



Diamond Shipping Services Limited v Kencott CFS & 3 others (Civil Appeal 198 of 2023) [2025] KEHC 1381 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 198 OF 2023
J NGAAH, J
FEBRUARY 21, 2025**

BETWEEN

DIAMOND SHIPPING SERVICES LIMITED APPELLANT

AND

KENCOTT CFS 1ST RESPONDENT

COMMISSIONER OF CUSTOM SERVICES 2ND RESPONDENT

MARK BOWEN 3RD RESPONDENT

FAST FORTY IMPORTERS & EXPORTERS COMPANY

LIMITED 4TH RESPONDENT

RULING

1. The application before court is a motion dated 24 April 2024 by the appellant expressed to be brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant prays for the following orders:
 - “1. That service of this application on the First, Second, Third and Fourth Respondents be dispensed with in the first instance and this application be certified as urgent and heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to issue an order of stay of execution of the decree and /or Judgment ensuing from the Judgment in CMCC No. 713 of 2017 (Fast Forty Importers and Exporters Company Limited -v/s Diamond Shipping Services Limited and 3 others pending the hearing and determination of this application inter-parties.
 3. That this Honourable Court be pleased to issue an order of stay of execution of the decree and/or Judgment ensuing from the Judgment of the Chief



Magistrate Court in CMCC No. 713 of 2017 (Fast Forty Importers and Exporters Company Limited -v/s- Diamond Shipping Services Limited and 3 others pending the hearing and determination of the Appeal herein.

4. That the costs of this application be provided for.”
2. The application is supported by the affidavit of Ms. Susan Ndirangu who has introduced herself as “the documentation officer” of the applicant.

In the affidavit Ms. Ndirangu has sworn that on 7 July 2023, the magistrates’ court rendered its decision in Chief Magistrates Court Civil Case No. 713 of 2017; Fast Forty Importers and Exporters Company Limited versus Diamond Shipping Services Limited and 3 others.
3. The suit arose as a result of a dispute between the third and fourth respondents over ownership of certain motor vehicles that had been imported into the country. Thus, the magistrates’ court was to determine who, between the third and fourth respondents, was the owner of the motor vehicles and who was to bear the accruing demurrage charges consequent upon the dispute over ownership.
4. According to the impugned judgment, the counter-claims against the fourth respondent and the appellant were held to have been proved and, therefore, the appellant and the fourth respondent were liable at the ratio of 50% to 50% for the sum of KShs. 13,583,667 as at 2 March 2021 and for any further demurrages from 3 February 2021 until the date of collection of the motor vehicles. The 3rd respondent was at liberty to pay the amounts adjudged and collect the vehicles and execute against the 4th respondent and the appellant. The 4th respondent and the appellant were also condemned to bear costs of the suit together with interest from the date of the judgment until payment in full at the ratio of 50% to 50%.
5. Being aggrieved by the judgment, the appellant instructed its advocates, Messrs A. B. Patel & Patel advocates to appeal against the decision. The advocates filed a memorandum of appeal. Ms. Ndirangu has been informed by her counsel on record, which information she verily believes to be true, that an application for the typed and certified copy of the judgment and proceedings was made on 24 July 2023 to facilitate the lodging of the appeal against the said decision.
6. Apparently, at the time of swearing the affidavit, the record of appeal had been prepared but had not been filed. The appellant fears that the first and the third respondents, or either of them will execute the decree ensuing from the judgment of the magistrates’ court unless the orders sought in this application are granted.
7. The applicant, it is sworn, will suffer substantial and irreparable harm if orders for stay of execution are not issued urgently, as it is unlikely to recover the decretal sum payable by it from the first and third respondents or either of them if they are paid the decretal sum which, in the applicant’s view, is substantial. Again, it is alleged, if the decretal sum is paid without the possibility of being recovered, the appeal will be rendered nugatory.
8. The appellant, it is sworn, is prepared to give appropriate security as may be ordered by this Honourable Court or place its half of its 50% of the decretal amount within 60 days in the joint names of the first and third respondent and the appellant in an interest earning bank account.
9. The 1st and 4th respondents have opposed the application by way of grounds of objection. In the 1st respondent’s grounds of objection dated 19 November 2024, the 1st respondent has averred that the application is premature because Order 42 Rule 6 presupposes that the application for stay ought to be made, in the first instance, in the court which granted the decree and that it is only after that application is refused that an applicant for stay can move to this Honourable Court by way of an appeal.



10. Filing the application in this Honourable court, it is urged, has denied the 1st respondent the advantage of the right to appeal from the magistrates court. Nonetheless, the 1st respondent is agreeable to the decretal sum being deposited in a joint interest earning account in the joint names of advocates on record for the disputing parties or, in the alternative, the decree does remain in force until conclusion of the appeal.
11. The 4th respondent has opposed the application on the grounds that an order for stay of proceedings is a remedy that is only to be granted in the rarest of cases and that in the instant application, there are no exceptional circumstances to warrant the grant of the orders sought. The application is also said to be without merit because it has not been demonstrated that the applicant has an arguable appeal; or if a stay of execution is not granted, the appeal will be rendered nugatory; or that a substantial loss would otherwise occur if an order for stay of execution is not granted.
12. The 4th respondent also contends that there has been inordinate delay in the filing of the application and the delay has not been satisfactorily explained by the appellant. The application is, thus, an afterthought.
13. The 4th respondent also pleads that it is in the interest of justice that an order of stay is not granted because, if granted, the 3rd respondent will be greatly prejudiced for the reasons that motor Vehicle Chassis numbers CHS.NT31-106223, CHS.ACA38-5136852 and CHS.NZT260-3054925 which are in the possession of the 1st respondent will continue accumulating demurrage charges to amounts that neither the applicant nor the 4th Respondent will be able to settle, if the appeal does not succeed.
14. It is also averred that while the appeal was filed on 07 August 2023, the appellant has not made any effort to prosecute it and, as a matter of fact, the appellant is yet to file its record of Appeal to date. The application is thus a delaying tactic by the appellant aimed at denying the 3rd respondent the fruits of its judgement.
15. It is the 4th respondent's position that in the event this Honourable Court is inclined to allow the appellant's application, the appellant should be ordered to provide, as security, the entire amount of the decretal sum as well as costs into an interest earning account in a reputable commercial bank in the names of the advocates of the appellant as well as the 1st and 3rd respondents' advocates.
16. The facts, material to this application are not in contest. It is not in dispute that the judgment, the subject of the applicant's appeal, was handed down on 7 July 2023. The court tracking system portal (CTS) shows that the memorandum of appeal was filed 7 August 2023. But it was not until 30 April 2024, ten months later, that the applicant filed the instant application.
17. According to Order 42 Rule 6 (2) of the Civil Procedure Rules, timeous filing of an application for stay of execution is a prerequisite for grant of an order in that regard. To understand this provision in context, it is necessary that both sub rules (1) and (2) are read together. They read as follows:
 - 6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.
 - (2) 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.

Rule 6(2) (a) is clear that no order for stay of execution shall be made unless the court is satisfied that, among other things, the application for stay of execution has been made without unreasonable delay.

18. Whether any sort of delay is unreasonable is, of course, a question of fact and will depend on the circumstances of each particular case. In the instant case, a delay of ten months is not just unreasonable but it is also inordinate. I say so not just because, by any standards, ten months is such a long time to file an application for stay but also because no explanation or any sufficient explanation has been proffered by the applicant why it took it this length of time to file the current application. Without belabouring the point, in the absence of any or any sufficient explanation for the delay, the application does not meet the threshold set in Order 42 Rule 6(a) of the Civil Procedure Rules and, on that score alone, the application should fail.

19. It would appear from the applicant's own affidavit, pleadings and submissions, that all that the applicant has filed since judgment was delivered in July 2023 is a memorandum of appeal despite the fact that it has, in its custody, all that is necessary to file the record of appeal. In paragraph 8 of Ms. Ndirangu's affidavit, she has sworn as follows:

“8. That there is now shown to me the Appellant's Record of Appeal for filing in Court and I am advised by Sanjeev Khagram which advise (sic) I believe to be true that this Honourable Court will proceed to admit the Appeal and thereafter issue directions on its disposal.”

20. It is apparent from this deposition that, even at the time of filing the current application, the applicant had all that was necessary to file the record of appeal and set in motion the process of hearing and determination of the appeal but for some reason, it has chosen not to file the appeal. The only logical conclusion that can be drawn from the appellant's conduct is that it is not keen to pursue the appeal.

21. As a matter of fact, it would appear from the submissions filed on its behalf that the appellant was only nudged into action when decree holder-initiated steps to execute the judgment in the lower court. To quote the applicant:

“The present application was filed on 30th April 2024 as soon as there was imminent danger of execution by the First & Third Respondent who have filed an application before the Trial Court for review of the judgment and decree. May Court find this to be reasonable time within which the Applicant brought this Application to Court. It is common ground that the Record of Appeal is yet to be compiled and filed since the typed proceedings has not been availed.

My Lady, it is the Appellant's humble submissions that there is no inordinate delay in bringing the instant Appeal as it was filed vide the Memorandum of Appeal dated 7th August 2023 whereas the judgment was delivered on 7th July 2023.” (Emphasis added).

22. It is apparent from these submissions that rather than comply with Order 42 Rule 6 of the Civil Procedure Rules and file its application timeously, the applicant chose to wait until there was what its counsel has described “imminent danger of execution” for it to file the application for stay.



23. The submissions also reveal some element of inconsistency in the applicant's case. While, on the one hand, it has been sworn that the applicant has the record of appeal ready for filing, it is submitted, on the other hand that:

“It is common ground that the Record of Appeal is yet to be compiled and filed since the typed proceedings has (sic) not been availed.”

24. For these reasons, I am not satisfied that the applicant's application has any merits. At the very least, it is an abuse of the process of this Honourable Court. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED AT MOMBASA ON 21 FEBRUARY 2025.

NGAAH JAIRUS

JUDGE

