Dikus Transporters Limited & another v Odiga & another (Civil Appeal E057 of 2024) [2025] KEHC 2429 (KLR) (4 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E057 OF 2024

OA SEWE, J

MARCH 4, 2025

BETWEEN

DIKUS TRANSPORTERS LIMITED ..... 1ST APPLICANT

HASSAN HUSSEIN GODANA ..... 2ND APPLICANT

AND

JOSEPHINE AKOTH ODIGA ..... 1ST RESPONDENT

JOHANES ODIAGA NYAMBOK ..... 2ND RESPONDENT

RULING

1. The Notice of Motion dated 5th November, 2024 was filed by the applicants under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya; Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks orders that:

   (a) Spent

   (b) Spent

   (c) Stay of execution of the Judgment and the Decree in Homa Bay MCCC No. E035 of 2023 be granted pending the hearing and determination of this appeal.

   (d) Costs be provided for.

2.

   (2) The application was premised on the grounds the judgment the subject of this appeal was delivered on 22nd August 2024 by Hon. J.S. Wesonga, PM, and that the applicant made an oral application for stay of execution which was granted for 30 days. The applicant expressed the conviction that the appeal has high chances of success and shall be rendered nugatory unless the order of stay sought is granted.

3. The application was supported by the affidavit of Mr. Erick Ochieng, Advocate, in which he deposed that the issue of liability was seriously contested and therefore the finding of the learned magistrate is erroneous, in his view. The applicants further deposed that they are ready, able and willing to comply with any conditions the Court may impose.

4. In response, the respondents relied on a Replying Affidavit sworn by the 1st respondent. They posited that the application is nothing but a delaying tactic, made in bad faith for the sole reason of denying them the fruits of their judgment. They accused the applicants of inordinate delay in filing the application and the appeal. They further contended that the conditions for stay have not been established and therefore the application ought to be dismissed with costs.

5. The application was fixed for hearing on 18th February 2025 and although service of the Hearing Notice effected on the respondents, they did not attend court. Accordingly, hearing proceeded ex parte following the respondents' non-attendance.

6. Having considered the application, the averments set out in the Supporting Affidavit as well as the Replying Affidavit filed by the respondents, the only issue arising for determination is whether the defendant has made out a good case for the grant of the order of stay of execution from the standpoint of Order 42 Rule 6 of the Civil Procedure Rules. That provision states thus:

> (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.
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> (2) No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.

7. Accordingly, for a party to succeed in an application for stay of execution, Order 42 Rule 6 (2) of the Civil Procedure Rules requires such party to fulfill three conditions 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.

(See James Wangalwa & Another v Agnes Naliaka Cheseto, supra)

8. It is also trite that the power of the court to grant or refuse an application for stay of execution is discretionary, and that the discretion should be exercised in such a way as not to entirely stifle an appeal.

The Court of Appeal in the case of Butt v Rent Restriction Tribunal [1979] eKLR made this point thus:

> "...It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:
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> "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

9. Hence in Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR the Court of Appeal held: -

> " Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

10. Similarly, in Machira t/a Machira & Co Advocates v East African Standard (supra) it was stated that: -

> "...In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted.
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> In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.
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> If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or intended appeal)..."

11. I have looked at the Memorandum of Appeal dated 18th September 2024 and the Supporting Affidavit filed therewith. It cannot be said that the appeal is frivolous because it does raise triable issues fit for canvassing by way of appeal. That being the case, and balancing the interests of the parties, I am satisfied that sufficient cause has been shown by the applicant to warrant the issuance of the orders prayed for.

In this regard, I am persuaded by the position taken by Hon. Warsame, J. (as he then was) in Samvir Trustee Limited v Guardian Bank Limited (supra) that:

> "...the Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court..."

12. In terms of security, in the case of Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR it was pointed out that:

> "...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.
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> Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal..."

13. Moreover, in the case of Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR it was held:

> "...First of all, the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick..."

14. It is notable that, at paragraph 8 of the Supporting Affidavit, the applicant indicated its willingness to give appropriate security for the due performance of the orders that may ultimately be binding on it.

15. In the light of the foregoing, it is my finding that the applicants have made out a good case for stay of execution and proved all the elements provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. Accordingly, the Notice of Motion dated 5th November 2024 is hereby allowed and orders granted as hereunder:

    (a) That stay of execution of the judgment and the Decree passed in Homa Bay MCCC No. E035 of 2023 be and is hereby granted pending the hearing and determination of this appeal on condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of counsel for the parties within 45 days from the date hereof.

    (b) The costs of the application be costs in the appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 4TH DAY OF MARCH 2025.

OLGA SEWE

JUDGE