



**Kilu v Jianxi Water and Hydropower Construction Kenya Limited (Environment & Land Case 34 of 2018) [2022] KEELC 2645 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2645 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 34 OF 2018**

**CK NZILI, J  
JULY 13, 2022**

**BETWEEN**

**RHODA S. KILU ..... PLAINTIFF**

**AND**

**JIANXI WATER AND HYDROPOWER CONSTRUCTION KENYA  
LIMITED ..... DEFENDANT**

**RULING**

1. The court by an application dated 39.3.2022 is asked to stay execution under Order 40 Rule 1, 42 Rule 6(1) of the *Civil Procedure Rules* Section 1A, 1B & 3A of the *Civil Procedure Act* pending hearing and determination of the intended appeal against the ruling delivered on 23.2.2022.
2. The application is supported by an affidavit of Ran Longbing sworn on March 29, 2022. The grounds in support are that the application seeking to reopen the case and adduce additional evidence was dismissed on February 23, 2022 and a notice of appeal lodged. Similarly, a judgment was delivered on March 9, 2022 and a notice of appeal filed against the judgment. Thereafter execution ensued before the bill of costs was assessed and taxed. That the intended two appeals would be rendered nugatory if the execution is completed and the applicant would stand to suffer substantial loss.
3. That the respondent has no financial ability having been greatly affected by the covid 19 pandemic hence it has no sufficient cash flow otherwise if execution occurs it will be crippled. That it is only fair and in the interest of substantial justice that it be afforded adequate opportunity to challenge the two decisions.
4. That the respondent will not be prejudiced if the application is allowed for it is willing and ready to comply with any conditions of stay and deposit any security for costs as it may be ordered by the court.
5. The application is opposed through a replying affidavit of Rhoda S. Kiilu sworn on 8.4.2022. The reasons given are that after the judgment was entered auctioneers on March 23, 2022 proclaimed the



- applicant's goods and took them away after the proclamation notice expired since the applicant had failed to serve the order on time as directed.
6. That the application was an afterthought aimed at interfering with enjoyment of her fruits of litigation and derail justice in this matter. The respondent states the applicant has merely put assertions of substantial loss without any demonstration through empirical documentary evidence nor has it attached a draft memorandum of appeal to show the appeal is arguable.
  7. Further the respondent avers the issue of financial inability is farfetched and unproven for lack of attached audited accounts and bank statements so that the court may consider. Lastly the respondent states she is ready and willing to concede to the application on condition that the decretal amount, costs and interest are deposited in a joint interest earning bank account in the joint advocates names.
  8. With leave of court, parties were ordered to file written submissions to the application within 14 days with effect from April 27, 2022. None of the parties filed within the set timelines.
  9. A party seeking stay of execution under Order 42 Rule 6 Civil Procedure Rules has to meet the two conditions set out namely that it will suffer substantial loss unless the order is made and secondly that he is ready and willing to offer security for the due performance of the decree.
  10. Similarly, under Section 1A, 1B & 3A of the Civil Procedure Act the court must also be satisfied that it is in the interest of justice to grant the orders sought.
  11. The Court of Appeal in Kenya Shell Ltd vs Kibiru & another (1986) KLR 410 held substantial loss is the cornerstone of both jurisdiction for granting stay.
  12. In Butt vs Rent Restriction Tribunal (1982) KLR 447 the court held to grant or not to grant stay is a discretionary power to be exercised in such a way as not to prevent an appeal being heard based on whether there is no other overwhelming hindrance and that a judge should not refuse a stay if there are good grounds for granting it.
  13. Further the court held if there are special circumstances of the case and unique requirements, stay may be granted.
  14. In Samvir Trustee Ltd vs Guardian Bank Ltd (2007) eKLR the court held special circumstances if in existence may sway the discretion of the court in a particular manner but the yardstick is for the court to balance or weigh the scales of justice by ensuring an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment.
  15. In this matter the applicant says it is likely to suffer substantial loss if the stay is not granted, given it has two intended appeals.
  16. In Mukuma vs Abuoga (1988) KLR 645 substantial loss was defined as what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.
  17. It is not enough for an applicant to assert substantial loss. There must be sufficient cause to enable the court to exercise the discretion in favour of the applicant.
  18. The applicant has in an attempt to explain substantial loss said the respondent has proclaimed its goods and taken them away in execution of the decretal amount which is colossal and given covid 19 pandemic it has been crippled financially and its cash flow is at risk.
  19. In Machira t/a Machira and Co. Advocates vs East African Standard (2002) KLR 63 the court held an applicant must prove specific details and particulars of substantial loss otherwise without



- demonstrable pecuniary or tangible loss to the satisfaction of the court stay shall not be granted. The applicant has not specified the value of the attached good.
20. The applicant also has not attached any proof of its financial standing by way of bank statements or audited annual reports prior to and since covid 19 pandemic, to substantiate its alleged financial impact by the pandemic.
  21. In *James Wangalwa & another vs Agnes Naliaka Cheseto* (2018) eKLR, the court held that the fact that execution process was underway or was likely to be put on motion does not by itself amount to substantial loss since execution is a legal process. Therefore, a party must establish other factors to show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful party in the intended appeal.
  22. In this application the applicant has not explained why it delayed in applying for stay until the execution commenced. Further the applicant has not placed any real or cogent evidence that should the intended appeals succeed the respondent may not be able to repay the sum due. This is more so bearing in mind the circumstances and the history of this suit and the alleged delaying tactics as averred in the replying affidavit. See *Antoine Ndiage vs African Virtual University* (2015) eKLR, *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & another* (2006) eKLR
  23. In *R.W.W vs E.K.W* (2019) eKLR, the Court of Appeal held the purpose of stay 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. The court held in doing so, it should weigh this right against the rights of a successful litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
  24. Further the court is also expected under Section 1A, 1B & 3A *Civil Procedure Act* to look at the interests of justice.
  25. In *Absalom Dova vs Tarbo Transporters* (2013) eKLR the court held 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 would be not introduce any disadvantage but administer the justice that the case deserves. In other words, the court would be looking at two competing rights of appeal and of execution by focusing on reconciling the two.
  26. In this matter the applicant has filed two notices of appeal regarding the refusal to reopen the suit and bring additional evidence and against the judgment eventually delivered after the refusal of its application. This came after both parties had closed their respective cases and at the filing of written submissions.
  27. It is trite law that the applicant enjoys an automatic right of appeal to the judgment. If the execution ensues definitely the applicant would be prejudiced than the respondent should its attached properties be sold off. On the other hand, it is quite obvious, the respondent has also had a long wait for justice going by the history of this suit. Therefore, any delay of execution is equally imparting on her rights to justice in an expeditious manner.
  28. As a good gesture and in line with Order 42 Rule 6 *Civil Procedure Rules* the applicant has offered to give security on such terms as may be imposed by the court as condition precedent for the grant of stay. The respondent is also willing to accept such security but insists of the whole decretal amount plus costs and interest.



29. In *Arun C. Sabrma vs Ashana Rainkundalia t/a Rairundalia* (2014) eKLR the court held the purpose of security under Order 42 *Civil Procedure Rules* is to guarantee the due performance of such decree as may ultimately be binding on the applicant and was not aimed at punishing the judgment debtor.
30. In *Giafranco Manethi & another vs Amaco Co. Ltd* (2019) eKLR the court held an applicant must show and meet the condition of payment of security for the due performance of the decree.
31. In doing so the right to appeal is not fettered since in a money decree a debt is already owed and due for payment to the successful litigant before a court which passed the decree.
32. In other words, it is not the duty of the court to assist litigants to delay execution of decrees through the filing of vexatious and frivolous appeals. That is why the issue of a deposit of security is not a matter of willingness but for the court to determine.
33. In my view therefore, I find that it is in the interest of justice to grant the application for stay on condition that the applicant deposits with the Deputy Registrar of the Court Kshs.70 Million within 14 days from the date hereof failure of which execution to proceed.
34. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 13<sup>TH</sup> DAY OF JULY, 2022**

**In presence of:**

Matu for defendant/applicant

Muthomi for plaintiff/respondent

**HON. C.K. NZILI**

**ELC JUDGE**

