



Haji Motors Limited v Auto Commercial International GTD FZCO (Civil Appeal E964 of 2024) [2025] KEHC 4920 (KLR) (Civ) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E964 OF 2024

TW OUYA, J

APRIL 24, 2025

BETWEEN

HAJI MOTORS LIMITED APPLICANT

AND

AUTO COMMERCIAL INTERNATIONAL GTD FZCO RESPONDENT

RULING

1. Vide a Notice of Motion dated the 23rd of August, 2024, the applicant, Haji Motors Limited, approached this court seeking the following orders:
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That the honourable court be pleased to grant a stay of execution of the judgement rendered in MCCC 1866 of 2019, Auto commercial international GTD FZCO versus Haji Motors Limited, together with the consequent decree or orders, pending the hearing and final determination of the appeal;
 - v. That the honourable court be pleased to grant such further orders as may be necessary, just and expedient;
 - vi. Costs.
2. The application is premised on the grounds stated on the face of motion and on the depositions made in the supporting affidavit, sworn on the 23rd of August, 2023, by Mr. Mark Okumu, the director of Haji Motors Limited. In brief, Mr. Okumu averred that on the 26th of July, 2024, Hon. Rawlings



- Musiega entered judgement at the lower court in favour of the respondent against the applicant for the sum of USD 28, 107.12; and upon delivery of the said judgement, the learned trial magistrate issued a 21 day stay of execution, to enable the applicant make arrangements to satisfy the decretal sum.
3. He contended that the stay of execution granted by the trial court has since lapsed and the respondent has commenced the process of executing the judgement and decree issued by the said court; and unless a stay of execution pending the hearing and determination of this appeal is issued, the said appeal will be rendered nugatory.
 4. Mr. Okumu further contended that the applicant is willing to abide by any condition imposed by this court for granting of the orders for stay of execution; that the present application and appeal have been filed timeously; and that no prejudice will be suffered by the respondent if this court grants their application for stay of execution of the lower court's judgement.
 5. The application was opposed by the respondent vide a replying affidavit sworn on the 23rd of October, 2024, by Mr. Rajesh Singh Joginder Singh Sehmi, the respondent's managing director. In the affidavit, Mr. Sehmi contended that the applicant's application seeking stay of execution of the lower court's judgement is not only frivolous but also an abuse of the court process. He averred that the application was meant to deny the respondent's enjoyment of the fruits of its judgement and it ought to be dismissed with costs.
 6. It was his contention that the applicant has not met the conditions for stay of execution pending appeal; as such, he must satisfy the decretal sum issued by the lower court, together with interests and costs in full. He averred that the respondent is a company of means, and in the unlikely event the applicant's appeal is successful, the respondent will be able to refund any decretal amount paid, hence the applicant will not suffer any loss.
 7. Counsel Sehmi averred that in the event the court is inclined to grant a stay of execution pending appeal, then the same should be on condition that the appellant deposits the entire decretal sum together with interests and costs in a joint bank account, in the respective names of the appellant's and respondent's advocates, failure to which execution to ensue.
 8. The application was canvassed by way of written submissions. In its written submissions dated the 4th of November, 2024, the applicant submitted that for a party to be successful in an application for stay of execution pending appeal, it must be proved that the applicant will suffer substantial loss unless the order for stay is made; that the application for stay has been made without delay; and that the applicant must be willing to offer such security as the court may order.
 9. It was the applicant's submission that the loss it would suffer, is that its appeal will be rendered nugatory, considering that the courts have time and again stated that loss need not be in monetary terms.
 10. The applicant submitted that it had filed an appeal against the decision of the lower court, through a Memorandum of Appeal filed on the 23rd of August, 2024; and that the said appeal raises triable issues, as such, should execution be levied, its appeal will be rendered nugatory. The applicant further submitted that it has an arguable appeal with a strong chance of success; and that the respondent has not demonstrated that it can refund the decretal sum should its appeal succeed. As such, it will stand to suffer substantial loss in the event that stay of execution is denied.
 11. It was the applicant's submission that they filed the present application without undue delay, considering that the limited stay of execution granted by the trial court lapsed on the 19th of August, 2024, and it filed the present application for stay together with its appeal on the 23rd of August, 2024.



12. The applicant further submitted that it is willing to furnish security for costs as this court may order; and that it is ready to abide by any condition that this court may impose for granting of the order for stay, including depositing the entire decretal sum of USD 28, 107.12 as security, in a joint interest earning account, in the name of both advocates.
13. On the other hand, the respondent in its submission dated the 17th of November, 2024, submitted that the applicant has not explained the manner in which its appeal will be rendered nugatory, or the loss that it is likely to suffer, in the event that stay of execution is not granted.
14. It was the respondent's submission that whereas it had produced a bank statement demonstrating that it is financially capable of refunding the decretal sum in the unlikely event that the appeal is successful; the appellant has failed to demonstrate that the respondent is not able to refund the decretal sum, as a result, the applicant has failed to demonstrate that it stands to suffer substantial loss if the stay of execution is not granted.
15. The respondent contended that it continues to be prejudiced by the applicant's continuing delay to settle the decretal sum as it is being denied what it is legally entitled to and its much-needed working capital for its business.
16. The respondent urged this court to dismiss the application, however it submitted that should this court be inclined to grant a stay of execution pending appeal, then the same should be strictly on condition that the appellant deposits the entire decretal sum in a joint interest earning account in the respective names of their advocates within a period of 14 days, failure to which execution to issue.
17. Having carefully considered the application, the replying affidavit in opposition thereto, the rival submission by both parties together with the authorities cited therein; I find that the main issue that arises for determination is whether the prayer for stay of execution pending appeal is merited.
18. The guiding law in an application of this nature, is found in Order 42 rule 6 of the Civil Procedure rules which stipulates thus:

“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.”
19. The conditions to be fulfilled by an applicant seeking stay of execution orders pending an appeal, have been provided for under Order 42 rule 6 (2) as follows: “No order for stay of execution shall be made under sub rule (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.
20. The Court of Appeal in *Butt v Rent Restriction Tribunal* (1979) eKLR; gave guidance on how courts are to exercise their discretion while considering an application for stay of execution. The Court of



appeal stated as follows: “If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. 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: “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.” Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require...”

21. It is clear from the above decision of the court of appeal, that the courts while exercising their discretion to grant orders of stay of execution, should do so in such a way that will not render the appeal nugatory if successful. In the present application, the applicant had submitted that its appeal will be rendered nugatory should its prayer for stay of execution not be granted, as the respondent has already commenced the process of execution, in order to satisfy the decretal sum that it had been awarded by the trial court.
22. The applicant had also submitted that the respondent has not demonstrated that he will be able to refund the decretal sum should the appeal be successful; as such, it is likely to suffer substantial loss should the order for stay of execution pending appeal not be granted.
23. Although the applicant had alleged that the respondent had already commenced the process of execution in order to satisfy the decretal sum awarded to it by the trial court, no evidence has been adduced before this court to demonstrate that execution of the trial court’s judgement and decree is eminent.
24. Being that as it may, I have noted that the respondent had adduced before this court his bank statement demonstrating that he is financially capable of refunding the decretal sum in the event that the applicant’s appeal is successful. I have gone through the said bank statement, and it is evident that the respondent has demonstrated that it will be able to refund the entire decretal sum in the event that the applicant’s appeal is successful.
25. I have however noted from the records of this court, that the respondent company is not based within the jurisdiction of Kenya. It is evident from the records of this court, that the respondent is based in Dubai, within the United Arab Emirates; as such, it may not be easy for the applicant to recover the decretal sum from the respondent in the event that its appeal is rendered successful, should the respondent be paid the entire decretal sum before the applicant’s appeal is heard and determined.
26. Furthermore, there is a likelihood that the applicant’s appeal may be rendered nugatory if the stay orders are not granted, seeing that the applicant may not be able to recover the decretal amount from the respondent should it be paid to the respondent before the hearing and final determination of the appeal, as it is clear that the respondent company is not based within the jurisdiction of Kenya.
27. Based on the above, I am of the considered view that the applicant is likely to suffer substantial loss in the event that an order for stay of execution pending appeal is not granted.



28. The applicant has also indicated that he is ready to provide security for the due performance of the decree, and abide by any condition set by this court for the orders of stay of execution to be granted. The respondent had proposed that the entire decretal sum be deposited in a joint bank account opened in the names of the respective advocates for the parties; the applicant in his written submissions had indicated he was ready and willing to abide by the respondent's proposal.
29. In my view, the fact that the applicant is willing and ready to deposit the entire decretal sum in a joint bank account registered in the names of their respective advocates is a show of good faith on the part of the applicant; as it demonstrates that he is not making this application as a way of denying the respondent the fruit of his judgement.
- The applicant has therefore satisfied this ground for granting an order for stay of execution.
30. Regarding whether the present application has been brought without delay; the judgement in this case was delivered on the 26th of July, 2024, the applicant filed his Memorandum of Appeal and the present application before this court on the 23rd of August, 2024. This is a period of approximately 28 days after the said judgement was rendered. It is therefore clear that the same was made without unreasonable delay.
31. Flowing from the foregoing, I am of the considered view that the applicant has met the threshold for granting an order for stay of execution pending appeal.

Determination

32. It is hereby ordered that stay of execution of orders are granted pending hearing and determination of the appeal on the following conditions:
- i. The applicant deposits the entire decretal sum of USD 28,107.12, in a joint interest earning account in the names of the respective counsels on record for the parties within a period 30 days from the date of this ruling;
 - ii. That in default, the orders for stay of execution be automatically vacated and the respondent shall be at liberty to execute;
 - iii. Costs of the application to follow the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL, 2025

HON. T. W. OUYA

JUDGE

For Appellant/Applicant.....Otieno

For Respondent.....Mituga HB for Mr Obel

Court Assistant...Doreen Njue

