



Kimeria (Suing in Her Capacity as the Administrator of the Estate of Harrison Charles Kimeria - Deceased) v Housing Finance Company (K) Ltd (Commercial Case 250 of 2008) [2024] KEHC 3636 (KLR) (Commercial and Tax) (15 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3636 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 250 OF 2008
JWW MONG'ARE, J
APRIL 15, 2024

BETWEEN

FAITH WANJIRU KIMERIA (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF HARRISON CHARLES KIMERIA - DECEASED) PLAINTIFF

AND

HOUSING FINANCE COMPANY (K) LTD DEFENDANT

RULING

1. The Defendant/Applicant filed a Notice of Motion application dated 18th December 2023 pursuant to the provisions of Sections 1A, 1B, & 3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 22 Rule 22, Order 42 Rule 6, & Order 50 Rule 6 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law seeking the following orders: -
 - i. Spent;
 - ii. This Honourable Court be pleased to extend the order of stay of execution issued by this Honourable Court on 30th November 2023 pending the filing, hearing, and determination of the Applicant's intended application to the Court of Appeal;
 - iii. This Honourable Court be pleased to grant an order of stay of execution of the Judgment and decree of this Honourable Court delivered on 30th November 2023; and
 - iv. The costs of and occasioned by this Application be provided for.
2. The application is anchored on the grounds on the face of the application and supported by an affidavit sworn on the same day by Belinda Ng'ang'a the Defendant's head of legal. In opposition thereto,



the Plaintiff filed a replying & supplementary affidavit sworn by Faith Wanjiru Kimeriah the Plaintiff herein on 9th January 2024 and 30th January 2024.

3. The Defendant's case is that this Court delivered a judgment in this suit on 30th November 2023 in favour of the Plaintiff, granting her inter alia Kshs.150,000,000/= and costs of the suit. Thereafter, the Defendant's Advocates filed a Notice of Appeal dated 8th December 2023 and applied for a copy of the judgment and typed proceedings. The Defendant averred that a copy of the judgment was availed to it on 11th December 2023 but by this time the Court of Appeal calendar for the year 2023 had been finalized.
4. The Defendant further averred that it has an arguable appeal in view of the fact that this Court awarded the Plaintiff damages on the basis of the current market value instead of the value at the time of the sale. It stated that the decretal sum is a colossal amount of money which if paid and the intended appeal succeeds, the Defendant will not be able to recover it from the estate of the Plaintiff. Further, it contended that it is ready and willing to comply with any condition this Court may deem reasonable in the circumstances of this case.
5. The Plaintiff in response thereto deposed that the Defendant has not demonstrated that it has an arguable appeal, and no sufficient cause has been demonstrated to warrant grant of the orders sought herein. In addition, the Defendant has not proposed any security to warrant grant of the orders sought despite the fact that the decree herein is a money decree. She asserted that in the event this Court is inclined to grant the orders sought, then the Defendant should be directed to pay her half of the decretal amount, and deposit the balance in a joint interest earning account in the name of the advocates for parties. The Plaintiff averred that she has sufficient fixed assets capable of raising such amount for refunds should the intended appeal succeed.

Submissions

6. This application was canvassed by way of written submissions. I shall not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination as necessary.

Analysis and Determination

7. Upon consideration of the application filed herein, the grounds on its face and the affidavit filed in support thereof, the replying and supplementary affidavits by the Plaintiffs, together with the written submissions by Counsel for parties, I find that the issue that arises for determination is whether an order for stay of execution pending appeal should issue.

“Whether an order for stay of execution pending appeal should issue.”

8. Stay of execution pending appeal is provided for under Order 42 rule 6 (2) of the [Civil Procedure Rules, 2010](#) which states that -

“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.



9. In *Visbram Ravji Halai v Thornton & Turpin* [1990] KLR 365, the Court of Appeal held that the High Court’s jurisdiction to grant an order for stay off execution pending appeal is fettered by three conditions –
- i. establishment of a sufficient cause;
 - ii. satisfaction of substantial loss; and
 - iii. the furnishing of security.
10. In addition to the above, an Applicant has the burden of demonstrating that the instant application has been made without unreasonable delay, and that the intended Appeal will be rendered nugatory in the event the orders sought herein are not granted.
11. This Court entered judgment for the Plaintiff against the Defendant vide its judgment delivered on 30th November 2023 granting her inter alia Kshs.150,000,000/=. The decree herein is a money decree and ordinarily, Courts will not readily grant an order for stay of execution pending appeal unless it is demonstrated that the decree-holder is not financially capable of refunding the decretal sum to the judgment debtor in the event the appeal is successful.
12. On whether or not the Defendant stands to suffer substantial loss in the event the application herein is disallowed, I am guided by the Court’s holding in the often-cited case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, where it was held that -
- “It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money”.
13. In this case, the Defendant relied on the case of *Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & Anor* [2017] eKLR which cited the Court of Appeal decision in *Mukuna v Abuoga* [1988] KLR 645 and argued that the intended appeal has overwhelming chances of success, thus in the event it succeeds and the Defendant has already paid the Plaintiff the decretal sum, it shall suffer substantial loss. The Defendant submitted that it is apprehensive that the Plaintiff will be unable to refund it the decretal sum if it is paid to her and the intended appeal succeeds.
14. The Plaintiff on the other hand submitted that the Defendant has not demonstrated any sufficient cause and/or that it has an arguable appeal to warrant grant of the orders sought. It relied on the case of *Shell Ltd v Kibiru & another* [1986] KLR 410 and argued that the Defendant has not discharged its burden of proving that paying the decretal sum would affect its business significantly. She referred to the Court of Appeal case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR and asserted that a claim that the Respondent cannot refund the decretal sum is not sufficient, there must be cogent evidence and reasonable grounds provided by the Defendant in support of the said claim which burden the Defendant has not discharged.
15. To this end, I am persuaded by the Court’s observation in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR where it held that–
- “Where the allegation is that the Respondent will not be able to refund the decretal sum the burden is upon the Applicant to prove that the Respondent will not be able to refund to



the Applicant any sums paid in satisfaction of the decree. See *Caneland Ltd. & 2 Others v Delphis Bank Ltd.* Civil Application No. Nai. 344 of 1999.

The law, however appreciates that it may not be possible for the Applicant to know the Respondent's financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an Applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then, in those circumstances, where the Applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua* Civil Application No. Nai. 367 of 2001; *ABN Amro Bank, N.K. v Le Monde Foods Limited* Civil Application No. 15 of 2002.”

16. The Defendant averred that the decretal sum if paid to the Plaintiff at this juncture will fundamentally affect its business. Furthermore, the Plaintiff is not in a position to refund the said decretal sum in the event it is paid and the Defendant's appeal is successful. In as much as the Defendant made the aforesaid allegations, it did not discharge its legal burden of stating and/or listing the grounds upon which the above allegations are founded. It is only once an Applicant states reasonable grounds that inform its belief, that the Respondent is expected to demonstrate its financial capabilities to the Court.
17. In addition, upon claiming that its business will be significantly affected if it pays the decretal sum to the Plaintiff, the Defendant did not demonstrate and/or elaborate on how and/or to what extent paying the decretal sum would affect its business. Be that as it may, the Plaintiff swore an affidavit of means deponing that the Estate of the Late Harrison Charles Kimeriah is approximately Kshs.160,000,000/=.
18. In view of the above, this Court finds that no substantial loss will be suffered by the Defendant in the event the Court declines to grant the orders sought in the instant application.
19. The above notwithstanding, in dealing with an application for stay of execution pending appeal, Courts have a duty to balance the competing interests of the parties taking into account the fact that an Appellant has an undoubted right of appeal, and the Respondent has a decree which she should not be obstructed from executing unless there is a good reason. This suit was filed approximately sixteen years ago; this means that the Plaintiff has waited for sixteen years to finally be able to enjoy the fruits of her judgment. The Defendant has argued that it has an arguable appeal.
20. At this point, it is important to point out that this Court heard and determined this case on its merit and found that the Plaintiff proved her case against the Defendant on a balance of probability. Therefore, it is impossible for this Court to find that the Defendant's appeal is arguable and/or has chances of success. The Defendant deposed that the only reason this application was not filed at the Court of Appeal is because the Court of Appeal's diary for the year 2023 had been finalized. In addition, at paragraph 14 of its supporting affidavit the Defendant averred that it has begun the process of filing the appropriate application at the Court of Appeal.
21. To me, this means that the Defendant is fully aware that if it requires an order for stay of execution pending appeal, it should file an application at the Court of Appeal seeking grant of the said order, being the Court not only with jurisdiction to grant the said order, but also seized of the matter. Further,



no explanation has been offered by the Defendant why an application of this nature has not yet been filed at the Court of Appeal despite the fact that we are almost four months into the year 2024.

22. In the circumstance, this Court finds that the Defendant has not established sufficient cause and/or that it will suffer substantial loss if this application is disallowed, to warrant grant of the orders sought.
23. In the end, I find that the instant application is devoid of merit. As a result, it is hereby dismissed with costs to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF APRIL, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. King'ara for the Plaintiff.
2. Mr. Paul Kamara holding brief for Mr. Chacha Odera for the Defendants.
3. Amos - Court Assistant

