



Nasser Ahmed t/a Air Time Business Solutions v Celtel Kenya Limited (Civil Case 661 of 2007) [2021] KEHC 419 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 661 OF 2007
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

NASSER AHMED T/A AIR TIME BUSSINESS SOLUTIONS PLAINTIFF

AND

CELTEL KENYA LIMITED DEFENDANT

RULING

1. Through the application dated 23rd November 2020, the applicant seeks the following orders: -
 - 1) Spent.
 - 2) Spent.
 - 3) That there be a stay of this suit, judgment and orders made on 24th September 2020 pending the hearing and final determination of Court of Appeal Civil Appeal No. E422 of 2020 filed by the Defendant against the Plaintiff herein.
 - 4) Costs be provided for.
2. The application is supported by the affidavit of Lilian Mugo and is based on the following grounds: -
 - a. The Defendant being aggrieved by the judgment and orders made on 24/9/2020 has filed Civil Appeal No. E422/2020 at Court of Appeal Nairobi seeking to set-aside the said judgment and orders;
 - b. The judgment/ orders made on 24/9/2020 excuse the Plaintiff from the duty to prove his case and instead transfer the duty and burden on the Defendant in violation of our adversarial system;



- c. The order for accounts is fueled by the incorrect finding that the Plaintiff had made an application for accounts and the Defendant frustrated the ensuing audit;
 - d. The other tributary to the order for accounts is the finding that the Plaintiff was entitled to earn commission even after termination, which finding again is erroneous in the face of the written Agreement;
 - e. The Honourable Court has narrated facts to credit the Plaintiff with good deeds and paint the Defendant in bad light;
 - f. The Appeal is arguable and raise weighty questions of law, which ought to be heard by the Court of Appeal;
 - g. The order for accounts is an unnecessary burden upon the parties and does not advance the case of the Plaintiff nor the Defendant;
 - h. The Defendant is apprehensive that unless stay is granted, its right to a fair trial will be prejudiced;
 - i. Unless stay is granted, the success of the said appeal will be defeated and rendered nugatory;
 - j. The orders sought are necessary to preserve the suit, save costs and the limited judicial time; and
 - k. The orders sought commend themselves in the unique circumstances of this case.
3. The respondent opposed the application through his replying affidavit dated 25th February 2021 wherein he states that the defendant filed the appeal in order to circumvent the court order on accounts. He further states that the court is yet to pronounce itself fully on the plaintiff's claim as it only dealt with the issue of accounts and that the defendant therefore has no basis in law to challenge the preliminary decree. He contends that the determination of other prayers in the plaint was deferred until after the taking of accounts. He further states that the defendant did not show any sufficient cause for the granting of the orders of stay and that such stay will delay the final determination of the suit that had been pending for more than 14 years.
 4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the court should grant an order of stay of execution pending appeal.
 5. Order 42 Rule 6(1) of the *Civil Procedure Rules* provides that: -

“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 an application of stay of execution pending appeal, the applicant needs to satisfy the conditions that the application was filed without undue delay, that he or he would suffer substantial loss and that he is ready and willing to abide by the order for security for the due performance of the decree.
8. In *Butt vs. Rent Restriction Tribunal [1979]*, the Court of Appeal stated that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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, 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, 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.
9. The applicant herein seeks to stay the judgment and orders made by this court on 24th September 2020 pending the hearing and final determination of Court of Appeal Civil Appeal No. E422 of 2020. According to the applicant, the court made an error with regard to accounts by blaming the defendant for frustrating the audit process. Counsel for the defendant submitted that the appeal will be rendered nugatory if the suit was allowed to proceed to conclusion
10. The respondent/plaintiff on the other hand stated that the applicant ought to have demonstrated that it will suffer substantial loss if the stay is not granted. According to the respondent, there was no threat of execution as the final orders of the court are yet to be granted.
11. In *Tabro Transporters Ltd vs Absalom Dova Lubasi 2012 eKLR* the court held that: -

“the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantage, but administers the justice that the case deserves.”
12. On the issue of substantial loss, the court in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto MISC application 42 of 2012 eKLR* 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. This is what substantial loss would entail.
13. A perusal of the court record reveals that the court issued orders for the taking of accounts of the business between the plaintiff and the defendant before making the final orders. I note that the applicant has not demonstrated that it will suffer substantial lose in the event stay is denied. The applicant needed to demonstrate how it would be irreparably affected if the application is not allowed.



14. The second condition for consideration in an application for stay is security of costs. 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.”

15. 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.

16. In the instant case, the applicant contends that the orders issued by the court were not final in nature and that there is therefore no need of granting stay of execution pending appeal. The main purpose of stay of execution pending appeal is to preserve the subject matter of the appeal so as to avoid rendering the appeal nugatory. In making an order for stay of execution, the court has to balance the interest of both parties. In this case, I note that the orders sought to be stayed are not final and that there is therefore no threat of execution. I note that the court has not pronounced itself in finality in respect to the present suit and that there is therefore nothing before the court that it capable of being stayed.
17. I am not satisfied that the instant application is merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 16th day of December 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: -

Mr. Omondi for Ojiambo for Defendant/Applicant

No appearance for Respondent.

Court Assistant: Margaret

