



REPUBLIC OF KENYA



**Pramukh Tyres & Retreads Limited v Metro Logistics Limited (Civil Case E095 of 2018)
[2024] KEHC 1484 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E095 OF 2018
JWW MONG'ARE, J
FEBRUARY 19, 2024**

BETWEEN

PRAMUKH TYRES & RETREADS LIMITED PLAINTIFF

AND

METRO LOGISTICS LIMITED DEFENDANT

RULING

1. Before the Court is the Defendant's Notice of Motion application dated 23rd May 2023, brought under Sections 79G and 95, 63(e), 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules*, seeking the following orders:-
 1. Spent
 2. Spent
 3. That pending hearing and determination of the appeal lodged herein, the Honourable Court be pleased to grant orders of stay execution of the decree and judgment of this court issued on 27th April, 2023 and all consequential orders arising therefrom.
 4. That the court be pleased to grant any other equitable orders in this matter.
 5. That Costs of this Application be provided for.
2. The application is predicated upon the grounds set on its face and the supporting and supplementary affidavits sworn by the Applicant's managing director, Mburu Njoroge On 23rd May 2023 and 29th August 2023 respectively. The Applicant also filed written submissions dated 29th August 2023.
3. The grounds upon which the orders are sought are that through a Judgment delivered on 27th April 2023, this Court allowed the Plaintiff's claim for Kshs.23,768,820.90/= plus interests; that the



Defendant has already filed an appeal challenging the said judgment and is apprehensive that the Plaintiff will proceed with execution; that the Defendant discovered that the Plaintiff applied for the decree un-procedurally, without any service of the draft to the Defendant or its counsel and which decree has been signed by this Court; that the copy of the said decree is not available to the Defendant or on the e-filing portal; that the Plaintiff has applied for execution of the decree and issuance of warrants to an auctioneer, before the taxation of costs; that the warrants of execution will irregularly issue any time and the Plaintiff will move on with execution; that if execution is allowed to proceed the appeal herein will be rendered nugatory and that the Defendant is able and willing to give an appropriate security for costs held in form of landed property being LR. Nos. Kajiado/Ochoro-Onyore/21786, Kajiado/Ochoro Onyore/28107 and Kajiado/Ochoro Onyore/20704 registered in the name of one of the directors and jointly valued at over Kshs.30 million, which sum is in excess of the judgment debt herein, for it to be allowed to pursue the appeal.

4. The Defendant asserted that its intended appeal is arguable with a high probability of success; that in the absence of an order of stay of execution of the decree pending appeal, the appeal will be rendered nugatory and the Defendant will stand to suffer irreparable loss and damage which cannot be compensated by way of damages thus and that it is only fair, just and equitable that the said application be heard on priority basis.
5. The application is opposed by the Plaintiff/Respondent by way of a replying affidavit sworn by its director, Paras M. Shah on 21st July 2023. The Respondent also filed written submissions dated 7th September 2023.
6. The gist of the Respondent's depositions was that the application is lacking in merit, is in bad faith, and should be dismissed with costs; that the Applicant had previously admitted to owing the judgment sums and given a proposal for settlement of the decretal sums; that upon the Respondent's instructions, M/s Muchangi Nduati & Co. Advocates, drafted a settlement agreement which was sent to the Applicant's director for approval; that however, the Applicant changed mind and filed a Notice of Appeal together with the current application; that though the Respondent had agreed to meet its advocate's costs and forfeit costs of the suit; that in the circumstances, there is no arguable appeal.
7. In brief rejoinder, the Applicant contended that its application is brought in good faith as it has offered security as consideration for the due performance of its obligations and as a condition for stay of execution. The Applicant also asserted that it will suffer substantial loss if the stay is not granted while the Respondent has not shown any substantial loss that it will suffer if stay is granted.

Analysis and Determination

8. I have considered carefully the pleadings and the parties' respective submissions and list of authorities. To my mind, the only issue for determination is "whether the Applicant has made out a case for the grant of stay of execution of the decree pending appeal." Order 42 Rule 6 of the [Civil Procedure Rules](#) provides that:-

“ [Order 42, rule 6.] Stay in case of appeal.

6.

- (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.”

9. Under Order 42 Rule 6, this Court’s power to grant stay of execution pending appeal is premised on three conditions namely, establishment of a sufficient cause, substantial loss and security. Additionally, the application ought to be made without unreasonable delay and the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted.

10. The Applicant argued that it has established sufficient cause and that it will suffer substantial loss if the stay is not granted because the Respondent has commenced the execution process. However, as was held in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the Court held 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.”

11. The Respondent highlighted that no appeal has been filed yet and that the Applicant has already admitted owing in the said judgment sums and proposed how it wishes to liquidate the debt in the evidence produced during the hearing of the matter. Alleging bad faith, the Respondent also underscored the Applicant’s proposal for settlement of the judgment sum which it reneged before filing the present application. The Respondent further pointed to the Applicant’s earlier delay tactics in the matter. Based on the foregoing, the Respondent submitted that no sufficient cause has been shown and the Applicant is merely engaged in an exercise to delay the Respondent from realizing the fruits of its judgment.



12. I am guided by the decision in *Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi* [2008] eKLR, where the Court stated 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. The court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment”.

13. Additionally, in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63, the Court similarly observed that:-

“In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage..... In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result...In this kind of application for stay, it is not enough for the Applicant merely to state that substantial loss will result. He must provide specific details and particulars...Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

14. From the record, I note that the Applicant filed a Notice of Appeal dated 8th May 2023, showing that the Applicant intends to appeal against the judgment delivered on 27th April 2023. I also note that the Respondent produced an email dated 2nd May 2023 from the Applicant’s managing director, Mburu Njoroge, in which, among other proposed terms of settlement, he indicated that the Applicant will not contest the judgment and wished to settle the matter amicably. What then changed to have the Applicant file the current application?

15. When all is said and done, I am not persuaded that the Applicant has established sufficient cause to warrant the grant of the orders sought or that it will suffer substantial loss if stay is not granted.

16. The upshot is that the application dated 23rd May 2023 is dismissed for want of merit with costs to the Plaintiff/Respondent.

17. Orders accordingly.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 19th DAY of FEBRUARY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Nduati for the Decree Holder.
2. Mr. Kirimi for the Defendant/Applicant.



3. Amos- Court Assistant

