



REPUBLIC OF KENYA



KENYA LAW
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**Summit Cove Lines Company Limited v Uap Insurance Company Limited
(Civil Suit 43 of 2017) [2024] KEHC 10298 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 43 OF 2017
F WANGARI, J
APRIL 18, 2024**

BETWEEN

SUMMIT COVE LINES COMPANY LIMITED PLAINTIFF

AND

UAP INSURANCE COMPANY LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 27th November, 2023 the applicant seeks the following orders:
 - a) Spent
 - b) Spent
 - c) That pending the hearing and determination of the defendant's intended appeal, this honorable court be pleased to grant a stay of execution to its ruling and orders delivered on the 27th October, 2023.
 - d) Costs of this application be provided for.
2. The application is premised on the grounds on the face of the application and on the affidavit of Frankline Nyaga a senior legal officer at the defendant's company.
3. The plaintiff/respondent had opposed the application by filing grounds of opposition dated 28th November, 2023 and a replying affidavit sworn on 14th December, 2023 by Joseph M. Kirema a director of the Plaintiff company.
4. Both parties had filed submissions in support of their respective positions.
5. The applicant's application is premised on the grounds that on 27th October, 2023 the honorable court had delivered a ruling which allowed the plaintiff's Notice of Motion dated 16th November, 2022.



6. The applicant contends that the ruling was to be delivered on the 19th October, 2023 and when it was not delivered they had waited for a notice of the same. That, they only came to learn of the delivery of the ruling on the 23rd November 2023 when it received warrants of attachment and a proclamation notice from Galaxy Auctioneers in purported execution of the Ruling after it had been delivered on 27th October, 2023.
7. The defendant contends that it was not able to file its notice of appeal within 14 days of the date of delivery of the ruling but have since filed an application to the court of appeal for extension of time to file its Notice of Appeal
8. The applicant submits that there being no express provisions in the rules for an application to stay execution pending the determination of an application for extension of time to serve a notice of appeal before the Court of Appeal they have invoked the inherent jurisdiction of this Court. That denying the requested order for a stay of execution would lead to the futile pursuit of the application before the Court of Appeal thus rendering the defendant's intended appeal meaningless.
9. While placing reliance on the provisions of order 42 rule 6(2) of the Civil Procedure Rules, the applicant contends that they have met all the tests for grant of an order of stay.
10. The respondent submits that the application lacks merit as there is no appeal that has been lodged in the court of appeal by the defendant/applicant. They submit that a decree has already been issued by this court an Arbitrator's award has already been recognized and adopted as the order of this Honorable Court and that the only avenue to challenge that is to lodge an appeal at the court of appeal.
11. The respondent contends that the Arbitral Award in this matter was made on the 14th August, 2018 which is now running to the sixth year since the award and the applicant is deliberately to impeded the course of justice and hold the plaintiff at ransom in perpetuity from realizing the fruits of the Arbitral award.
12. That the stay would amount to reinstatement of corrected order and that the applicant had failed to explain their reason for non-attendance when the ruling was delivered.

Analysis and Determination

13. I have considered the said 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 applicant has made out a case for grant of orders of stay pending hearing and determination of their intended appeal. Corollary to this finding is the issue of costs.
14. 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."

15. 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. 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 ...”

16. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicants submitted that they stand to suffer a loss of Kshs. 11,650,000 plus 12% interest from 30 days after 14th August, 2018. 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. The applicant is yet to file an appeal in this matter. All they have is to file an application to file an appeal out of time. I do find that the applicant has not substantiated what loss they stand to suffer.

17. On the other hand, the Respondent would be kept away from the fruits of her judgement. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. 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...”



18. The respondent has held an award since 14th August, 2018 that they have been unable to enjoy the fruits thereof as a result of a lengthy process. Litigation must come to an end.
19. On the issue of delay, the Application was filed within one month after delivery of ruling. The applicant was well aware of the pending ruling and they slept on their rights until the 23rd November 2023 when it received warrants of attachment and a proclamation notice from Galaxy Auctioneers in purported execution of the Ruling after it had been delivered on 27th October, 2023.
20. I agree with the respondent that in the absence of an appeal, the application dated 27th November, 2023 lacks merit. I reiterate that litigation must come to an end and being alive to the decision in *Geo Chem Middle East v Kenya Bureau of Standards* (Petition 47 of 2019) [2020] KESC 1 (KLR) (18 December 2020) (Judgment) the Supreme Court held in paragraph 41,

“Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the *Act*. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in *Nyutu* and *Synergy* should not be taken as stating anything to the contrary.” (Emphasis mine)

21. Following the foregone discourse, the upshot is as follows;
 - i. The Application dated 27th November, 2023 lacks merit and is hereby dismissed.
 - ii. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF APRIL, 2024.

F. WANGARI

JUDGE

In the presence of:-

Mokaya Advocate for the Plaintiff

Wameo Advocate h/b for Ndungu Advocate for the Defendant

Barile, Court Assistant

