



Ezgo Limited v Neptune Hotels (Zanzibar) Limited (Civil Appeal E240 of 2021) [2024] KEHC 16964 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 16964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E240 OF 2021
F WANGARI, J
JANUARY 19, 2024**

BETWEEN

EZGO LIMITED APPELLANT

AND

NEPTUNE HOTELS (ZANZIBAR) LIMITED RESPONDENT

RULING

1. This ruling relates to an application dated 7th September, 2023 which sought for the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That this Honourable Court be pleased to issue a Stay of Execution proceedings in Mombasa CMCC E115 of 2023, Neptune Hotel (Zanzibar) Limited v Ezgo Limited, pending hearing and determination of the appeal herein.
 - d. That the Honorable Court be pleased to admit the Appellant/ Applicant's appeal against the Lower Court ruling in Mombasa CMCC E115 of 2023, Neptune Hotel (Zanzibar) Limited v Ezgo Limited, dated 5th July 2023 out of time.
 - e. That this Honorable Court be pleased to make any other or such further orders as it may deem fit and just to grant.
 - f. Costs of this application be provided for.
2. The application was opposed through a Replying Affidavit dated 13th September, 2023, stating that there was nothing to stay in the Lower Court as there were no proceedings going on, and that the Appellant has not satisfied the conditions of being granted Stay of Execution orders. It was also stated



that the appeal was an afterthought and no valid reasons have been granted as to the delay in filing it within time.

3. The Lower Court having granted stay orders pending the outcome of this application, parties were directed to argue the application orally. Both parties filed their list of authorities in support of their rival positions.

Analysis and Determination

4. I have considered the oral submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant has made out a case for grant of orders sought pending hearing and determination of appeal preferred. Corollary to this finding is the issue of costs.

5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules](#), 2010 which provides as follows: -

“(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.

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute.

7. In [RRW v EKW](#) [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...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. 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...”

8. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicant submits that its business will suffer irreparable loss if the stay of execution orders are not granted. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. Execution proceedings had already commenced, as the warrants of attachment of movable properties and sale had already been issued. On the other hand, the Respondent should not be kept away from the fruits of its judgement. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice.
9. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
10. Considering that this court had no opportunity to peruse through the Statement of Defence filed by the Appellant in the lower court, by denying it the orders sought, it would place the Appellant at a more prejudicial position than the Respondent. While it is unfortunate that the Respondent will have to wait a little bit longer to enjoy the fruits of its judgement, the same shall be cured by ensuring there is sufficient security deposited by the Appellant and fast tracking of the Appeal.
11. On the issue of delay, though the Respondents argue that the application was filed after a period of 2 months, 8 days which I agree would be inordinate, I note that the Lower Court ruling on summary judgement settling the Plaintiff's claim. As such, the order emanating therefrom was negative in nature and as such, there was nothing to stay.
12. However, what precipitated the present application and which issue has not been rebutted by the Respondent is the execution proceedings resulting to the proclamation of attached goods dated 4/9/2023 and this application was filed 4 days later i.e. 8/9/2023. I thus hold that the same was filed without unreasonable delay.
13. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment



is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

14. Order 42 Rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security the Applicant should give as may ultimately be binding on the applicant. This modeling of the law is to ensure the discretion of the court is not fettered. I shall thus make orders accordingly on the issue of security.
15. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Notice of Motion dated 7th September, 2023 is merited and is hereby allowed by granting Stay of Execution proceedings pending hearing and determination of this appeal, on condition that the Applicant shall deposit the sum of USD 39,500 in a joint interest earning account in the names of Counsels on record for the parties herein within a period of thirty (30) days from the date hereof.
 - b. In default of (a) above, the Stay of Execution orders lapses and the Respondent is at liberty to proceed with the execution.
 - c. The Appellant to compile, file and serve a Record of Appeal within thirty (30) days from the date hereof, in the alternative, the lower court file be availed.
 - d. That Appellant’s submissions be filed and served within next 30 days, and the Respondent’s submissions be filed and served within 14 days after service.
 - e. Further directions to be issued immediately after this ruling.
 - f. Costs to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY, 2024.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Ms. Machogu Advocate h/b for Oluga Advocate for the Respondent

Barile, Court Assistant

