



Okeno & Sons Building Contractors v Bukura Agricultural College & another (Miscellaneous Civil Application E014 of 2022) [2024] KEHC 6210 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E014 OF 2022**

PJO OTIENO, J

MAY 24, 2024

BETWEEN

OKENO & SONS BUILDING CONTRACTORS APPLICANT

AND

BUKURA AGRICULTURAL COLLEGE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The court is called upon to determine the Notice of Motion dated 19.3.2024 seeking stay pending appeal. It is disclosed in the application that a notice of appeal has been filed and same is dated 8.3.2023 which exists in the court file.
2. For purposes of this application for stay, an appeal is deemed filed with that notice on record.
3. The grounds and premise upon which the orders are sought is very straight forward. It reads that the Applicant being aggrieved by the decision of the court dated 4.3.2023 has preferred an appeal and seeks the protection of the court against execution pending the outcome of that appeal. The same grounds are regurgitated in the Affidavit in support of the application.
4. The application was resisted by the decree holder on the basis of the Replying Affidavit sworn by one Paul Otieno Okeno sworn on 3.4.2024. In that Affidavit it is contented that the court has become functus officio on the basis that after the decision of 4.3.2024 by which it gave to the judgment debtor a stay spanning period of fifteen (15) days to settle the decree, and after an appeal was lodged to the Court of Appeal, to entertain the current application for stay would be tantamount to sitting on an appeal by the court from its own decision. It is then added that the appeal to the Court of Appeal disputes not the consent order on payment but seeks to revise the terms of the consent arising from a binding arbitral award. The decree holder deems it illogical that the judgment debtor is pursuing an



- appeal without contesting the enforceability of the consent order. The decree holder then views the court to portend visiting upon it an injustice by continuing to entertain the application for stay.
5. Lastly, it asserts that the appeal filed presents no arguable point and has no prospects of being rendered nugatory because the outstanding sum is admitted.
 6. Parties thereafter filed and exchanged written submissions which the court has read and benefited from. The court shall give all the due consideration to the Submissions without having to rehash the same in this decision.
 7. Whether or not to grant stay pending appeal is a matter always sitting at the discretion of the court. The discretion is very wide and unfettered but the law gives parameter for consideration by dint of Order 42 Rule 6, *Civil Procedure Rules*.
 8. The parameters are that there must be; a pending appeal; the court must be satisfied that substantial loss will result to the Applicant if the orders are not made; the application must be brought timeously and without unreasonable delay and lastly that the court must impose an order for provision of security for the due performance of the decree should the appeal not succeed.
 9. Of all the consideration, the cornerstone is the substantial loss aspect. The Applicant must satisfy the court that it stands to suffer a loss that is so substantial which then renders the entire appeal nugatory.
 10. To this court, it is unusual for enforcement of a monetary decree to render an appeal nugatory. It is unusual because when only money is to pass between the parties the same is capable of reversal unless the Applicant proves that the Respondent is a man of the straw who would be unable to effect a refund in the event the appeal succeed. In this matter no such allegation has been made and no demonstration has been offered, the court is thus not satisfied that no substantial loss will result.
 11. In monetary decrees, that there is threat to execution or that execution has indeed been levied does not amount to substantial loss. Execution is itself a lawful process toward concluding litigation and is never by itself an injustice. The Applicant must demonstrate other factor to show that execution will drastically tilt and alter the scales of justice in a manner that make the pending litigation on appeal worthless; phantom academic and any outcome a mere pretence of administration of justice – see *James Wangalwa & Another v Agnes Naliaka |Cheseto* [2012] eKLR.
 11. For the court, without demonstration of substantial loss, there is no basis, and no interests of justice to be served by granting stay. The court thus lacks a reason upon which to base its discretion and thus finds the application to lack merit. The same is hereby dismissed with costs to the Respondent/decree holder.

Dated, signed and delivered at Kakamega, this 24th day of May, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Mandala for the Decree holder

Mr. Juma for the Applicant/Judgment debtor

No appearance for the Garnishees

Court Assistant: Polycap Mukabwa

HC. Misc. Civil Application No. E014/2022 – Ruling Page 2 of 2

