



Kamindi Selfridges Supermarket Ltd v Darmas (Suing as the Administrator of the Estate of the Late Dalmas Rioba Mwiti) (Civil Appeal E118 of 2023) [2024] KEHC 9616 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 9616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E118 OF 2023
DO CHEPKWONY, J
MAY 3, 2024**

BETWEEN

KAMINDI SELFRIDGES SUPERMARKET LTD APPLICANT

AND

JACKLINE RIOBA DARMAS (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE DALMAS RIOBA MWITI) RESPONDENT

(Being an Appeal from the Judgment of Honourable Emily Ominde, Chief Magistrate delivered on 4th April, 2023 in Kiambu CMCC No.E541 of 2021)

RULING

1. What is before the court for determination is the Notice of Motion application dated 18th August, 2023 which seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to order stay of execution of the Judgment and/or Decree from the Judgment of Honourable Emily Ominde Chief Magistrate delivered on 4th April, 2023 in Kiambu CMCC No. E541 of 2021 pending the hearing and determination of the Appeal in Kiambu HCCA No. E118 of 2023.
 - d. That this Honourable Court be pleased to order that the Applicant provides security in the form of bank guarantee from a reputable bank within the Republic of Kenya as a condition for stay of execution pending the hearing and determination of the Appeal in Kiambu HCCA No. E118 of 2023.



- e. That costs of this application be in the cause.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit sworn by Michael Mwaniki Karuki, as the Manager of the Applicant on 18th August, 2023.
 3. According to the Applicant, on August, 2023, the Respondent through Silverline Auctioneers served upon it proclamation notices, warrants of attachment and sale together with the auctioneer's fee note over the decretal sum of Kshs. 4,467,535/= which have targeted the Applicant's entire stock of trade and 5 motor vehicles which are critical tools of trade for the operations of its business and which have been deliberately undervalued.
 4. It is the Applicant's contention that the said Proclamation Notices have indicated that at the lapse of seven days which was to occur on 21st August, 2023, its the essential stock of trade and 5 motor vehicles shall be attached and sold through public auction. The Applicant thus argues that with the Judgment of 4th April, 2023, it was ordered to pay the decretal sum of Kshs. 4,073,613.00/= plus costs and interest of the suit. And being dissatisfied with the said Judgment, the Applicant filed the present Appeal and on 11th May, 2023, filed an application for stay of execution at the Kiambu Chief Magistrate's Court but no interim orders of stay were issued to protect the substratum of the suit. On 23rd May, 2023, the parties attended court for the said application to be heard and the Applicant was granted a further seven (7) days leave to file and serve supplementary affidavit and for the parties to exchange written submissions. By 18th July, 2023 when the matter came up for ruling, the court was not sitting despite the Applicant's having complied with its directions. Since the trial Magistrate did not issue any interim orders, the Applicant filed an application under Certificate of Urgency seeking stay of execution pending hearing and determination of appeal. According to the Applicant, unless the application was certified urgent and its determination brought forward, before the 28th August, 2023, the Applicant's fundamental right to be heard and access to justice of guaranteed under *the Constitution* and it would suffer prejudice and substantial loss since the Respondents address and financial status are unlawful to that of execution were to proceed, the appeal would be rendered nugatory. It is the Applicant's contention that it is ready and willing to furnish security in the form of the Bank Guarantee from a reputable bank.
 5. The Respondent opposed the application through the Replying Affidavit sworn by Morris Mugendi Karigi on 29th August, 2023 wherein it stated that the application is unmerited and abuse of the court process only meant to delay its rights of enjoyment of the fruits of its Judgment.
 6. It is the Respondent's case that the application has been overtaken by events since the Applicant has already paid a sum of Kshs. 1,469,035/= as part payment of the decretal sum. The Respondent also states that the amount due and owing of Kshs. 3,000,000 is payable by the Applicant's insurer which it had already written an email showing willingness to settle the amount on 14th July, 2023. The Respondent therefore contends that there is no reason to grant the orders sought and that the Applicant's right to appeal should be weighed with the rights of the Respondent in enjoying the fruits of her Judgment.
 7. The Respondent has urged that the application be dismissed since it does not meet the threshold for stay of execution orders to issue and neither has the Applicant demonstrated that its appeal has a high chance of success.
 8. On 22nd August, 2023, the court directed that the application be canvassed by way of written submissions and the Applicant filed its submissions dated 22nd September, 2023 while the Respondent



filed theirs dated 25th September, 2023. The court has read through and will consider the arguments therein in its ruling.

9. Upon reading through the pleadings and written submissions filed by either party, the court finds the issue for determination being whether the Applicant has satisfied the conditions required under Order 42 Rule 6 of the [Civil Procedure Rules](#).

10. The law on stay of execution is enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:-

Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:-

“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”

11. On the purpose of an application for stay of execution pending appeal the court in [RWW v EKW](#) [2019] eKLR, held:-

“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”.

12. It is trite law that for a court to grant stay of execution orders, three conditions must be met, and these are that:-

- a. The application has been made without unreasonable delay.
- b. The Applicant will suffer Substantial loss
- c. The Applicant has offered security for due performance of the decree.

13. On the first condition, the Judgment herein was delivered on 4th April, 2023 and the present application was filed on 18th August, 2023 which is about four (4) months, which the court finds a little bit unreasonable delay hence this condition has not been fulfilled.

14. On the second condition where the Applicant is apprehensive of suffering substantial loss, the Applicant has stated that it is likely to suffer substantial loss since its stock of trade and five motor vehicles have been proclaimed which is sufficient evidence to show the substantial loss it will incur if the said items were to be sold. For this reason, the court finds there is need to protect the said property pending the determination of the appeal.



15. The issue of substantial loss was defined in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR, wherein it is held as follows:-

“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”.

16. This court agrees with the decision in the case of Kenya Shell supra that without the evidence of the substantial loss it is difficult to grant the stay orders as there is no reason why the Respondent should be kept away from its Judgment. In this case, the court has found that the Applicant has shown sufficient evidence that it is likely to suffer substantial loss if the application is not granted.

17. Lastly, is the issue of security for the due performance and in this case, the Applicant has offered to give security through bank guarantee from a reputable bank as a condition for stay in the Affidavit in order to fulfil this condition. The issue of security was discussed in the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, wherein it was held that:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails...”

18. Having considered the Replying Affidavit of the Respondent which shows that the amount of Kshs. 1,469,035/= has already been paid leaving a balance of Kshs. 3,000,000/= which the Applicant had shown willingness to pay though it is not certain on the status of the payment, the court finds that it would be prudent to issue stay of execution orders on condition that the Applicant does deposit the entire balance of the decretal sum in court.

19. In the resultant, the Notice of Motion application dated 18th August, 2023 is found meritable and allowed and for avoidance of doubt on the following terms:-

- a. That there be a stay of execution of the Judgment and or Decree of the Judgment of Honourable Emily Ominde, Chief Magistrate delivered on 4th April, 2023 in Kiambu CMCC No.E541 of 2021 on condition that the Applicant deposits the entire balance of the decretal sum in court as security within thirty (30) days from the date of this ruling.
- b. The Appellant/Applicant to file and serve a record of Appeal within thirty (30) days from the date hereof.
- c. Mention on 4th June, 2024 for parties to confirm compliance of Order (a) and (b), and further directions to issue on the disposal of the appeal.
- d. Failure to comply with Order (a) and (b), the application will stand dismissed and orders discharged.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF MAY, 2024.



D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Masinga counsel for Applicant/Appellant

Mr. Ombati holding brief for Mr. Njagi for Respondent

Court Assistant - Martin

