



**Ogolla v Target Educational Publishers Limited (Commercial Appeal E135 of 2023)
[2024] KEHC 2480 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E135 OF 2023**

MN MWANGI, J

FEBRUARY 9, 2024

BETWEEN

CHRISPINE JOSEPH OMONDI OGOLLA APPELLANT

AND

TARGET EDUCATIONAL PUBLISHERS LIMITED RESPONDENT

RULING

1. This ruling determines the applicant's Notice of Motion dated 19th June, 2023, brought under the provisions of Sections 3A and 1B of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant seeks interalia for a stay of execution of the judgment delivered on 16th December, 2022, and the resultant decree and consequential orders, pending the hearing and determination of the appeal. The applicant prays for costs to be in the cause.
2. The application is supported by the annexed affidavit of Chrispine Joseph Omondi Ogolla, the appellant herein. The grounds of the application are that the applicant has filed an appeal to challenge the judgment of Hon. R.L. Musiega delivered on 31st May, 2023, in Milimani Commercial suit No. E440 of 2022, where the Hon. Magistrate ordered the applicant to refund the respondent a sum of Kshs 400,000/= and to pay a sum of Kshs 900,000/= as a penalty for breach of contract. The applicant states that the intended appeal is arguable and unless orders for stay of execution are issued, the respondent will proceed with execution posing an imminent danger to the applicant, and the appeal will be rendered nugatory.
3. The application is opposed by the replying affidavit of Peter Kinyanjui Kiarie sworn on 4th July, 2023, in which he deposes that no security has been offered for the decretal sum and that the applicant's means are unknown, thus he ought to furnish the Court with security. The respondent also states that



no prejudice will be suffered by the applicant if the sums ordered by the Trial Court are paid, as the respondent is a reputable company.

4. The application was canvassed by way of written submissions. The applicant filed written submissions dated 18th July, 2023, whereas the respondent filed written submissions on 20th July, 2023

Applicant's submissions

5. In his written submissions, the applicant stated that the appeal has good prospects and a high chance of success. He stated that he seeks a chance to demonstrate to the Court that the judgment by the Trial Court was erroneous by holding that the applicant failed to hand over handwritten manuscripts and failed to appreciate that manuscripts can be typed.
6. It was submitted by the applicant that he will suffer substantial loss as the decretal amount is Kshs 1,390,000/=, which amount if executed, will render the appeal nugatory and expose his business to substantial financial loss.
7. It was also submitted that the application was made without unreasonable delay as it was filed within the window period for filing an appeal.
8. On the issue of furnishing of security, the applicant contended that he could not provide security without the discretion and condition being set by the Court on amount and the form of security to be deposited. Counsel cited the case in *Eswari Electricals (PVT) Limited vs Empower Installation Limited & Another* [2017] eKLR, where the Court of Appeal held that the power to order a party to furnish security is to be exercised with great caution because at the time it is exercised, the dispute has not been determined in one way or another on merit.
9. Counsel urged this Court to find the application herein as being merited and to allow the same.

Respondent's submissions

10. Counsel for the respondent contended that the applicant has not met the threshold of being granted stay of execution pending appeal, as the applicant has not provided security in due performance of the decree. He also contended that the applicant is employing delaying tactics to deny the respondent the chance to enjoy the fruits of the judgment. Counsel urged this Court to dismiss the application.

Analysis and Determination.

11. I have considered the application filed by the applicant, the grounds in support thereof, and supporting affidavit. I have also considered the replying affidavit and submissions alongside the case law cited by both Counsel for their respective clients. The only issue for determination is whether the applicant has demonstrated that the orders for stay of execution pending appeal are merited.
12. The conditions to be met for grant of an order for stay of execution pending appeal are well settled. They are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which states the following-

“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.”

1. An application for stay of execution must satisfy the above conditions, namely, substantial loss may result to the applicant if stay of execution is not granted, the application was made without unreasonable delay, and such security has been provided in due performance of the decree.
2. The purpose of an application for stay of execution is to maintain the status quo. It is a discretionary remedy of the Court, as stated by the Court of Appeal in RWW vs. EKW [2019] eKLR where it stated thus-

“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.”

15. The impugned judgment was delivered on 31st May, 2023, whereas the instant application was filed on 19th June, 2023. In the circumstances, I am satisfied that there has been no delay in bringing the current application in Court.
16. The applicant has submitted that he stands to suffer substantial loss if stay of execution is not granted as the decree is a money decree for the sum of Kshs. 1,390,000/= together with interest and costs. He stated that the respondent is not capable of refunding the amounts as it failed to pay the fees agreed on, thus necessitating the filing the suit in the Trial Court.
17. On its part, the respondent stated that no substantial loss will be suffered as in the event the appeal succeeds, it will be able to compensate the applicant the monies in issue, as it is a big company. In National Industrial Credit Bank Limited v Acquinas Francis Wasike & another Civil Application No. 238 of 2005 (UR), the Court of Appeal held that once an applicant expresses his fears of a respondent’s inability to pay back the decretal sum, the evidential burden shifts to the respondent since that is a matter that is peculiarly within his knowledge. In this matter, the respondent did not demonstrate that if it is paid the amounts in issue, it has the capability to repay the full amount.
18. This being a money decree, I am persuaded that the applicant has proved that he will suffer substantial loss if an order for stay of execution is not granted.



19. On the issue of deposit of security, the applicant is willing to furnish security but has left it to the discretion of the Court to determine the security to be furnished in due satisfaction of the decree. The respondent contended that the applicant is undeserving of the orders as he has failed to furnish security to the Court.
20. The issue of security is at the Court's discretion. The applicant has demonstrated his willingness to provide security. In the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the Court held as follows-
- “...Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of Judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”
21. In an application for stay of execution, it is within the province of the Courts to determine the form and security that should be deposited by an applicant for the due performance of a decree.
22. In the circumstances, I allow the applicant's application dated 19th June, 2023 and grant a stay of execution of the decree made in Milimani Commercial Case No. E440 of 2022 on condition that the applicant deposits half of the sum of Kshs.1,390,000/- within thirty (30) days in a joint interest-earning account in a reputable commercial bank to be held in the names of both the Advocates on record. The costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kariuki for the appellant/applicant

Mr. Ochieng h/b for Mr. Kimathi for the respondent

Ms B. Wokabi – Court Assistant.

