they have filed a cross-appeal signifying their dissatisfaction with the decision of the Trial Court.
14. Both parties filed submissions and authorities which I have considered.

Analysis & Determination

15. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is whether the Appellant/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal.
16. The principles upon which the court may stay the execution of orders appealed from are well settled. The same are set out under Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant parts of which provide 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.”
17. Further reliance has been put on Order 22 Rule 22(1) of the *Civil Procedure Rules* which provides that a court may stay execution upon sufficient cause being shown. In discussing the case concept of stay



pending Appeal, the Court of Appeal in the case of Halai & Another vs Thornton & Turpin (1963) Ltd [1990] eKLR held *inter-alia*:-

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

18. It is evident from the above provisions and the cited authority that the grant of orders of stay of execution is subject to the court’s discretion, the court being guided in this regard by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in Butt vs Rent Restriction Tribunal [1982] KLR 417 who stated thus;

- “1. 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.
2. 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.
3. 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. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and 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.
5. 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.”

19. The Motion herein relates to the Judgement delivered by the Magistrates Court on September 16, 2022. The suit was instituted by the Respondents herein as the Plaintiffs seeking as against the Appellant as the Defendant Kshs 2, 040, 496 in favour of the 1st Plaintiff, Kshs 1, 882, 983/= in favor of the 2nd Plaintiff, damages for loss of business and breach of contract together with costs and interest of the suit.

20. The issues in the suit revolve around whether there existed a valid tenancy between the parties; whether the Respondents had paid any monies to the Appellant; whether there was a breach of the terms of the Agreement by the Appellant and the Respondents entitlement to the orders sought.

21. The matter proceeded for hearing and vide its Judgement of September 16, 2022, the Court found that the Respondents/Plaintiffs had proved their prayers against the Appellant/Defendant. The court ordered the Appellant to pay the Respondents the sums of Kshs 1, 850,000 being 3 months’ rent paid and deposit of Kshs 500,000 paid by the 1st Plaintiff and not utilized, Kshs 500,000 paid to the 2nd



Defendant being rent deposit, Kshs 179, 535 as expenses incurred in erecting the electric fence and costs and interests of the suit.

22. The Appellant is aggrieved by this decision and has filed a Memorandum of Appeal dated September 21, 2022. She asks this Court to stay the execution of the judgment pending the determination of the Appeal.
23. In determining whether or not to grant a stay of execution, the Court must be satisfied that sufficient cause has been demonstrated. As to what constitutes sufficient cause in this regard, the decision by the Court in *Antoine Ndiaye vs African Virtual University* [2015]eKLR, is instructive.

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; 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.”

24. Before delving into the merits of the application, the court will tackle the aspect of whether the Motion has been brought without unreasonable delay. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & Another vs Priscillah Boit & Another* [2014] eKLR where Munyao J stated as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012* the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

25. In the instant case, the Judgment sought to be appealed against was delivered on September 16, 2022 whereas the present application was filed on the September 22, 2022. This constitutes a 7-day window between the delivery of the judgement and the present application.
26. The Appellant has averred that her, together with Counsel, were unaware of the delivery of judgement and that it was only upon finding out and obtaining a copy of the judgement that the present application was filed. Indeed, the Judgment was delivered in the absence of the Appellant and in the circumstances, the filing of the application seven days after the fact does not in the Court’s opinion constitute unreasonable delay.



27. What constitutes substantial loss was discussed by the Court of Appeal in the case of *Rhoda Mukuma vs John Abuoga* [1988] eKLR where their Lordships stated as follows;

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

28. In the case of *Tropical Commodities Suppliers Limited & Others vs International Credit Bank Ltd (in liquidation)* (2004) 2 E.A 331 the Court persuasively defined the aspect of substantial loss thus;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal.”

29. In considering whether the Appellant will suffer substantial loss unless an order of stay of execution is granted, the Court is guided by the decision of the Court of Appeal in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] eKLR in which the court stated as follows:

“It is usually a good rule to see if Order 41 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 cornerstone of both jurisdictions for granting stay.”

30. The Appellant asserts that she stands to suffer substantial loss if the stay is not granted. She states that execution is eminent; that the decretal amount is colossal and that considering the financial means of the Respondents are unknown, it is unlikely that the Respondents will be able to refund the decretal amount.

31. It is not in dispute that the decree whose stay of execution is sought herein is a monetary decree. In considering whether or not to grant the order of stay, the Court is mandated in as far as possible, to balance the interests of the parties by not only safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum upon the success of the appeal.

32. It has been stated by the Courts that whereas the Applicant bears the onus of proving that an Appeal in a monetary decree would be rendered nugatory by the Respondent’s inability to pay back the decretal sum, where a reasonable fear has been raised, the burden shifts to the Respondent to prove his ability to do so. This position was stated by the Court of Appeal in *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & another* [2006] eKLR as follows:

“... while the legal duty is on the 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 an applicant to know in detail the resources owned by a Respondent or 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.”

33. What amounts to reasonable grounds for believing that a 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 this case, the Appellant contends that the decretal amount is colossal and considering the financial means of the Respondents are unknown, it is unlikely that the Respondents will be able to refund the decretal amount leading to substantial loss.
34. The Respondents, despite being alive to this assertion, have not made any attempts to refute the same. With this in mind, the Court finds that the Appellant has demonstrated that she stands to suffer substantial loss if the stay is not granted.
35. Noting that the Applicant is willing to deposit the decretal sum and the Respondent is amenable to the same being deposited in a joint account of the two advocates, I shall allow the application on condition that the decretal amount is deposited in an interest earning joint account.
36. The upshot is that the Appellant’s Notice of Motion application dated September 22, 2022 is allowed as follows:
 - a. There shall be a stay of execution of the Judgment of the Chief Magistrates Court at Nairobi dated September 16, 2022 in Nairobi Chief Magistrates Civil Case No E071 of 2021 pending the hearing and determination of the Appellant’s appeal on the following condition;
 - i. That the Appellant does deposit the full judgement sum being Kshs 3,029,535 in an interest earning account in the joint names of the Advocates on record for the parties within 30 days.
 - ii. In default of compliance with the deposit of the decretal amount within 30 days, the orders for stay will be automatically vacated.
 - b. The costs of the application shall be borne by the appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023.

O. A. Angote

Judge

In the presence of;

Ms Kyera holding brief for Ms Thingo for Respondent

Mr. Shah for the Appellant

Court Assistant - Tracy

