



**Events Space Limited & another v Kyalo (Civil Appeal
E093 of 2023) [2024] KEHC 8448 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E093 OF 2023**

**M THANDE, J
JULY 12, 2024**

BETWEEN

EVENTS SPACE LIMITED 1ST APPELLANT

BUSCAR EA LIMITED 2ND APPELLANT

AND

URBANUS SILA KYALO RESPONDENT

RULING

1. By a Notice of Motion dated 31.7.23, the Appellant/Applicant seeks stay of execution and proceedings of the judgement delivered in favour of the Respondent, on 14.6.23 in Malindi CMCC No 187 of 2022, pending appeal. The grounds upon which the Application are premises are set out in the Application and in the supporting affidavit of Arasa Nicodemus, counsel for the Appellant/Applicants, sworn on 8.7.23.
2. The Respondent opposed the application through a replying affidavit sworn on 20.9.23 by his counsel, Yvonne Mbithe Mutete.
3. The Appellant/Applicant is aggrieved by the judgement of the trial court and has already filed an appeal against the said decision. In particular, the Appellant/Applicant is aggrieved by the award of damages of Kshs 272,550/= plus costs awarded to the Respondent. It is averred that the 30 day stay lapsed on 14.7.23 It was averred that unless stay is granted, the Appellant/Applicants will suffer substantial and irreparable loss and damage loss and prejudice as they will be unable to recover the decretal amount awarded to the Respondent. Further that the appeal which is arguable with high chances of success will be rendered nugatory if the Application, which was filed without delay is not allowed. On the other hand, that the Respondent will suffer no prejudice or any damage that cannot be compensated by way of costs if the orders sought are granted.



4. The Respondent's reply is that the Application is an afterthought, bad in law, incompetent, res judicata, a tactic for forum shopping, a blatant abuse of the court process, is meant to deny the Respondent the fruit of litigation and is an abuse of the court process, is brought in bad faith and is overtaken by events. Further that stay of execution was granted by a court of competence jurisdiction which delivered the judgment and that this Court cannot deliver another ruling.
5. It was further stated that the Applicants have not obeyed the order of this Court of 31.1.23 granting stay on terms that the decretal amount be deposited in Court within 40 days. As such, this Courts should not allow the Application. Additionally, it was averred that stay having been previously granted the present Application is res judicata. Further that the Applicants have not met the test for grant of stay of execution.
6. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the [Civil Procedure Rules](#). Sub-rule 2 provides:
 - (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
7. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. It is an equitable remedy and not a right of a party. In the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR, the Supreme Court stated that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the Court. By parity of reasoning, stay of execution being an equitable remedy may only be granted to a deserving party.
8. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. Where the Court is called upon, as in the present case, to exercise its discretion in any application, it must do so judicially, the overriding objective being to ensure that the ends of justice are met.
9. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in the [Butt v Rent Restriction Tribunal](#) [1982] KLR 417, as follows:
 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a 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.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case 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.



5. 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.
10. Flowing from the cited decision, it can be discerned that while considering an application for stay, the discretion of the Court must be exercised in a manner that will not prevent an appeal or render an appeal nugatory; the Court will consider whether there is any overwhelming hinderance for the grant of stay; whether good grounds have been advanced; existence of any special circumstances and unique requirements. Lastly the Court may order security for costs.
11. The law requires that an application for stay of execution be filed without unreasonable delay. The Application was made without undue delay. The decision appealed against was made on 14.6.23 while the Application was filed on 31.7.23.
12. It is trite law that the purpose of stay of execution is to preserve the substratum of the matter in dispute. In the case of RWW v EKW [2019] eKLR, Ongeru, J. stated:

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.
13. On substantial loss and the appeal being rendered nugatory, the Applicant contended that there is a likelihood of being unable to recover the decretal sum from the Respondent should the same be released to him. This has not been countered by the Respondent.
14. The Respondent contends that the Application should be declined as the Appellant/Applicants failed to comply with the directions to deposit the decretal amount in Court within 40 days from 31.7.24. Forty days would have ended on 10.9.23. From the record, the deposit was made on 9.10.23, a delay of about 1 month. While it must be appreciated that timelines are not given by the Court in vain, in the wider interests of justice the Court is inclined to overlook the delay. In any event, no prejudice has been occasioned to the Respondent.
15. In light of the foregoing, the Court has formed the opinion that there is no overwhelming hinderance to grant the stay sought herein. Accordingly, the Application succeeds and I allow the same on terms that the record of appeal shall be filed and served by 2.8.24. In default, the stay so granted shall lapse. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 12TH DAY OF JULY 2024.

M. THANDE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -



..... for the Appellant/Applicant

..... for the Respondent

..... Court Assistant

