



Radeecal Communications v Sea Breeze Tours & Travel & another (Commercial Appeal E290 of 2023) [2024] KEHC 6704 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E290 OF 2023**

MN MWANGI, J

MAY 24, 2024

BETWEEN

RADEECAL COMMUNICATIONS APPELLANT

AND

SEA BREEZE TOURS & TRAVEL 1ST RESPONDENT

JOHN KIPKORIR KIBET 2ND RESPONDENT

RULING

1. This ruling is in respect to two applications. The first application is the appellant’s Notice of Motion dated 24th October, 2023 filed pursuant to the provisions of Sections 3, 3A & 75 (1) (h) of the *Civil Procedure Act*, Order 42 Rules 1 & 6, Order 43 Rule 1, Order 50 Rule 6 & Order 51 Rules 1, 3, & 4 of the Civil Procedure Rules 2010, and all enabling provisions of the law seeking the following orders –
 - i. Spent;
 - ii. Spent;
 - iii. Pending the hearing and determination of Appeal filed herewith, an order be and is hereby issued staying the execution of the judgment delivered by Hon. A.N. Ogonda (SRM) on 2nd October 2023 in Milimani CMCC No. 6881 of 2018- Sea Breeze Tours and Travel Limited v John Kipkorir Bett and Radeecal Communication Limited;
 - iv. Any other relief that this Honourable Court deems fit and appropriate to grant; and
 - v. Costs be in the cause.
2. The application herein is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 30th October, 2023 by Edwin Masivo Luyali, the appellant’s Director. In opposition



- thereto, the 1st respondent filed a replying affidavit sworn on 24th January, 2024 by Reena Desai, the 1st respondent's Director.
3. The 2nd application is the appellant's Notice of Motion dated 16th January 2024 filed pursuant to the provisions of Section 80 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 45 Rules 1 & 2, Order 50 Rule 5, Order 51 Rules 1 & 3 of the Civil Procedure Rules 2010, Article 159 (1) (d) of the Constitution of Kenya and all other enabling provisions of the law, seeking the following orders –
 - i. Spent;
 - ii. That the Honourable Court be pleased to review, vary and/or set aside its orders of 4th November, 2023 directing the applicant to deposit 70% of the decretal sum in court within 45 days failing which the stay shall automatically lapse and substitute it thereof with an order directing the applicant to furnish the Court with a Bank Guarantee from a reputable bank for the decretal sum;
 - iii. That this Honourable Court be pleased to order that the applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the Judgment in Milimani CMCC No. 6881 of 2018 - Sea Breeze Tours and Travel Limited v. John Kipkorir Bett and Radeecal Communication; and
 - iv. That the costs of the application be provided for.
 4. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Edwin Masivo Luyali, the appellant's Director. In opposition thereto, the 1st respondent filed a replying affidavit sworn on 24th January, 2024 by Reena Desai, the 1st respondent's Director
 5. The applications herein were canvassed by way of written submissions. The appellant's submissions were filed by the law firm of H&K Law Advocates on 28th February 2024, whereas the 1st respondent's submissions were filed on 20th March, 2024 by the law firm of Kiarie Mungai & Associates Advocates. Mr. Otwal for the 1st respondent informed this Court that the 2nd respondent did not participate in the matter before the lower Court. The said respondent did not also file responses in the present applications.
 6. Mr. Kiplangat, learned Counsel for the appellant relied on the provisions of Order 42 Rule 6 and the case of RWW v EKW [2019] eKLR and submitted that the appellant has satisfied the threshold for being granted an order for stay pending appeal, and a review of the orders of 4th November, 2023. He further submitted that the appellant faces execution over Kshs 3,473,600/= and costs, yet it has filed an appeal against the judgment of the Court from where the decree sought to be executed emanates. He stated that the appellant has no money and has never traded as to have any security that would be used to satisfy the conditions imposed by this Court on 4th November, 2023.
 7. On the issue of substantial loss, Counsel cited the cases of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and Michael Ntouthi Mithen v Abraham Kivondo Musau [2021] eKLR and stated that in the event the orders being sought are not granted, the appellant will be greatly prejudiced since the 1st respondent will proceed with execution of the decretal sum which is a substantial amount, thus rendering the appeal nugatory and causing the appellant to suffer irreparable loss.
 8. Mr. Kiplangat stated that the instant application was filed timeously having been filed less than thirty (30) days from the date of delivery the judgment.



9. On the issue of security, Counsel referred to the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, and asserted that the Court orders made requiring the appellant to deposit 70% of the decretal sum was manifestly high noting that the appellant has no finance and has never traded, and in any event, the appellant is ready and willing to furnish this Honourable Court with a Bank Guarantee from a reputable bank as security for the decretal sum. It was submitted by Counsel that the appellant's appeal raises substantial questions of law and fact, and has an overwhelming chance of success.
10. Mr. Otwal, learned Counsel for the 1st respondent referred to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 and the case of *Pamela Akinyi Opundo v Barclays Bank of Kenya Ltd* [2011] eKLR and submitted that the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010, cannot be severed, but must be met simultaneously, and that failure to prove one dislodges the other. He further submitted that the appellant has not demonstrated how it will suffer substantial loss in the event an order for stay of is not granted. He relied on the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, where the Court cited the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (supra) and contended that this being a money decree the reasons set forth by the appellant do not warrant granting of an order for stay of execution.
11. Counsel cited the case of *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR and contended that no sufficient evidence had been adduced to show the financial strain the appellant will face if ordered to comply with the order for deposit of security. He stated that no evidence of the appellant's financial statements had been attached to the application herein save only for the bare statements by the appellant's Director, which have little to no probative value, thus being unsuccessful in demonstrating substantial loss as a requirement by the law. In submitting that if this Court is minded to grant an order for stay of execution, then the Court should make an order that the appellant deposits the decretal sum in a joint account owned by the two corresponding law firms, Mr. Otwal relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd* (supra).

Analysis And Determination.

12. I have considered the two applications filed by the appellant, the grounds they are anchored upon, and the affidavits filed in support thereof. I have also considered the replying affidavits by the 1st respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for stay of execution pending appeal should issue in favour of the appellant.
13. The appellant in its affidavit in support of the application dated 24th October, 2023 deposed that vide a plaint dated 30th July, 2018 the 1st respondent sued it and the 2nd respondent for breach of contract in form of a Purchase Order which was alleged to have been executed on 10th May, 2018 between the 1st & 2nd respondents, with the 2nd respondent acting on behalf of the appellant. The appellant averred that the said agreement could not have been entered into on its behalf, since at that time it had not yet been incorporated.
14. It was stated by the appellant that judgment was delivered in favour of the 1st respondent against the appellant and the 2nd respondent on 2nd October, 2023 by the Trial Court. That the Trial Court found that the appellant and the 2nd respondent were liable to pay the 1st respondent Kshs.3,473,600/= together with interest from the date of filing the suit. Being dissatisfied with the said judgment, lodged an appeal against it.
15. The appellant contended that the said appeal raises serious and weighty issues with reasonably high chances of success such as, that the Trial Court enforced a contract allegedly entered into by the 2nd



- respondent on behalf of the appellant, when the appellant had not even been incorporated. It asserted that in the event that the 1st respondent executes the said judgment, it will not only suffer irreparable loss and damage, but the appeal filed will also be rendered nugatory.
16. The appellant stated that it is ready and willing to furnish the Court with a favourable security in lieu of deposit and/or to comply with any conditions and/or requirements that this Court may deem fit.
 17. In the affidavit in support of the application dated 16th January, 2024 the appellant deposed that together with the Memorandum of Appeal, it filed a Notice of Motion application dated 24th October, 2023 seeking an order for stay of execution pending appeal.
 18. That on 4th November, 2023, Judge Aleem Visram granted it an order for temporary stay pending the hearing and determination of the said application on condition that it deposits 70% of the decretal sum in Court within 45 days failure to which the order for stay shall automatically lapse.
 19. The appellant averred that it is not trading and has never traded since its incorporation, therefore it has no money to deposit in Court as security for the due performance of the decree the subject of the appeal. It further averred that it is faced with imminent execution yet it has no means of raising the 70% decretal sum required, but it is ready and willing to furnish the Court with a Bank Guarantee from a reputable bank for the decretal sum.
 20. It prayed for the Court order issued on 4th November, 2023 to be reviewed and for the appellant's Directors to be granted an opportunity to furnish the Court with a Bank Guarantee from a reputable bank as security for performance of the decree of the Court.
 21. The 1st respondent in its replying affidavit deposed that the appellant has failed to show this Court sufficient cause why the applications herein should be allowed. In addition, the documents placed before this Court by the appellant do not disclose or demonstrate that the appellant will suffer irreparable harm in any way if the orders for stay of execution are not granted. It also averred that any continued delay in realizing the fruits of its judgment will subject it to financial catastrophe.
 22. It was stated by the 1st respondent that the instant applications are mere dilatory tactics to delay the appellant from enjoying the fruits of its judgment. It stated that the right of appeal must be balanced against an equally weighty right of the 1st respondent to enjoy the fruits of the judgment delivered in its favour, which means that there must be a just cause for depriving the 1st respondent that right, which cause the appellant has failed to demonstrate.
 23. The 1st respondent contended that despite stating that the appellant is willing to furnish security and despite being issued with conditions for a temporary stay of execution by the Court, the appellant has been unable to satisfy the said conditions thus there is no guarantee that it will comply with the set conditions for security that this Court may grant, if any. The 1st respondent contended that the appellant has hidden its assets and as such, it has been difficult to attach the said assets for the purposes of realizing the judgment issued by the Trial Court in favour of the 1st respondent.
 24. The 1st respondent asserted that in the circumstances, it would be reasonable, fair and just for the appellant be ordered to have the entire decretal sum deposited in a joint interest earning account held by the Advocates for both parties herein.
 25. The 1st respondent deposed that an application for review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court, which elements lack in the appellant's application dated 16th January, 2024.



26. The 1st respondent averred that mere apprehension that the process of execution has been allegedly put in motion or is likely to be put in motion by itself does not amount to substantial loss. That even in the event of successful execution, it does not in itself amount to substantial loss under the law, as execution is itself a lawful process.

Whether an order for stay of execution pending appeal should issue in favour of the appellant.

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

“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.”

28. In determining an application for stay of execution pending appeal, Courts are under a duty to balance the competing interests of the parties, by taking into account the fact that an appellant has an undoubted right of appeal, whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. In the case of [Visbaram Ravji Halai v Thornton & Turpin](#) [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 Rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely –

- i. establishment of a sufficient cause;
- ii. satisfaction of substantial loss; and
- iii. the furnishing of security.

29. In this case, judgment was entered by the Trial Court in favour of the 1st respondent as against the appellant and the 2nd respondent on 2nd October, 2023 for Kshs.3,473,600/= together with interest from the date of filing the suit. Dissatisfied by the said judgment, the appellant filed this appeal against it.

30. The appellant contended that its appeal raises serious weighty issues of fact and law, thus it is not only arguable, but it also has high chances of success. It argued that the 1st respondent’s suit was based on the fact that the appellant through the 2nd respondent entered into a contract with the 1st respondent in the form of a Purchase Order on 10th May, 2018, but by that time the appellant had not yet been incorporated. On perusal of the appellant’s CR-12, it is evident that the appellant was incorporated on 18th May, 2018, which is 8 days after execution of the aforesaid contract. For this reason, I am persuaded that the appellant has an arguable appeal with chances of success.

31. It is noteworthy that the decree herein issued on 21st November, 2023 is a money decree. It is now settled law that when a decree is a money decree, Courts will not readily grant an order for stay of execution pending appeal, unless it is demonstrated that the decree-holder is not financially sound thus he/she/it is incapable of refunding the decretal sum to the judgment debtor in the event the appeal



is successful. In the case of *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] eKLR, the Court of Appeal held that -

“Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”

32. I am cognizant of the fact that the appellant neither averred nor alluded to the 1st respondent’s inability to refund the decretal sum in the event the appeal is successful. Further, in as much as the appellant stated that it stands to suffer substantial loss that cannot be compensated by an award in damages, it did not put forth its current financial position and how the same will be affected in the event an order for stay of execution is not granted. To the contrary, the appellant averred that it has no money and has never traded so as to have any security that would be used to satisfy the conditions imposed by this Court on 4th November, 2023. In the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* (*supra*) the Court in allowing a similar application to the one before me made the following observation –

“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.”

33. In this matter, the 1st respondent neither demonstrated its financial capacity to this Court nor did it file an affidavit of means to demonstrate its ability to refund the appellant the decretal sum in the event it was successful in its pending appeal. I am however of the view that the 1st respondent had no responsibility to do so since the appellant has not alleged and/or disclosed any reasonable grounds to show that the 1st respondent will not be in a position to refund the decretal sum if the appeal succeeds.
34. In light of the foregoing, this Court finds that the appellant has not demonstrated that it stands to suffer substantial loss in the event the applications herein are not allowed.
35. On whether there has been delay in filing the instant application, this Court notes that the judgment by the Trial Court was delivered on 2nd October, 2023. The application seeking orders for stay of execution of the said judgment pending hearing and determination of this appeal was filed together with the Memorandum of Appeal on 2nd November, 2023, which is approximately one month later. In the premise, this Court finds that the application herein was filed timeously.



36. The appellant averred that it is ready and willing to furnish the Court with favourable security in lieu of deposit and/or to comply with any conditions and/or requirements that this Court may deem fit. In the case of *Focin Motorcycle Co. Limited v. Ann Wambui Wangui & another* [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

37. The 1st respondent contended that despite the appellant stating that it is willing to furnish security and despite being issued with conditions for a temporary stay of execution by the Court, the appellant was unable to satisfy the said conditions, thus there is no guarantee that it will comply with the set conditions for security that this Court may grant (if any). This Court notes that when the application for stay of execution was first presented before Judge Aleem Visram, the Hon. Judge granted the appellant a conditional order of stay of execution pending the hearing and determination of the said application. The appellant however failed to comply with the said order and as a result, this Court on 4th March, 2024 vacated the said conditional order for stay.

38. Since the conditional order for stay was vacated, the application dated 16th January, 2024 seeking a review of the orders issued on 4th November, 2023 is spent as there is no order left for this Court to review and/or substitute. I further hold that the appellant’s conduct of failing to comply with the conditional order for stay granted by Judge Aleem Visram on 4th November, 2023 leaves this Court with doubt as to whether the appellant will indeed comply with an order to furnish security for the due performance of the decree in the event that one is issued by this Court.

39. In the absence of proof of substantial loss, Courts will rarely grant an order for stay of execution pending appeal. The Court in the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, in discussing substantial loss stated 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”.

40. In view of the fact that the appellant has established that it has an arguable appeal with chances of success, this Court finds that the application dated 24th October, 2023 is merited. The application dated 16th January, 2024 on the hand is bereft of merits.

41. In the premise, I make the following orders -

- i. The application dated 16th January, 2024 is hereby dismissed;
- ii. Pending the hearing and determination of this appeal, an order is hereby issued staying the execution of the judgment delivered by Hon. A.N. Ogonda (SRM) on 2nd October 2023 in Milimani CMCC No. 6881 of 2018- Sea Breeze Tours and Travel Limited v John Kipkorir Bett and Radeecal Communication Limited;



- iii. The appellant shall deposit the entire decretal sum in a joint interest earning account in the names of the Advocates for the parties within 30 days from the date of this ruling;
- iv. In default of order No. (iii) above, the order for stay of execution shall lapse and the 1st respondent shall be at liberty to execute;
- v. Costs of the application dated 16th January, 2024 is granted to the 1st respondent; and
- vi. Costs of the application dated 24th October, 2023 is granted to the applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kiptoo h/b for Mr. Kiplang'at for the applicant

Mr. Otwal h/b for Mr. Kiarie for the 1st respondent

No appearance for the 2nd respondent

Ms. B. Wokabi – Court Assistant.

