



**Blue Seal Communications Limited v Alacha (Civil Appeal
E092 of 2024) [2024] KEHC 7555 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E092 OF 2024
RE ABURILI, J
JUNE 14, 2024**

BETWEEN

BLUE SEAL COMMUNICATIONS LIMITED APPELLANT

AND

MILVEN VIVIAN ALACHA RESPONDENT

*(Arising from the Judgment and decree of Hon. G. C. Serem RM in
Kisumu SCCOMM No. E596 of 2023 rendered on 25th April, 2024)*

RULING

1. The application dated 15th May 2024 seeks for stay of execution of decree in Kisumu SCC Commercial Case No E596 of 2023 pending the hearing and determination of this appeal.
2. The application is supported by the affidavit sworn by Paul Chelimo, the Director of the Appellant who maintains that the Appellant did not carry out any transactions with the Respondent to warrant the judgment by the Adjudicator.
3. The application was opposed by the Respondent Decree holder who filed a replying affidavit and a Replying affidavit on 28th May 2024.
4. In the said opposition, it was contended and deposed, among others, that should the court grant stay, it should be a conditional stay as per paragraph 5 of the Replying affidavit.
5. The application was argued orally, with the respective parties' counsel arguing on behalf of their respective clients.
6. Mr. Chemuok Advocate submitted that the decretal sum is over Kshs 800,000 which is substantial and that substantial loss will be suffered by the Appellant if execution is effected. He submitted that they have an arguable appeal. Further that the application had been made timeously.



7. On conditional stay, it was submitted that the Respondent has no fixed abode known to the Appellant as she has no business or transaction known by this court. that therefore if money is paid to her then she will not reimburse as her income and means are unknown. Counsel submitted that there should be no conditional stay because there was no transaction between the parties.
8. On the part of the Respondent, counsel, Mr. Ondego opposed the application and submitted that a conditional stay does issue if this court is inclined to grant a stay.
9. Mr. Chemuok submitted in a rejoinder that the Appellant pleaded innocence and that if stay conditions are made, the Appellant may not meet them.

Determination

10. I have considered the application, the grounds and supporting affidavit. I have also considered the opposition filed and the respective counsels' oral submissions.
11. The issue for determination is whether the Applicant has demonstrated that the order of stay of execution pending appeal are merited.
12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“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.”
13. Further, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
14. Section 1A (2) of the [Civil Procedure Act](#) provides that:

“The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”
15. Under section 1B some of the aims of the said objectives are:

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
16. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) 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. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

17. As to what substantial loss is, it was observed in [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, 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 ... 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.”

18. In the instant case, the applicant avers that it stands to suffer substantial loss of over Kshs 800,000 as well as costs and interest if stay of execution is not granted. It is further averred that the respondent has not demonstrated that she is able to refund the sum if the appeal succeeds and that she has no known fixed abode. The appellant has also pleaded that it is not able to comply with any order as to security of costs as it had no transactions with the respondent.

19. On her part, the respondent has not addressed the issue of her capacity to reimburse the decretal sum should it be paid to her and the appeal succeeds.

20. The court, in [RWW v EKW](#) [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

21. In this case, the Respondent has not given any material as to her ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicants’ counsel that it shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.

22. I am also satisfied that there has been no inordinate delay in bringing the instant appeal and the application for stay. The impugned judgment was delivered on 25th April 2024 while the application was filed on 14th May 2024.

23. As to security of costs, the appellant has not made provision for the same claiming that the money is a lot. The respondent has asked for conditional stay with timelines for compliance. However, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice.



24. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*.
25. Accordingly, I hereby allow the applicant/appellants' application dated 15/5/2024 and grant stay of execution of decree made in Kisumu Small Claims Court Case number E596 of 2023 on the following conditions:
- a. The applicant/ appellant shall deposit the entire decretal sum into court within thirty (30) days of the date of this ruling
 - b. Costs shall be in the appeal.
 - c. The appeal shall be mentioned on 18/7/2024 before the Deputy Registrar to confirm compliance and availability of the lower court record for admission to hearing.
26. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 14TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

