



REPUBLIC OF KENYA



**Raeli Hydro Systems Limited v Ouko (Civil Appeal
E029 of 2024) [2024] KEHC 5124 (KLR) (10 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E029 OF 2024
RE ABURILI, J
MAY 10, 2024**

BETWEEN

RAELI HYDRO SYSTEMS LIMITED APPELLANT

AND

EDWARD OUKO RESPONDENT

*(Being an application for stay of execution of the Judgment and Decree of
Hon. G. C. Serem, Adjudicator/Resident Magistrate dated 1st February
2024 at the Small Claims Court at Kisumu in SCCCOM No. E423 of 2023)*

RULING

1. The Appellant Raeli Hydro Systems Limited was the Defendant/Respondent before the Small Claims Court. The Respondent herein Edward Ouko was the claimant who sought against the Appellant special damages of Kshs.875,800. The Respondent was awarded the said sum of money vide Judgment rendered on 1st February 2024.
2. Aggrieved by the said decree, the Appellant herein filed the Memorandum of Appeal dated 12th February 2024 challenging the judgment and decree pending the hearing and determination of the appeal herein.
3. The Appellant vide Notice of Motion dated 15th March 2024 has sought from this court stay of execution of decree passes by the Small Claims Court until the appeal herein is heard and determined.
4. According to the Appellant, it requested for certified copies of proceedings which have not been supplied and that is stay of execution of decree is not granted, the Appellant will suffer substantial loss should the appeal which according to the Appellant, has high chances of success, be successful. The Appellant avers that the application has been filed timeously.



5. The application is supported by the affidavit sworn by Steve Biko Odongo, the employee of the Appellant who reproduces the cause of action giving rise to the suit before the Small Claims Court while reiterating the grounds.
6. In addition, it was deposed that the Respondent will not be in a position to refund the decretal sum should the same be paid out. Further, that the Appellant is willing to deposit part of the contested decretal sum as security.
7. It was further deposed that in any case, the contract was between the Appellant and Sawa Farms Limited and not the Respondent herein.
8. In addition, that failure by the Appellant to complete the contractual works was occasioned by the Respondent's failure to provide security and denying the Appellant/Applicant access to the construction site.
9. The Appellant's employee further deposed that the Respondent did not exhaust the Alternative Dispute Resolution mechanisms under the contract before filing the suit.
10. The Respondent opposed the application and filed a Replying affidavit sworn on 12th April 2024 maintaining that he performed his part of the contract and paid the Appellant the amount claimed, that no work was done and that allegations of theft on site was hearsay.
11. The Respondent denied any knowledge of any contract between the Appellant and Sawa Farms Limited hence the Appellant cannot purport to enforce any contract between it and a non-party to it.
12. That the Respondent is only aware of a quotation between him and the Appellant for the 20 acres irrigation and other services, which was the subject of the suit and the judgment impugned herein.
13. That prior to filing of suit, the Respondent sent a demand letter which was ignored by the Appellant. That this appeal is intended to deny the Respondent his fruits of a lawful judgment and hence the appeal is misconceived, incompetent and intended to delay and prolong the matter and frustrate the Respondent.
14. The Respondent prayed that the application be dismissed but that should the application be allowed, then the entire decretal sum be deposited into court.
15. The application was argued orally with the parties' respective counsel submitting and reiterating the grounds and deposition by their respective clients. I need not reproduce those submissions here.

Determination

16. Having considered the application, grounds, affidavit in support and annexures together with the Replying Affidavit and the oral submissions for and against the application, the issue for determination is whether the prayer for stay of execution of decree is merited and if so, on what terms.
17. The principles that guide the courts in applications for stay of execution of decree/order pending appeal are now well settled as espoused in Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides as follows:

“6(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.”
18. In addition, courts have held that stay of execution may be granted only for sufficient cause being shown and the court in deciding whether or not to grant a stay, is guided by the overriding objective stipulated in Section 1A and 1B of the Civil Procedure Act.
19. The main conditions that must be satisfied for grant of stay of execution are:
- i. That the substantial loss may result to the Applicant unless the order is made;
 - ii. That the application has been made without unreasonable delay;
 - iii. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.
20. As to whether substantial loss will result to the Applicant if stay is denied, in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR it was stated that:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
- The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
- “...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
21. In this appeal, the Applicant deposes that it will suffer substantial loss as the Respondent will not be in a position to refund the decretal sum if paid out and the appeal is successful.
22. Beyond allegation that the Respondent will not refund the decretal sum, there was no evidence indicative of how impecunious the Respondent is such that he cannot raise Kshs.875,000 plus interest and costs as assessed, an amount of money that he raised, according to the claim, and paid to the Appellant.
23. This is not a claim for general damages where the claimant relies on the court to assess the damages. Here, the Respondent claimed for special damages which he allegedly paid to the Appellant for the latter to undertake specific contractual works on his farm.
24. I am therefore unable to accept the bare allegation and deposition by the Appellant’s employee that if paid out, the Respondent will not be in a position to refund to the Appellant and or that the Appellant will therefore suffer substantial loss.



25. I am equally unable to make a finding that the appeal herein shall, in any way be rendered nugatory should the decretal sum be paid and the appeal is successful.
26. As to the question of whether the appeal has high chances of success is not for this court to determine at this stage save that on appeal to this court on points of law only to be considered, no other appeal lies beyond this court.
27. It is however important to note that the purpose of stay of execution of decree pending appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. See *RWW v EKW* [2019] eKLR.
28. On whether the application was filed withhold delay, the judgment as impugned was rendered on 1st February 2024 while the application was filed on 18th March 2024. The appeal was filed on 14th February 2024. There is evidence that the Applicant applied for certified copies of proceedings which have not been supplied although there is a confusion on dates when applied.
29. In my view, the delay which is apparent is not inordinate or deliberate.
30. On security for the due performance of decree, the Applicant has deposed that it is willing to deposit part of the disputed sum but has not stated what part of the awarded sum is disputed.
31. The Respondent has urged the court in the event that it grants a stay, to order for deposit into court the entire decretal sum.
32. The condition on security for due performance of decree is not dependent on what the Applicant offers or the Respondent says. It is in the discretion of the court.
33. In this case, I am alive to the fact that money depreciates unless it is kept in an interest earning account and depositing it in court may not aid the parties during the period of the appeal.
34. Taking into account all the above, albeit the Applicant has not demonstrated what substantial loss it will suffer if stay is not granted, and in order to accord the Appellant an opportunity to ventilate its grievances as it claims that it was not heard and no proceedings have been availed to this court for perusal and appreciation of that ground, I exercise discretion, to give effect to the overriding objective of the *Civil Procedure Act* and order that there shall be stay of execution of decree in Kisumu Small Claims Court Claim No. E423 of 2023 pending the hearing and determination of this appeal subject to and conditional upon the Appellant depositing into in a joint interest earning account to be opened and held by the firm of K'Anjejo & Company Advocates for the Respondent and Otieno Mudany & Associates in a commercial Bank of repute the entire decretal sum of KShs.964,558.68 within 21 days of today and in default, the stay shall lapse and execution to issue.
35. Mention before the Deputy Registrar on 20th June, 2024 to confirm compliance and the availability of the lower court file.
36. Costs shall be in the appeal.
37. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF MAY, 2024

R. E. ABURILI

JUDGE

