



**Pharmacy and Poisons Board v Powen General Contractors Limited
(Appeal E097 of 2021) [2022] KEELC 2196 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
APPEAL E097 OF 2021
LC KOMINGOI, J
JUNE 16, 2022**

BETWEEN

PHARMACY AND POISONS BOARD APPELLANT

AND

POWEN GENERAL CONTRACTORS LIMITED RESPONDENT

RULING

1. This is the Notice of Motion application dated 31st day of January 2022.
2. It is brought under Section 1A, 1B, & 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules 2010* and other enabling provisions of the law.
3. It seeks orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending the hearing and determination of this appeal, the Honourable Court be pleased to issue an order of stay pending appeal of the ruling of the Business Premises Rent Tribunal court dated 2nd December 2021.
 - e. Costs of the application be in the cause.
4. The application is based on grounds on the face of the motion and on the supporting affidavit sworn on 31st January 2022 by Paul Nyaosi, Advocate on record for the Appellant.
5. Counsel deponed that the Appellant has appealed against the ruling of the Honourable Chairman delivered on 2nd December 2021 and that the appeal raises arguable points and as such, it will be



rendered nugatory should the orders of stay not be granted. He added that the Appellant will suffer substantial loss .He also deponed that the Appellant is willing to deposit security in fulfilment of the provisions of Order 42 Rule 6 being in the form of a banking guarantee.

6. Mr. Nyaosi also deponed that public interest considerations weigh in favour of granting stay pending appeal as it will not be prudent to commit substantial public funds by effecting payment while it is probable that the judgment could be set aside or varied He added that the Respondent is unlikely to refund the decretal sum and therefore expose the Appellant to substantial loss.
7. The Respondent opposed the application by way of the replying affidavit sworn by its director Edward Nyingi Mukundi on 16th February 2022 and his affidavit of means sworn on 7th April 2022. He deponed that the Appeal does not raise any serious issue for consideration by this court and that the Applicant has not demonstrated how and to what extent substantial loss may result to it if the stay is not granted. He also deponed that the Respondent is capable of meeting the decree.
8. On the 22nd February 2022, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Appellant's submissions

9. They are dated 28th March 2022.Counsel for the Appellant raised the following issues for determination: -
 - a. Has the Appellant met the prerequisite conditions under Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#) to qualify for orders of stay pending appeal?
 - b. Should the court exercise its discretion in its favour?
10. It was Counsel's submission that he Appellant has demonstrated that it has an arguable appeal. He cited the case of [Hasbmukhla Virchand Shah & 2 others v Investment & Mortgages Bank Limited](#)[2004] eKLR and the case of [David Omwenga Maobe v John Toleyio Ole Sawoyos](#) [2010] eKLR.
11. He submitted that this being a money decree, substantial loss lies in the ability of the Respondent to refund the decretal sum should the appeal succeed and that the Appellant has doubt that the Respondent is likely to refund the decretal sum. He put forward the case of [Century Oil Trading Company Limited v Kenya Shell Limited](#) [2008] eKLR.
12. He also submitted that the Appellant being a Government entity utilizing public funds, the Court is enjoined by Article 201(d) of [the Constitution](#) to ensure that public money is used in a prudent and responsible way.
13. It was his submission that the Appellant has intimated its willingness to deposit security in fulfillment of the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) and urged the court to be guided by the decision in [James Muthomi Njeru \(Suing as Legal Representative of the Estate of the Late Agnes Tirindi Njeru\) v Joseph Erasmus Mugo alias Joseph Mugo](#) [2021] eKLR and allow the Appellant to deposit a bank guarantee.
14. He submitted that the application was brought timeously and that the court has discretion to grant stay and that the court should exercise its discretion and opt for the lower rather than the higher risk of injustice.



The Respondent's submissions

15. They are dated 7th April 2022. Counsel for the Respondent submitted that the following sole issue arises for determination:-
 - a. Whether the Appellant has met the prerequisite conditions under Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#) to warrant the grant of stay pending appeal.
16. It was counsel's submission that the Business Rent Tribunal ruled in favour of the Respondent and ordered the Appellant to pay the Respondent rent arrears. He added that the amount is not excessive and erroneous as it constitutes arrears of rent and service charge owing from the Appellant.
17. It was counsel's submission that the Appellant failed to prove that it will suffer substantial loss if stay is not granted. He relied on the case of [Metiine Ole Kilelu & 19 others v Moses K. Nailole](#) [2009] eKLR. Counsel also submitted that the Respondent has established that he is capable of paying the decretal sum. He added that the legal burden of proving that the decree holder is a man of straw lies on the Appellant while the evidential burden of proving capacity to repay the decreed sum is placed upon the decree –holder. He relied on the cases of [ABN Amro Bank N v Lemond Foods Limited](#) Civil Application No.15 of 2002(unreported) cited in [Rose Sang Tarus v Barclays Bank Of Kenya Limited](#) [2021]eKLR; [Kenya Shell Limited v Benjamin Karuga Kibiru](#) [1986] eKLR; [Superior Homes Kenya Limited v Musnago Kithome](#) [2018]eKLR and [Lawrence Musyoka Ndmabuki & another v Daniel Kato Ndambuki](#)[2019]eKLR.
18. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issue for determination is whether the Appellant/Applicant has made out a good case for grant of stay pending Appeal.
19. The law on stay pending appeal is Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) which provides as follows:-
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.
 - (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.”



20. In *Elena Doudoladova Korir v Kenyatta University* [2014]eKLR the court reiterated the above provision of the law:-

“ the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another v Thornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that; “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, Substantial loss would ensue from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay.”

21. It is not disputed that the application was brought without delay and that the Appellant has offered security in terms of a bank guarantee. The issue is whether the Applicant has established sufficient cause and whether it has established substantial loss would ensue.

22. The Appellant argued that the Respondent would not refund the decretal sum. It also argued that being a parastatal and a public body, tax payer’s funds would be utilized to settle the decree yet it is probable that the judgement could be set aside or varied. The Respondent did file an affidavit of means and annexed its bank statement to dislodge that contention. The Respondent established that it has means. However, I note that it also annexed bank statements belonging to Paul Caffè Limited. No nexus was established between the Respondent and the said Paul Caffè Limited.

23. In *Metaine Ole Kilelu & 19 others v Moses K. Nailole* [2009] eKLR, the Court of Appeal stated:-

“In a matter such as is before us where the decree appealed against is a money decree, the Applicant has to show either that once the execution is done after our refusal of the application, the Applicant may never get back that money even if his appeal succeeds or that the decretal amount is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence. The Appellants needed to show for instance, that the Respondent is a man of straw who once the execution takes place and is given the decretal amount, would not be able to refund it when the appeal succeeds. They neither stated so in their affidavit nor demonstrate so at the hearing of the application.”

24. In *M/S Portreitz Maternity v James Karanga Kabia* Civil Appeal No. 63 Of 1997 cited in *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR the Court stated:-

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

25. Taking the law, facts and case law into consideration, and considering what is in contention is a money decree in form of rent arrears, I find that though the Respondent deserves to enjoy the fruits of the judgement delivered in its favour, the Appellant also deserves a conditional stay of execution pending appeal.

26. In conclusion, I find merit in this application, thereby grant the orders as follows:-

- a. That a stay of execution of the ruling of the Business Premises Rent Tribunal dated 2nd December 2021 is hereby granted pending the hearing and determination of the Appeal on condition that the Appellant do execute a bank guarantee equivalent to Kshs.300,000/- within fourteen (14) days from the date of this ruling.



b. That costs of this application do abide the outcome of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 16TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Mururancha for the Appellant

Ms Waiganjo for the Respondent

Steve - Court Assistant

