



Atlas Plumbers & Builders (K) Limited v Civicon Limited (Commercial Case E262 of 2023) [2025] KEHC 31 (KLR) (Commercial and Tax) (13 January 2025) (Ruling)

Neutral citation: [2025] KEHC 31 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E262 OF 2023
RC RUTTO, J
JANUARY 13, 2025**

BETWEEN

ATLAS PLUMBERS & BUILDERS (K) LIMITED APPLICANT

AND

CIVICON LIMITED RESPONDENT

RULING

1. This is a ruling on application seeking an order of stay of execution of this court’s ruling delivered on 13th May 2024 and the consequential orders pending hearing and determination of the applicants intended appeal in the Court of Appeal. The application is supported by the grounds on the face of it, the supporting affidavit sworn by Trevor Okoth on 28th May 2024 and the submissions dated 27th June 2024. The basis of this application is that the applicant has an arguable appeal and unless the orders are granted the appeal will be rendered nugatory.
2. The Applicant while relying on the case of Patricia Njeri & 3 Others v National Museum of Kenya (2004) eKLR urges this court to exercise its discretion judiciously and not whimsically. They set out two issues for determination namely; whether they are entitled to a stay of execution and who should bear the costs of the application.
3. The Applicant submits that it has an arguable appeal, emphasizing that the court struck out the defence despite it raising bonafide triable issues including the frustration of the subject sub-contract between the defendant and plaintiff due to the termination of the main contract. The Applicant also highlighted that the invoices raised were contested, thus it would have been prudent to hear parties before determining the suit summarily. The applicant urged this court to appreciate that these grounds raise arguable points that ought to be ventilated before the court of appeal. Further, it was submitted that the amount in dispute is substantial and that the Applicant has a compelling case that merits an



opportunity to be considered before the Court of Appeal. The applicant further urged the court to consider the peculiar circumstances of this case and find that the balance of convenience tilts in the favour of granting the injunction sought.

4. The applicant also indicates that they are willing to deposit a security in court such that if it does not succeed on appeal, the plaintiff can still call for the security. They urged the court to allow the appeal together with costs.
5. The respondent opposed the application by filing its Replying Affidavit sworn on 11th June 2024 by Harish Bhanderi and submissions dated 4th July 2024. The respondent submits that the Applicant has not satisfied the three prerequisite conditions for grant of stay of execution pending appeal as set out under Order 42 Rule 6 of the Civil Procedure Rules. To buttress this, they rely on the cases of Beatrice Mghamba Onyonka v Samuel Onsarigo Ooga(2019)eKLR; and Equity Bank Limited v Taiga Adams Company Limited (2006) eKLR.
6. They urged the court to exercise the discretion judiciously so as to ensure both parties are protected as observed in the case of Trishcon Construction Co Ltd v Avtar Singh Bahra (2017) eKLR. They submitted that the applicant has not demonstrated that it is deserving the exercise of this courts discretion or that they will suffer any substantial loss. Further, no sufficient cause to warrant issuance of orders of stay of execution has been provided. To buttress this argument reference was made to numerous cases including that of Winfred Nyawira Maina v Peterson Onyiego Gichana (2015) eKLR.
7. Without prejudice to their earlier submission, they submitted that if the court were inclined to grant the stay of execution, it should be conditional upon the applicant paying at least half of the decretal sum to the respondent and depositing the balance in a joint interest earning account under the joint names of the parties' advocates. Alternatively, they proposed that the the entire decretal sum be deposited in a joint interest earning account in the joint names of the parties' advocates. They cited numerous decisions to support this position.
8. Upon considering the application and the grounds thereof as well as the parties' rival submissions and the numerous authorities cited by both parties, the issue calling for determination is whether this court should grant the orders for stay of execution pending the hearing of the appeal.
9. Order 42 Rule 6 of the Civil Procedure Rules governs the grant of stay of execution by setting out the three requisites' principles to be met before the order can be granted. Thus, its emphatic that a person seeking a stay of execution should demonstrate that the application for stay was brought to court without unreasonable delay; a substantial loss will occur if the orders are not granted and that adequate security for the due performance of such decree or order as may be determined and imposed by the court has been provided.
10. This court notes that the application was filed timeously given that the decision was rendered on 13th May 2024 and the application filed on 28th May 2024. I will therefore not belabour on that.
11. On the issue of substantial loss occurring, the applicant needs to show that indeed he will suffer substantial loss if the orders sought are not granted. In this instance the applicant alleges that the amounts involved is substantial and that they present a very strong case with high chances of succeeding. In James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR it was held that;

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 Vs .Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above.



The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting 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.”

12. This court notes that in the event the execution of the decretal sum occurs and the applicant succeeds with the appeal, the appellant will be prejudiced since he will have already paid the decretal sum in vain. The converse of this statement is also true, thus the need to strike a balance between the two parties such that none suffers loss. I take note that both parties are seeking that this court to exercises its discretion judiciously to ensure both parties are protected. I also take note of the applicant submission that they are willing to deposit a security in court such that if it does not succeed on appeal, the plaintiff can still call for the security and or proceed to execute. On the other hand, the respondent proposes condition that the applicant pays at the very least half the decretal sum to the respondent and deposits the balance in a joint interest earning account in the joint names of the parties advocates or that the entire decretal sum be deposited in a joint interest earning account in the joint names of the parties advocates.
13. Noting that the Ruling being appealed against allowed the plaintiff the orders as prayed in the plaint, which included interest, it is important to secure the plaintiff rights and interest. Thus, in light of this, I do order that there be a stay of execution of the decree herein on condition that the Applicant deposit in court a security for performance of the entire decree which should be deposited within 45 days failure of which the stay of execution granted will lapse. Each party to pay its own costs of the application.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant:

