



**Kobilo Farm Limited & another v Elfam Limited; Commodities Fund (Interested Party)
(Environment & Land Case 24 of 2020) [2024] KEELC 6450 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 24 OF 2020**

**EO OBAGA, J
OCTOBER 3, 2024**

BETWEEN

KOBILLO FARM LIMITED 1ST PLAINTIFF

METROPOLE HOLDINGS LIMITED 2ND PLAINTIFF

AND

ELFAM LIMITED DEFENDANT

AND

COMMODITIES FUND INTERESTED PARTY

RULING

1. This is a ruling in respect of a Notice of Motion dated 8.4.2024 in which the Judgement Debtors/ Applicants seek stay of execution of the judgement of this court delivered on 14.3.2024 pending hearing and determination of an appeal by the Applicants. The Applicants contend that they have filed a Notice of Appeal and that if stay of execution is not granted, the Decree Holder/Respondent will commence execution for the damages awarded which will defeat the purpose of the appeal. The Applicants also state that they will suffer irreparably if execution is allowed to proceed and that the appeal will be rendered nugatory.
2. The Applicants have offered as security the amount deposited in the joint account of the Advocates for parties. They state that the application is brought without undue delay and in good faith.
3. The Applicants' application was opposed through a replying affidavit sworn on 15.4.2024. The Respondent contends that the Applicants' application lacks merit; that the Respondent has known assets; that the Respondent should be allowed to enjoy the fruits of its judgement; that this court is functus officio and that the best forum to urge an application like this is the Court of Appeal.



4. In a further affidavit sworn on 6.5.2024, the Applicants contend that this court is not functus officio as the Court is empowered by the provisions of order 42 Rule 6 to grant stay pending appeal. The Applicants state that the Respondent's assets alluded to in the replying affidavit were sold to 3rd parties and that the Respondent has not demonstrated its ability to refund the colossal sum if the appeal is successful.
5. The Applicants state that they have offered the 58,000,000/= which is held in the joint interest earning account in names of the Advocates for the parties and that the loss which the Applicants will suffer is irreparable if stay of execution is not granted.
6. The parties agreed to dispose of the application by way of written submissions. The Applicants filed submissions dated 3.6.2024. The Respondent filed submissions dated 23.5.2024.
7. The Applicants submitted that this court is not functus officio as far as stay of execution applications are concerned. They submitted that order 42 Rule 6(1) gives this court power to entertain an application for stay. Reliance was placed on the case of *Pius Mbithi & another -vs- Daniel Mutiria & another* (2017) eKLR.
8. The Applicant's further submitted that the issue of whether the appeal has chances of success is an immaterial consideration as that is only applicable on second appeals. Reliance was placed on the case of *Safaricom Sacco Limited -vs- Stephen Chorio Kiai & another* (2019) eKLR.
9. The Applicants submitted that they brought the application without unreasonable delay considering that there was an informal stay granted before the formal application was made. On the issue of substantial loss, the Applicants submitted that the court awarded the Respondent 16.9 million shillings and if execution was to proceed, the payment of this amount will defeat the purpose of the appeal and render it nugatory.
10. The Applicants further submit that if the money in the joint interest earning account was to be released, there will be nothing to lean on if the appeal succeeds as the assets of the Respondent have been sold to third parties. There is no demonstration that the Respondent will meet the sums for refund in case the appeal succeeds.
11. The Applicants further submitted that after they doubted the ability of the Respondent to repay the decretal sum if the appeal succeeds, they stated that the burden shifted to the Respondent to show its ability to do so. They relied on the case of *Superior (homes) Kenya Limited -vs- Musango Kithome* where the court held as follows:-

“The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondents to show that he would be in a position to refund the decretal sum.”

12. The Respondent submitted that the Applicants did not annex a draft memorandum of appeal for the court to appreciate if the intended appeal has chances of success.
13. The Respondent submitted that the mere fact that the execution process has been started or has been completed is no guarantee for stay of execution. The Applicant is expected to show that substantial



loss will ensue if stay is not granted. The Respondent relied on the case of *James Wangalwa & another -vs- Agnes Naliaka Cheseto* (2012) eKLR where the court held as follows:-

“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, a question that was aptly discussed in the case of *Silverstein v Chesoni* (2002) IKLR 867, and also in the case of *Mukumu v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High court and the Court of Appeal in the granting of stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus”... 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.”

14. The Respondent also submitted that this court is functus officio. The Respondent relied on the case of *Gladys Boss Shollei -vs- Judicial Service Commission & another* (Application No. 10 (E016) of 2022, (2023) KESC 8 (KLR (CIV) where the Court stated as follows:-

“Noting that in the case of *Raila Odinga vs IEBC & 3 otehrs* (2013) eKLR this court referred to the case of *Jersey Evening Post Limited v Athani* (2002) JLR 542 at page 550 where it was stated that: A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. One proceedings are finally concluded; the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

15. I have carefully considered the Applicants’ application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicants have met the threshold for grant of stay of execution pending appeal.
16. The conditions for grant of stay of execution pending appeal are given under order 42 Rule 6(1) of the *Civil Procedure Rules*. They can be summarized as follows: -
- a. Application to be brought without unreasonable delay.
 - b. Applicant to demonstrate that he will suffer substantial loss if stay is not granted.
 - c. Security for costs as will ultimately be binding upon the Applicant on the decree has to be given.
17. In the instant case, the judgement being appealed against was delivered on 14.3.2024. An informal stay of execution was given for 30 days on the same day. This application was filed on 8.4.2024. I therefore find that the application was brought without unreasonable delay.
18. On whether the Applicant’s will suffer substantial loss, it is important to look at what was granted in the Respondent’s counter-claim. The court granted damages of Kshs 10,000,000/ and 10% being forfeited deposit. The total roughly comes for about 17,000,000/= with costs to be assessed.



19. The Applicants have not demonstrated that by paying the decretal sum, their appeal will be rendered nugatory. It is in very rare cases where a monetary judgement can render an appeal nugatory. Even if the Respondent executed the decree in its favour, this in itself will not render the appeal nugatory. There is no evidence that if the decretal sum is paid out, the Respondent will not refund the decretal sum.
20. Demonstration of substantial loss is the cornerstone of any grant of stay pending appeal. As the Applicants have not demonstrated that they will suffer substantial loss or that the appeal will be rendered nugatory, there is no basis for this court to grant stay of execution. This court would have considered the issue of security if the Applicants had demonstrated that they will suffer substantial loss. I therefore find that the Applicants' application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Kibet for Mr. Kibii for Plaintiffs/Applicants.

Mr. Ngira for Defendant/Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

3RD OCTOBER, 2024

