



Center Park Limited v Chimphondah Media House Limited (Civil Appeal 8 of 2022) [2023] KEELC 629 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL 8 OF 2022
EK WABWOTO, J
FEBRUARY 2, 2023**

BETWEEN

CENTER PARK LIMITED APPELLANT

AND

CHIMPHONDAH MEDIA HOUSE LIMITED RESPONDENT

RULING

1. This ruling determines the applicant’s notice of motion dated February 25, 2022 seeking for stay of execution.
2. The applicants seek the following orders:
 - i) Spent..
 - ii) Spent..
 - iii) That this honourable court be pleased to issue an order of stay of execution of the Judgment dated and delivered on January 27, 2022 in Small Claims Court at Nairobi SCCOM/E372/2021, the resultant decree thereof and all consequent orders pending the hearing and determination of the appeal.
 - iv) That the costs of the application be in the cause.
3. The application is supported by the affidavit of Eleshikumar Chandrakant Gheewala sworn on February 25, 2022.
4. The application was opposed by the respondent who filed a replying affidavit sworn by Fikile Chimphondah on April 27, 2022.



5. The applicants' case is that they are aggrieved by the decision of the Small Claims Court delivered on January 27, 2022 in Small Claims Court at Nairobi SCCOM/E372/2021 and have since lodged an appeal challenging the judgment and decree.
6. They further aver that should the execution proceed, they stand to suffer irreparable loss and prejudice and further that the ability of the respondent to refund the decretal amount is unknown. It is their case that their appeal raises triable issues with high chances of success and that failure to stay the execution proceedings therein, the appeal stands to be rendered nugatory.
7. Opposing the application for stay pending appeal, the respondent contends that the instant application is a delaying tactic made in bad faith that is misconceived, incompetent, lacks merit and an abuse of the court process and ought to be dismissed with costs.
8. The parties agreed to canvass the application by way of written submissions. Both parties complied and filed their written submissions which the court has carefully considered.
9. In their written submissions, the applicant aver that should execution of the judgement/decree proceed, the applicant's appeal will be rendered nugatory and expose the applicant to irreparable loss and damage. Further, it is submitted that it is in the interest of justice that the orders sought are granted and that failure will amount to denying the applicant the opportunity to exhaust its legal remedies.
10. It was submitted that there is no inordinate delay by the appellant in bringing the instant appeal as it was filed *vide* a memorandum of appeal on the February 25, 2022.
11. On security for costs it is submitted that the same is complied with as the applicant already deposited KShs 50,000/- as was directed by Lady Justice Meoli pursuant to her orders issued on March 1, 2022.
12. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit and submissions together with case law cited by both counsel for their respective clients.
13. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
14. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“No order for stay of execution shall be made under subrule (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.
16. Further to the above, stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
17. Section 1A(2) of the [Civil Procedure Act](#) provides that “the court shall, in the exercise of its powers under this act or the interpretation of any of its provisions, seek to give effect to the overriding



objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”

18. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University \[2015\] eKLR](#).

19. As to what substantial loss is, it was observed in [James Wangalwa & Another v Agnes Naliaka Cheseto \[2012\] eKLR](#), 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 ... 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.”

25. The applicant aver that it stands to suffer substantial loss if stay of execution is not granted. The appellant has also pleaded that it has already complied with the order for security of costs that was earlier issued by my sister Lady Justice Meoli.

26. The court, in [RWW v EKW \[2019\] eKLR](#), considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal 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. However, in doing so, the court should weigh this 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 costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

27. In the instant case, I am satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the January 27, 2022 and the memorandum of appeal filed on February 25, 2022.

28. As to security of costs, the appellant has already complied with the earlier orders issued and deposited Kshs 50,000/- as security in court.

29. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the [Civil Procedure Act](#), I find and hold that the



applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under order 42 rule 6 of the *Civil Procedure Rules*.

30. Accordingly, I hereby allow the applicant/appellant's application dated February 2, 2022 and grant stay of execution of decree made in SCCOM E372 of 2021 Centre Park Plaza Limited v Chimphondah Media House Ltd on the following conditions:

- a. The sum of Kshs 50,000/- deposited in court to apply as security until the determination of the appeal.
- b. The appellant to file and serve its submissions in respect to the appeal within 21 days of this ruling;
- c. The respondent to equally file and serve its submissions within 21 days upon being served.
- d. matter to be mentioned on March 27, 2023 for the purposes of taking a judgment notice.

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023

E K WABWOTO

JUDGE

In the presence of: -

Ms Keya h/b for Mr Thiong'o for the applicant.

Mr Marube for the respondent.

Court Assistants; Caroline Nafuna and Philomena Mwangi.

