



Toner Holdings Limited v Alibhai & another (Environment and Land Appeal E061 of 2021) [2022] KEELC 14543 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E061 OF 2021
MD MWANGI, J
NOVEMBER 3, 2022**

BETWEEN

TONER HOLDINGS LIMITED APPELLANT

AND

AMYNAH AZIZ GULAMHUSSEIN JAMAL ALIBHAI 1ST RESPONDENT

MALEK AZIZ JAMAL ALIBHAI 2ND RESPONDENT

(In respect of the Notice of Motion Application dated 22nd September 2022 seeking a stay of execution of the decree in Milimani CMCC No. E923 of 2020 pending the hearing and determination of an appeal)

RULING

Background

1. The appellant/applicant in this matter seeks orders of stay of execution of the decree issued by the Magistrate's Court in Milimani CMCC E923 of 2020 awaiting the hearing and determination of the appeal pending before this court. The appellant filed the appeal by way of a memorandum of appeal dated August 25, 2021.
2. The application was opposed by the respondents.

Court's Directions.

3. Upon request by the parties, the court directed that the application be heard orally. It was heard in open court on the October 14, 2022.



Submissions by the Parties Through their Respective Advocates

4. Ms Akello, advocate for the appellant/applicant submitted that judgment in the magistrate's court case was delivered on July 29, 2021 while the appeal was filed on August 25, 2021. She clarified that the appellant has since paid up the principal amount as per the judgement of the court in full as well as the costs of the suit in the magistrate's court case. The appeal is only on the aspect of interest payable. The respondents had however initiated execution for the interest before the appeal could be heard and determined.
5. She further stated that the appellant had always been ready to prosecute the appeal but there had been delay occasioned by the unavailability of the magistrate's court file.
6. In her response, Ms Mutua Advocate for the respondents in response submitted that the appellant had not satisfied the conditions for the grant of an order of stay of execution under order 42 rule 6 of the [Civil Procedure Rules](#). She made reference to the case of [Kenya Shell Ltd -vs- B Karuga](#) (1986) KLR alongside the other authorities on her list of authorities. She prayed for the dismissal of the appellant's application with costs.

Analysis and Determination.

7. Grant of stay of execution pending appeal is provided for under order 42 rule 6 of the [Civil Procedure Rules](#). The rule provides that: -
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”
8. Subrule 2 of rule 6 (above), spells out the conditions to be met by an appellant in order to qualify for the grant of the orders of stay of execution in the following words: -
 - “(2) No order of 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.”
9. In the case of [Visbram Ravji Halai -vs- Thornton & Turnip](#) (1990) KLR 365, the Court of Appeal opined that whereas its power to grant a stay pending appeal was unfettered, the High Court's jurisdiction to do so on the other hand under order 41 (now 42) rule 6 of the [Civil Procedure Rules](#) was fettered by three conditions, namely;



- a. Establishment of a sufficient cause,
 - b. Satisfaction of substantial loss and
 - c. The furnishing of security.
10. There was a further requirement that the application must be made without unreasonable delay.
11. Justice Odunga, in the case of *Victory Construction –vs- BM {a minor suing through next friend one PMM}* (2019) eKLR however, observed that in the light of the overriding objective stipulated in sections 1A & 1B of the *Civil Procedure Act*, the court is no longer limited to the three conditions under subrule (2) of rule 6. He held that,

“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 powers under the Civil Procedure Act or in the interpretation of any of its provisions.

.....under section 1B, some of the aims of the said objective 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, at a cost affordable by the respective parties.”

12. Justice Odunga therefore stated that all the ‘pre - overriding objective decisions’ must be looked at afresh in the light of the provisions of sections 1A & 1B of the *Civil Procedure Act*. They must be interpreted in a manner that gives effect to the overriding objective. He concluded that it is important that the court takes into account the likely effect of granting the orders sought. He elaborated that-

“.....the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court in exercising its discretion should therefore always opt for the lower rather than the higher risk of injustice.”

13. The court in the above cited case also made reference to the position taken by Kimaru J in *Century Oil Trading Company Ltd- vs- Kenya Shell Ltd* (Nairobi Milimani HCMA No 1561 of 2007), where the judge had expressed himself in the following terms:

“The word ‘substantial loss’ cannot mean the ordinary loss to which every judgment debtor is necessarily subjected to when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words substantial loss must mean something in addition to all different from that.....

Where execution of a money decree is sought to be stayed in considering whether the applicant will suffer substantial loss the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interests of the applicant who is



seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

14. I find the matter before me unique in its own way. The appellant/applicant has already paid the principal amount and the costs of the suit before the magistrate’s court in full, which fact the respondent acknowledges. The outstanding dispute in the appeal before me is on interest payable on the principal amount. The magistrate’s court ordered the appellant to pay interest on the principal sum at court rates from the date the sale of the apartment by the appellant was withdrawn till payment in full. That is what the appellant seeks to set aside in its appeal before this court. The appellant contends that if all any interest was payable, then it ought to be paid only from the date of filing of the suit (August 17, 2021) until payment in full.
15. I am persuaded by the pronouncements by Justice Odunga in the Victory Construction case. In my view, the scales of justice lie in granting the stay of execution pending hearing and determination of the appeal but with a condition that the appellant/applicant deposits a sum of Kshs 1,000,000/- as security, in an interest earning account in the names of the advocates for the appellant and the advocates for the respondents in the next 30 days from today.
16. Further, the appellant is directed to prosecute its appeal in the next six (6) months failing which the court will vacate the orders granted.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 3RD DAY OF NOVEMBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kipruto holding brief for Ms. Akello for the Appellant/Applicant.

Ms. Mutua for the Respondent.

Court Assistant – Hilda

M.D. MWANGI

JUDGE

