



Newtone Ochieng' Ongele t/a Space Buster Company v Osore & another (Civil Appeal E064 of 2024) [2024] KEHC 7611 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E064 OF 2024
RE ABURILI, J
JUNE 19, 2024**

BETWEEN

**NEWTONE OCHIENG' ONGELE T/A SPACE BUSTER
COMPANY APPELLANT**

AND

**CALEB MATENDO OSORE 1ST RESPONDENT
PAMELA ATIENO NYAMORI 2ND RESPONDENT**

(An appeal from the decision of the Senior Resident Magistrate at Kisumu Hon. G. N. Barasa delivered on 25th March 2024 in Kisumu CMCC No. E111 of 2023)

RULING

1. The Applicant/Appellant vide Notice of Motion dated 11th April 2024 seeks orders for stay of execution of decree in Kisumu CMCC No E111 of 2023 pending the hearing and determination of this appeal.
2. He also seeks for costs of the application.
3. The grounds in support of the application are on the face of the application which is also supported by an affidavit sworn by the Appellant.
4. The Appellant's case is that upon being served with summons to enter appearance and a plaint, he entered appearance and filed a defence in Kisumu CMCC No E111 of 2023 in a suit he found to be baseless.
5. That thereafter, he was served with a Notice of discontinuance of suit duly filed and stamped and he took it to his advocates on record whom he instructed to file a bill of costs on the discontinued suit.



6. That he was therefore utterly shocked to learn that the suit was heard and determined *ex parte* and judgment entered against him yet he was never invited to appear in court to defend his suit.
7. That the Respondents then obtained decree and order directed at his tenants requiring them to pay rent to the Respondents who are the primary landlords.
8. That upon him learning of the *ex parte* judgment entered against him on a discontinued suit, he applied to have that judgment set aside but that the trial court declined to grant the orders sought while holding that the Notice to discontinue suit was fake thereby denying the Appellant the opportunity to be heard.
9. That the judgement as impugned is unfair and capricious, leading to the orders directing the Appellant's tenants to pay rent to the Respondents yet the latter have no contractual relationship with the Appellants tenants thereby denying the Appellant lawful dues, and exposing him to untold loss, damage, shame, embarrassment and inconvenience.
10. That the appeal shall be rendered nugatory unless the stay sought is granted and that the Appellant shall suffer substantial loss hence it is just and fair for the orders sought to be granted.
11. On the part of the Respondent counsel, Mr. Sala submitted that the stay sought was not merited unless the appellant deposits the entire decretal sum into court and further that the rents due from sublet tenants be paid into court.
12. Counsel further submitted that the case proceeded *ex parte* because the Appellant failed to attend court despite being served with Notices and times.
13. On the alleged Notice of withdrawal of suit, it was submitted that the same was found to be a forgery and the trial court set it aside, which matter is pending investigations by the DCI. Counsel submitted that the amount due on the decree is about Kshs 1.8 million and rent continues to accrue.
14. In a rejoinder, Ms. Owiti counsel for the Appellant submitted that the appellant contested the amount claimed although, on inquiry by the court, she stated that there was no record of any rent payment.

Analysis and Determination

15. The main issue for determination is whether the appellant/ applicant has demonstrated that the orders of stay of execution pending appeal are merited. 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.”
16. Further to the above, 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.



17. 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” while 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.”

18. 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.

19. . 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.”

20. In the instant case, the applicant avers that he stands to suffer substantial loss as he was never given the opportunity to be heard and that his tenants have been directed to pay the monthly rent to the respondent yet they have no contractual relationship with the respondent.

21. The appellants has deposed and submitted through his counsel that he is willing to furnish security as the court may direct s that he can be allowed to defend the suit.

22. On his part, the respondent submits that should the court grant stay, it should be conditional upon the appellant depositing the entire decretal sum into court and the monthly rent be paid by the sublet tenants too be paid into court. It was also submitted that the appellant is before this court with unclean hands as he defaulted to pay rent due to the respondent. That the Notice of discontinuance of suit is subject of investigations as the court below found it to be a forgery.

23. In *RWW v EKW* [2019] eKLR, the Court 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.

9. 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.”
24. In this case, the Respondent is the owner of the premises which he let to the appellant who has sublet it to other people and he gets rent therefrom then he pays rent to the respondent. There are allegations counter allegations of default of rent payment leading to the suit in the court below by the respondent against the appellant and the decree that ensued. The appellant on the other hand claims that he was never heard hence the need to be given an opportunity to defend the claim by the respondent.
25. The right to a fair hearing is akin to the right to access justice. Whether there was a notice of discontinuance of suit or not, or whether there was notice issued to the appellant for the hearing of the case are arguable issues which this court will have to determine on merit. Before that time comes, it is only fair and just that a stay is issued so as not to render the appeal nugatory.
26. Accordingly, I am persuaded that substantial loss has been proved.
27. I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the 25th March, 2024, while this application was filed on 11th April, 2024 after the appeal was lodged on 2/4/2024.
28. As to security of costs, the appellant has deposed and submitted that he is willing to abide by the conditions that the court may impose while the respondent has urged the court to make orders that the appellant deposits the entire decretal sum into court and that the subtenants do remit rents due to court as well.
29. 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.
30. 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.
31. Accordingly, I hereby allow the applicant/appellants’ application dated 11th April, 2024 and grant stay of execution of decree made in Kisumu CM CC No E111of 2023 on the following conditions:
 - a. that the appellant/ applicant shall deposit into court within thirty (30) days of this date, all rents due to the respondent up to date and including rent for June 2014 and to continue paying rent due to the respondent as and when such rent is due as per the tenancy agreement between the appellant and the respondent. In default, the stay herein issued shall lapse and the respondent shall be at liberty to execute the decree of the lower court.
 - b. Costs shall be in the appeal.
32. Mention on 26th September, 2024 to confirm compliance and availability of the trial court record for admission of the appeal.
33. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE, 2024



R.E. ABURILI
JUDGE

