



Silverstone Quarry (K) Ltd v Kingo t/a Joverest Enterprises & another (Civil Appeal E017 of 2024) [2024] KEHC 5430 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E017 OF 2024
FROO OLEL, J
MAY 6, 2024**

BETWEEN

SILVERSTONE QUARRY (K) LTD APPELLANT

AND

JOSHUA MUTUO KINGO T/A JOVEREST ENTERPRISES ... 1ST RESPONDENT

RHEMAT AUCTIONEERS 2ND RESPONDENT

RULING

1. The application before this court for determination is the Notice of Motion application dated 31st January 2024 brought pursuant to provisions of Section 1A, 1(B) and 3A of the [Civil Procedure Act](#), Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and all other enabling provision of law. Prayers (1), (2),(3) of the said application are basically spent and the main prayer sought is prayer (4) & (5) that;
 - a. That pending the hearing and determination of the Appeal herein, the Honourable court be pleased to issue an interim order of injunction and/or stay of execution in respect of the judgement dated 13th September 2023 and/or all consequential decree's thereof pursuant to the ruling dated 18th January 2024 disallowing the Applicants application to set aside the judgment.
 - b. That pending hearing and determination of the Appeal herein, the Honorable court be pleased to stay any further proceedings in Mavoko civil case No 463 of 2014
 - c. That costs of this Application be provided for.
2. This application is supported by the grounds on the face of the said application and the affidavits of the Applicant director one Mohammed Shalima dated 31st January 2024, and further Affidavit dated 2nd April 2024, while the respondents opposed this application through the replying affidavit filed by John Mutua Kingo dated 16th February 2024.



3. The Appellant averred that judgement was entered as against him in the trial court condemning him to pay Ksh 243,968/= together with cost and interest on 13.09.2023 and this was done without affording him an opportunity to call one of his key witnesses; a forensic documents examiner. He had instructed his advocate to apply to set aside the said judgment and therein explained at length why he was unable to attend court and/or avail his witness, but the trial court vide its ruling dated 18.01.2024 had disallowed the said Application hence this Appeal. The 1st respondent had instructed the 2nd respondent to proclaim and attach his goods thus necessitating this application.
4. The appellant further averred that he was exposed and would suffer substantial loss if the said decree was executed and that too would rob him a chance of ventilating this appeal. It was therefore necessary to grant stay of execution so as not to render the appeal filed to be rendered nugatory. Finally, the Applicant stated that this application had been filed promptly and the Respondents would not suffer any prejudiced if orders sought were granted.
5. The 1st Respondent did oppose this application by his Replying Affidavit dated 16th February 2024, wherein he stated that this application was a ploy by the applicant to waste time and delay to pay him for supplies made to the Applicant, who had vowed not to settle what was owned. The applicant had deliberately delayed the hearing of the matter before the trial court and subjected him to police investigations, at Parklands police station where the delivery notes were examined and it was confirmed that the same was signed by on S Siyani. The police had closed their investigations and directed the applicant to settle the debt but he had opted not to do so.
6. The applicant was well represented during the trial and he had failed to ensure the attendance of his witnesses despite being given several opportunities to do so. Once judgment had been entered, the applicant once again moved court and filed his application to set aside the said judgment which application was rejected. The respondent therefore urged court to find that this application for stay of execution had been made in bad faith and the applicant be directed to settle the decretal sum plus interest, which sum was Kshs.576,788.07/=.
7. The respondent further stated that he was not a man of straw and owned a car worth 1.5 million, a lorry used for delivery worth more than 2.8million and two pieces of land at Mavoko and Mlolongo, where he resided. He was therefore in a position to refund the sums paid, if the judgment of the trial court was reversed on determination of this Appeal. The respondents therefore prayed that this application be dismissed with costs.
8. The applicant did file a further affidavit dated 2nd April 2024, where he urged the court to find that he had satisfied the threshold for grant of stay pending Appeal and had clearly demonstrated that the appeal filed raised serious and arguable grounds for determination. With regard to the decretal sum, he had already deposited the same in court as earlier directed by court and therefore prayed that the court finds merit in this Application.

Analysis & Determination

9. I have carefully considered the Application, its Supporting Affidavit, and further Affidavit, the Respondent's Replying Affidavit and submissions filed by the parties. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
10. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay



and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.

11. As stated in the case of *Amal Hauliers Limited Vs Abdulnasi Abukar Hassan* (2017) eKLR which quoted with approval *Butt Vs Rent Tribunal* (1982) KLR 417 the guiding principles which the court should consider while determining an application of this nature. These were;
 - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.
 - e. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
 - f. The Appellants finally averred that this court is clothed with very wide discretion to grant the orders sought under Section 3A as read together with Section 63(c) of the *Civil Procedure Act*.
12. The ruling appealed against was delivered on 18th January, 2024. The Appeal herein was filed on 1st February 2024. This was within a period of less than 14 days from the date of judgment and thus it can be said that this appeal and this application has been file timeously.
13. On the likelihood of suffering substantial loss, it is evidence that the decretal sum of Ksh.243,968/= together with costs and interest, which the respondents stated has made it rise to Kshs.576,788/=. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another* (2010) eKLR the court stated as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
14. Though the 1st respondent has stated that he is a man of means, but he has not exhibited proof thereof. Guided by the above authorities and in the absence of the requisite proof from the Respondent that



he is a person of means, I find that the Appellants have satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition. I do note from the Memorandum of Appeal that the Appellant is vigorously contesting the hearing process and failure of the trial magistrate to recognize his right to fair hearing as enshrined in *the constitution* of Kenya 2010. These are no doubt grounds for an arguable appeal.

15. On the security, the Appellants have indicated that he has already abided by the court's directions given on 1st February directing him to deposit Kshs.243,968/= in court within 21 days.
16. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga (1988) KLR 645.
17. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
18. This issue of adequacy of security was also dealt with in the Court of Appeal in Nduhiu Gitahi Vs Warugongo (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal or will any party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

Disposition

19. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree issued in Mavoko CMCC No 463 of 2016 pending hearing and determination of this Appeal.



20. The Kshs.243,968/= already deposited in court will act as security to secure the Appellants obligation under the decree issued in Mavoko CMCC No 463 of 2016 pending hearing & determination of this Appeal.
21. The costs of this Application will abide the Appeal.
22. It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 6TH DAY OF MAY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MAY, 2024.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

