



**Fazal v Lias (Miscellaneous Application E109 of 2024)
[2024] KEHC 8175 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E109 OF 2024**

SM MOHOCHI, J

JULY 9, 2024

BETWEEN

ABDUL FAZAL APPLICANT

AND

RASHIDA ABDULRAHIM LIAS RESPONDENT

RULING

1. The Applicant moved Court under Certificate of Urgency *vide* the Notice of Motion Miscellaneous Application dated 26th March 2024 brought under Article 159 of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Orders 42 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
 - a. Spent
 - b. That pending the hearing and determination of this Application there be an order of stay of execution of the orders of the Honourable Resident Magistrate in Nakuru Small Claims Commercial E517 of 2023 issued on 19th March, 2024 and all consequential orders and proceedings;
 - c. That pending the hearing and determination of the appeal there be an order of stay of execution of the orders of the Honourable Resident Magistrate in Nakuru Small Claims Commercial E517 of 2023 issued on 19th March, 2024 and all consequential orders and proceedings;
 - d. Spent;
 - e. That costs hereof be in the cause.
2. The Application was premised on the grounds on its face and the supporting affidavit sworn by the Applicant wherein he avers that he filed an application seeking stay of execution of default judgment



entered in SCCCOMM No. E157 of 2023 the application was allowed extending time within which the Applicant was to file a response and ordered him to deposit the judgement amount in Court within 21 days thereof. Failure to would result to default judgement being automatically reinstated without further reference to Court. He averred that the orders are prejudicial to him denying him access to justice and undermine the principles of natural justice of being heard fairly and impartially.

3. He also averred that his financial situation has been exacerbated by his outstanding medical bills that accrued after his hospitalization at Pandya Memorial Hospital from 1st December to 8th December, 2023 amounting to Kshs 497,234 which he continues to pay in instalments as he is unable to clear in full. The burden of the medical bills and the requirement to deposit the full judgement amount in Court imposes a severe financial hardship inhibiting his ability to effectively participate in the proceedings.
4. He further stated that granting stay of proceeding is crucial at ensuring that his rights are protected and afforded a fair opportunity to defend himself. That he stood to suffer irreparable damage if the intended appeal will be rendered nugatory should the Respondent execute. That there will be no prejudice suffered by the Respondent herein. That it would be in the interests of justice that he is given an opportunity to prosecute the appeal without the threat of execution hanging over his head.
5. The Respondent in opposition, filed Grounds of Opposition dated 15th April, 2014 and a Replying Affidavit sworn on 15th April, 2024. He stated that the Application is incompetent and incurably defective as it seeks to enforce a right through a miscellaneous application; it was commenced through unprocedural means thus incapable of procuring the orders sought; the orders sought are not anchored in any substantive appeal and that the Application is an abuse of the Court process.
6. The Respondent in the Replying Affidavit averred that the Applicant was served with the pleadings but failed to enter appearance to which the Court entered default judgement having satisfied itself that service was proper. That the Applicant only rushed to Court on 21st November, 2021 after being served with a proclamation notice. The Respondent further agreed to compromise the Application by consent adopted on 7th December, 2023 and the Applicant was allowed to file a response within seven (7) days. The Applicant did not comply. That when the matter came up for compliance on 19th December, 2023, the Court further gave the Applicant a further 2 days to comply in default the judgement entered on 24th July, 2023 would be automatically reinstated. The Applicant still did not comply, judgment was reinstated and the Respondent began the execution process.
7. That the Applicant again moved Court on 1st February, 2024 seeking stay of execution and extension of time within which to file the response to the claim. The Application was heard and the Court granted the Applicant 7 days to file response on condition that he deposits the entire decretal sum in Court within 21 days in default judgement be reinstated.
8. He deposed that the Court exercised its discretion judiciously after observing the conduct and delay tactic of the Applicant. The Application does not raise triable issues and the Applicant has not demonstrated what prejudice he stands to suffer if he deposits the decretal sum in Court. That further the Applicant has not indicated his willingness to furnish security as such undeserving of the orders. That from the record, the Applicant has been employing delay tactics to deny the Respondent fruits of his judgement.
9. The Court on 4th April, 2024 directed that the Application be disposed by way of written submissions. Applicant filed written submissions on 18th April, 2024 whereas the Respondent filed his submissions on 24th April, 2024.



Applicant's submissions

10. The Applicant submitted on one issue on whether the stay of execution pending appeal should be granted. It was submitted that the Respondent will execute the default judgment which condemned him to deposit the sum of Kshs 377,000 in a matter that was not heard on merit yet he produced medical records. That he stands to suffer substantial loss if stay is not granted.
11. He contended that the grounds raised in the memorandum of appeal are triable and the conditions of the Court are prejudicial as the Small Claims Court ought to have imposed throw away costs instead. That the Application has been filed without undue delay and was ready to adhere to any conditions imposed by the Court.

Respondent's Submissions

12. The Respondent to the other hand submitted on three (3) issues. Firstly, on whether the Application has merit, it was his submission that laid down procedure of instituting an application for stay of execution pending appeal under Order 42 Rule 6 was not complied with. He relied on the case of *Photo Energy v Hasbi Energy Limited* Misc 180 of 2018 to submit that seeking the orders in a miscellaneous suit is a strange and unknown procedure. The Court in the case held that:-

“...a Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit...”

13. That in as much as the Court is guided by Article 159 for the *Constitution*, he relied on the pronouncement in *Wanja & Another v Rootbaert* [20222] EKHC 10255 (KLR) to submit that not every blunder can be excused as a mere technicality.
14. Secondly, on whether the Applicant has made a case to warrant grant of the Orders sought, it was the Respondent argument that it has not. He contended that the alleged irreparable loss and damage is a mere apprehension and assumption and in any event, being a money decree, the loss can be compensated by refund or an award of damages if the appeal succeeds. That Section 38 of the *Small Claims Court Act* provides procedure of appeals to the High Court should be on pure points of law and the attached memorandum of appeal does not raise arguable points of law deserving judicial determination.
15. On the issue of security, the Respondent argued that the Applicant has not demonstrated readiness and willingness to furnish security. However, should the Court be inclined to grant stay the Applicant should deposit the entire decretal sum in Court as security for due performance of decree. Thirdly, costs follow the event.

Analysis and Determination

16. Having considered Application and the submissions of the two parties alongside the legal authorities they have relied upon, the main issue for determination is whether the Application has merit and should be allowed.
17. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court Appealed from may for



sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

- (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.
- (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

18. The power of a Court to grant stay of execution is discretionary as correctly submitted by the Respondents. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial Court’s decision. (see [*Butt vs. Rent Restriction Tribunal*](#) [1979]).

19. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in [*RWW vs. EKW*](#) (2019) eKLR addressed itself on this as hereunder: -

“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.”

(See also Court of Appeal of Uganda in *Mugenyi & Co. Advocates vs. National Insurance Corporation* [Civil Appeal No. 13 of 1984]).

20. The Court of Appeal in [*Visbham Ravji Halai vs. Thornton & Turpin*](#) Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that,

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure



Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security”.

21. The first requirement is that the intended appeal must be arguable. A cursory look at the Miscellaneous Application dated 26th March 2024 shows that it seeks to stay execution in Nakuru Small Claims Commercial; Suit No E157 of 2023. It is Apparent that no Appeal has been filed This first ground is therefore not met. The Court cannot determine the arguability or trialability of an Appeal that is yet to be filed. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the Appellate Court overturn that of the trial Court.
22. The second aspect is to consider whether the Application before Court had been filed without undue delay. I noted that the Order sought to be stayed was issued on 19th March, 2024 while the present application is dated 26th March 2024. Thus, there is no undue delay.
23. Thirdly, this Court must determine whether not granting the order will occasion substantial loss to the Applicant. Substantial loss was explained in the case of *James Wangalwa & Another vs. 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.”
24. Since no Appeal exists upon which the Application is anchored, the Court is of the respective view that the Applicant has not demonstrated any substantial loss to be occasioned should the orders sought not be granted. On the converse the Respondent has a judgment yet to realize the fruits thereof.
25. It is Trite that the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicants herein, though they brought this Application without undue delay, he failed in adequately demonstrating the substantial loss that he would suffer, and he failed to furnish security as stipulated by sub-rule 2b.
26. The Upshot is the Notice of Motion Miscellaneous Application dated 26th March 2024 lack merit and the same is accordingly dismissed.
27. This Court awards the costs of this Application to the Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 9TH DAY OF JULY 2024.

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Mohochi S.M.

Judge.

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