



REPUBLIC OF KENYA



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Bluesand Holdings Limited v Mitei t/a Arap Mitei Advocates (Civil Suit E010 of 2024) [2025] KEHC 4678 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E010 OF 2024
RN NYAKUNDI, J
APRIL 11, 2025**

BETWEEN

BLUESAND HOLDINGS LIMITED APPLICANT

AND

CHRISTOPHER MITEI T/A ARAP MITEI ADVOCATES RESPONDENT

RULING

1. Before me for determination is the Respondent's Notice of motion dated 11th February, 2025 expressed to be brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and section 3A of the Civil Procedure Act in which he seeks orders as follows:
 - a. Spent
 - b. That there be a stay of proceedings pending the hearing and determination of this application.
 - c. That there be stay of execution herein pending the hearing and determination of the intended appeal to the Court of Appeal.
 - d. That the costs of this applications be provided for.
2. The applicant anchored on grounds that:
 - a. That it is in the interest justice to grant a stay of proceedings in this matter.
 - b. That the intended appeal has *prima facie* merit.
 - c. That to grant the order will save the use of scarce judicial time and its optimum utilization.
 - d. That the application has been brought expeditiously
3. According to the applicant, on 6th November, 2024 the applicant through its advocate who are well vast with their client's case opted to have the same be disposed off by way of documentation on record,



affidavits and written submissions which mode of proceeding he was not averse to hence his advocates consented to it. That the court adopted the said directions for disposal as sought by the parties as a consent.

4. He further deposed that the applicant filed its 15 pages of submissions, trial bundle and list of authorities together with the case digest. That he also filed submissions and the matter came up for highlighting with parties opting to rely on the submission as they were on record. That the matter was fixed for preparation of judgment as the parties had concluded the trial based on disposal through submissions. The court however did not deliver judgment as reserved opting to deliver a ruling on the 28th January, 2025 giving directions to have the matter heard by viva voce evidence.
5. The Respondent/Applicant is now aggrieved with the said decision and averred that he has since lodged a Notice of Appeal and requested for certified proceedings.
6. In response to the application, the Respondent deposed as follows:
 - a. This Court has not delivered any decision, whether ruling or judgment dated 24th January, 2025. The notice of the notice of appeal dated 21st January, 2025 therefore makes reference to a non-existence decision and cannot be a basis of either an appeal or an application for stay of proceedings pending the filing, hearing and determination of an intended appeal.
 - b. This Court delivered a ruling dated 28th January, 2025 which it directed that the originating summons be subjected to a full substantive hearing by way of viva voce evidence to give specific consideration on the scope of the matter in dispute.
 - c. I am aware that the Respondent has not filed any notice of appeal communicating an intention to challenge the ruling dated 28th January, 2025.
 - d. That there is no valid notice of appeal on record as the purported one dated 21st January, 2025 intends to appeal against a non-existent ruling/decision. It is thus strange that the Respondent in the suit intends to stay non-existent orders.
 - e. I verily believe, as an advocate of this Court, that in absence of a valid notice of appeal that refers to an existing ruling or judgment, the Court is bereft of jurisdiction to hear, determine or grant the reliefs sought in the application dated 11th February, 2025.
 - f. That for an order of stay of execution to issue, the Respondent/Applicant must demonstrate substantial loss and furnish security as required under Order 42 Rule 6 of the [Civil Procedure Rules](#).
 - g. The Respondent has not demonstrated that he will suffer any substantial loss if an order for stay of proceedings pending appeal is not granted. In fact, no prejudice or loss shall be suffered by the Respondent as he shall pursuant to the directions of the Court have an opportunity to lead and challenge evidence in furtherance of the right to fair hearing that is protected under Article 50 of the [Constitution](#).
 - h. That Article 159(2)(d) of the [Constitution](#) enjoins this Court to dispense justice without undue regard for procedural technicalities. The intended appeal against directions that a matter proceeds by way of viva voce evidence in realization of the values espoused under Article 50 of the [Constitution](#) falls in the nature of appeals that are intended to annoy, scandalize due process and give room to procedural technicalities at the expense of substantive justice. I therefore verily believe that the Court should on the basis of Article 159(2)(d) of the [Constitution](#) dismiss the application dated 11th February, 2025.



Analysis and Determination

7. Having examined the stay application, its supporting grounds and affidavit with accompanying annexures, as well as the Replying affidavit and its contents, I now proceed to make a determination.
8. The central question before this Court is whether the applicant has established sufficient grounds warranting the grant of stay of execution orders pending appeal.
9. 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.”
10. Beyond these statutory requirements, it is recognized that stay may be granted only where sufficient cause exists. Following the incorporation of the overriding objective principles in sections 1A and 1B of the *Civil Procedure Act*, the Court's discretion is no longer confined strictly to the aforementioned provisions. Courts are now mandated to implement the overriding objective when exercising powers under the *Civil Procedure Act* or interpreting its provisions.
 11. 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.”

12. Consequently, an applicant seeking stay of execution pending appeal must satisfy the conditions enumerated in Order 42 Rule 6(2): namely
 - (a) demonstrating potential substantial loss absent the order,
 - (b) showing the application was made promptly without unreasonable delay, and
 - (c) providing adequate security as directed by the court for compliance with any decree or order that may ultimately bind the applicant. This position was affirmed in *Antoine Ndiaye v African Virtual University* [2015] eKLR.
13. 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.”

14. 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.”

15. Further, as articulated in *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal outlined key considerations in determining whether to grant or refuse stay of execution pending appeal:

“The power to grant or refuse stay applications is discretionary and should be exercised so as not to impede an appeal.

The general principle is that, absent overwhelming impediments, a stay should be granted to prevent rendering an appeal nugatory should the appellate court overturn the decision.

A judge should not deny a stay where good grounds exist merely because a better remedy might become available to the applicant at the conclusion of proceedings.

The court will consider the unique circumstances and specific requirements of each case when exercising its discretion.”

16. In addressing these principles, I must examine three essential conditions:

“Whether substantial loss may result to the applicant without such an order

Whether the application was made without unreasonable delay

Whether appropriate security has been or can be provided.”

17. Regarding timeliness, I note that the Respondent filed his Notice of Motion on 11th February, 2025. The ruling that the Respondent seeks to appeal was delivered on 28th January, 2025. The application was therefore filed approximately two weeks after the ruling. In light of this timeframe, I find that the application was made without unreasonable delay.



18. On the question of substantial loss, I am guided by the decision in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331, where Ogolla, J stated:
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
19. Similarly, in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007, Kimaru, J observed:
- “The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected 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 and 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.”
20. In the present case, the Respondent contends that the intended appeal has *prima facie* merit and that, absent a stay, execution proceedings would commence, which would prejudice his position and potentially render the appeal nugatory. The Applicant opposes this view, arguing that the Respondent has not demonstrated any substantial loss that would result if the application is denied.
21. A critical examination of the Respondent's supporting affidavit reveals that he has not provided specific evidence showing the nature of substantial loss he might suffer. The mere assertion that execution would prejudice him is insufficient to meet the threshold established in the aforementioned authorities. Substantial loss requires demonstration of how execution would fundamentally undermine the applicant's position beyond the ordinary deprivation that follows any judgment.
22. A critical examination of the subject matter of this application reveals a fundamental flaw in the Respondent's case. What the Respondent seeks to stay is not executable orders but rather case management directions issued by this Court on 28th January, 2025. These directions merely instructed that the originating summons be subjected to a full substantive hearing through viva voce evidence to allow comprehensive consideration of the disputed issues. Such directions are procedural in nature, designed to ensure each party receives a fair hearing in accordance with Article 50 of the *Constitution*. They do not constitute a final determination of rights that can be executed against the Respondent. The Court's direction to proceed by way of oral evidence rather than through written submissions is not an executable decree or order contemplated under Order 42 Rule 6 of the *Civil Procedure Rules*. It would be jurisprudentially unsound to grant a stay of directions whose sole purpose is to facilitate a just determination of the dispute. This renders the present application fundamentally misconceived and an improper invocation of the Court's jurisdiction under Order 42 Rule 6.
23. Accordingly, the following orders do issue:
- a. The application for stay of execution pending appeal is dismissed as it relates to procedural directions that are not executable orders within the meaning of Order 42 Rule 6 of the *Civil Procedure Rules*.



- b. The parties shall comply with the directions issued on 28th January, 2025, for hearing the matter through viva voce evidence.
- c. Costs of this application shall be borne by the Respondent.

24. It is so ordered.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2025.

R. NYAKUNDI

JUDGE

Representation:-

M/s Mukabane & Kagunza Advocates

M/s Rapando & Odunga Advocates

