



**Gichimo t/a Jerusalem Gate Enterprises v Kooner (Sued in their capacity as Trustees of Baptist Bible Mission of East Africa Registered Trustees); Peakscale Limited (Third party) (Environment & Land Case 310 of 2016) [2023] KEELC 19260 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19260 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 310 OF 2016  
A OMBWAYO, J  
JULY 26, 2023**

**BETWEEN**

**GEORGE LM GICHIMO T/A JERUSALEM GATE ENTERPRISES .... PLAINTIFF**

**AND**

**JAMES EBERHARD OLAF KOONER (SUED IN THEIR CAPACITY AS TRUSTEES OF BAPTIST BIBLE MISSION OF EAST AFRICA REGISTERED TRUSTEES) ..... DEFENDANT**

**AND**

**PEAKSCALE LIMITED ..... THIRD PARTY**

**RULING**

1. The judgment debtor applicant has come to court seeking orders that that this honorable court be pleased to stay execution of the judgment and decree herein pending the hearing and final determination of the intended appeal and That the costs of this application be provided for.
2. The application is based on grounds that by a judgment delivered on May 8, 2023 this honorable court entered judgment for the plaintiff in the sum of Kshs11, 941,120.00. That the court failed to consider the defendant's submission which raised important points of law inter alia. That the court failed to consider decisions of the Court of Appeal which has interpreted section 3 (3) of the Law of Contract and this failed to follow the doctrine of judicial precedent. That the court considered documents whose production had been objected to and were never produced as exhibits in awarding a sum of Kshs453,920.00.
3. Aggrieved by the said judgment and Decree the defendants have lodged a notice of appeal against the said decision which has been served upon all the parties affected by the judgment and have applied and



- paid for typed proceedings for purposes of filing the intended appeal and served the letter bespeaking proceedings on all the affected parties.
4. The appellant is apprehensive that the plaintiff is in the process of executing the decree and if execution is not stayed immediately, the intended appeal, which had high chances of success, will be rendered nugatory because the defendants may not have recover the money paid to the plaintiffs in execution of the decree because he may not be able to refund the decretal sum and the Applicants will suffer substantially. The defendants are willing to give any security which the court may order for the due performance of the decree. That the application has been filed without unreasonable delay. That it is in the interest of justice and fairness that the application herein be allowed as prayed.
  5. That the plaintiff will not be prejudiced in any manner if the application is allowed. The supporting affidavit of Olaf Konnerup reiterates the grounds in support of the application.
  6. In the replying affidavit, George L. M. Gichimo states that the applicant chose not to attend court and give evidence and therefore cannot use submissions to raise issues of law. The respondent states that he is a man of substance and would not fail to refund Kshs11,941,120/= should the intended appeal succeed.
  7. The respondent states that the businesses that the respondent operates are known as St. Georges Grassland Academy in Bahati subcounty, St Georges Greenland Academy in Bahati Subcounty, Bahati North Academy, Saint Lawrenzo Lake Academy in Nakuru City and Vineyard Hotel in Bahati Subcounty. That the respondent also owns motor vehicles of substantial value copies of the Log Books of which are annexed. That around March 31, 2023, the applicants sold the suit property securing their rights and rendering the subject matter of the suit out of reach for the respondent.
  8. Besides, the respondent alleges that the applicants are a flight risk as they are foreign national and selling the suit property during pendency of this case implied that they have no intention of being bound by the decision of the court.
  9. That in the event that the court is inclined to grant stay to the applicants, it would serve the ends of justice if they are ordered to deposit the entire sum of Shs11,941,120/= in a reputable bank to be agreed upon by the parties and the funds to be held in an interest earning account operated by the two firms of advocates for the parties. That it is for the above reasons that the respondents prays this application be dismissed with costs.
  10. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:  
No order for stay of execution shall be made under subrule (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.
  11. Further to the above, stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.



12. Section 1A(2) of the *Civil Procedure Act* provides that “the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”
13. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (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.
14. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, 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. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

  9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
16. In this case, the respondent has given any material as to his ability to repay the decretal sum in case the appeal succeeds. I am persuaded that substantial loss has not been proved.
17. I have considered the application for stay of execution pending appeal in totality and do find that the notice of appeal was filed timeously, the application was filed without inordinate delay and therefore the applicant satisfies the first limb of the condition for granting of a stay of execution pending appeal.
17. However, I do find that the respondent has satisfied the court that he is a man of means and will be able to refund the decretal amount to the applicants if they succeed on appeal. The applicant has not demonstrated otherwise.



18. That notwithstanding, in the interest of justice, I do order that there be a stay of execution pending appeal on condition that the appellants deposit the decretal amount in court within the next 30 days. In the alternative the appellants to deposit in this court a security of the value of Kshs15, 000,000. Cost of the application to be in the appeal.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF JULY 2023.**

**A O OMBWAYO**

**JUDGE**

