



Emaar Consult Limited v Lakhman (Environment and Land Appeal E105 of 2024) [2025] KEELC 1379 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E105 OF 2024**

**TW MURIGI, J
MARCH 14, 2025**

BETWEEN

EMAAR CONSULT LIMITED APPELLANT

AND

VARSHA LAKHMAN RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 9th August 2024 brought under Sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act and Order 9 Rule 9, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. In which the Appellant seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That Pending the inter partes hearing of the appeal, this Court be pleased to grant stay of execution of the ruling delivered on 8th July 2024 and any other subsequent orders of the Court issued by Hon. Opande.
 - d. That the costs of this application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Hassan Jirow, the Assistant Managing Director of the Appellant sworn on even date.

The Applicant's Case

3. The deponent averred that the lower Court delivered a ruling on 8th July 2024 allowing the application on admission dated 2nd March 202 in Nairobi MCELC No. 502 of 2023. That the Court also granted the Appellant stay of execution orders that lapsed on 8th August 2024. That being aggrieved with the ruling, the Appellant lodged an appeal which is meritorious and raises arguable grounds. The



Appellant is apprehensive that if execution is not stayed, the company will suffer irreparable loss. In conclusion, the deponent urged the court to allow the application as prayed.

The Respondent's Case

4. The Respondent filed a replying affidavit dated 17th October 2024 in opposition to the application. She averred that the court entered judgement on admission in her favour based on a settlement plan for the monies owed her by the Appellant. She further averred that the instant application is a delaying tactic by the Appellant who has failed to reimburse her money since April 2023.
5. The Respondent contended that the Appellant has not demonstrated that it will suffer substantial loss if the order of stay is not granted. She further contended that the Appellant has not offered any security for the due performance of the decree sought to be stayed.
6. In conclusion the Respondent stated that she is willing to compensate the Appellant in the event the appeal succeeds.
7. The application was canvassed by way of written submissions.

The Appellant's Submissions

8. The Appellant filed its submissions dated 2nd February 2025.
9. On its behalf, Counsel outlined the following issues for the court's determination:-
 - a) Whether the stay of execution should be granted.
 - b) Costs.
10. On the first issue, Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules, to submit that the Appellant has satisfied the conditions for the grant of stay of execution pending Appeal. It was submitted that the Appellant will suffer substantial loss if stay orders are not granted as it had invested the Respondent's money in another project which will be affected negatively. Counsel further submitted that the appeal was filed without delay as judgement was delivered on 8th July 2024 and the instant application was filed on 9th August 2024. Counsel submitted that the appeal will be rendered nugatory if stay is not granted. To buttress his submissions, Counsel relied on the following authorities:-
 - i) *Butt v Rent Restriction Tribunal* [1979] eKLR,
 - ii) *Sewankambo Dickson v Ziwa Abby* HCT-00-CC MA 0178 of 2005
 - iii) *Ujagar Singh vs Runda Coffee Estates Limited* [1966] EA 263,
 - iv) *Siegfried Busch vs MCSK* [2013] eKLR and *RWW v EKW* [2019] eKLR .

The Respondent's Submissions

11. The Respondent filed her submissions dated 19th February 2025. On her behalf, Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules to submit on the conditions to be met for the grant of stay of execution pending appeal. Further reliance was placed on the cases of *Pauline Yebei & another v Estate of Kiprotich Arap Letting* represented by *Andrew Kiprotich Kiprono* [2017] eKLR, *Hamisi Juma Mbaya v Asman Amakecho Mbaya* [2018] eKLR, *Ujagar Singh (Supra)* and *Bonface Kariuki Wahome v Peter Nziki Nyamai & another* [2019] eKLR, It was submitted that the only ground the Appellant had fulfilled for grant of stay of execution was that of bringing the Application without



delay. It was further submitted that the Appellant is a developer and had received fully paid mortgages from other purchasers to the tune of Kshs. 150 Million and therefore refunding the Respondent Kshs. 8 Million would not destabilize its project.

12. Counsel submitted that the Appellant has not provided any security for the due performance of the decree. Counsel further submitted that the Appellant has not demonstrated that the judgement was irregular or that the Respondent would be unable to repay the monies in the event the appeal succeeds. In view of the foregoing the Respondent urged the court to dismiss the application with costs.

Analysis And Determination

13. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.

14. Order 42 Rule (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that;

6(1) No appeal or 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 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.

6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.

15. The grant of an order of stay of execution is a discretionary one. In the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal gave the following guidelines on how a court should exercise its discretion as follows;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

16. Similarly, in the case of RWW Vs EKW (2019) eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

17. This Court is therefore called upon to balance both the rights of the successful party so as not to hinder her from her fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

18. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.

19. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that it is likely to suffer substantial loss, it must prove that it will suffer substantial loss if stay orders are not granted.

20. In the case of Charles Wahome Gethi Vs Angela Wairimu Gethi (2008) eKLR the Court of Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

21. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs Abuoga (1988) KLR where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.

22. Discussing substantial loss, Platt, JA in the case of Kenya Shell Ltd v Benjamin Keruga Kibiru and others 1982-85 1 KAR 1018 observed as follows:-

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”

23. In the case of Pan African Insurance Co. Ltd vs International Air Transport Association High Court No. 86 of 2006 the court held that:-

“The deponent should go a step further to lay the basis upon which court can make a finding that the applicant should would suffer a substantial loss as alleged. The applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted.”



24. The Applicant contended that unless an order of stay is granted, the Respondent will execute the judgment and the company will suffer substantial loss.
25. The Respondent on the other hand contended that the judgment involves a money decree and that the Applicant has not demonstrated that it will suffer substantial loss if stay is not granted.
26. The Appellant submitted that it had utilized the funds deposited by the Respondent in a project. It was further submitted that the projects will stall if funds are diverted to pay the Respondent. The Applicant has not demonstrated how it will suffer substantial loss if it refunds the money sought by the Respondent. The Appellant has not situated the Kshs. 8 Million that the Respondent is seeking within its projects in a manner to show that such sum is substantial to the running of its projects. I therefore find that the Applicant has not demonstrated that it will suffer substantial loss as the claim that the projects will stall is not supported by any evidence.
27. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. The ruling against which the appeal lies was delivered on 8th July 2024 The instant application was filed on 9th August 2024. I find that the application was filed without undue delay.
28. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of *Arun C Sharma Vs Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR, the court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
29. The case of *Focin Motorcycle Co. Limited v 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.”
30. The Applicant has not expressed its willingness to provide security for due performance of the decree.
31. From the foregoing, I find that the Applicant has not met the threshold for the grant of stay of execution pending appeal.
32. The upshot of the foregoing is that the application dated 9th August 2024 is devoid of merit and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF MARCH, 2025.



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T. MURIGI

JUDGE

In the presence of:-

Oduor holding brief for Okubasu for Respondent

Ms. Omar Holding brief for Ms. Hilda for the Applicant

Ahmed – Court assistant

