



**Skair Associates Architects v The Trustees of the Evangelical
Lutheran Church of Kenya (Commercial Suit 342 of 2014)
[2024] KEHC 10280 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 342 OF 2014
DO CHEPKWONY, J
JULY 11, 2024**

BETWEEN

SKAIR ASSOCIATES ARCHITECTS PLAINTIFF

AND

**THE TRUSTEES OF THE EVANGELICAL LUTHERAN CHURCH OF
KENYA DEFENDANT**

RULING

1. The Defendant/Applicant filed an application dated 28th April, 2022 seeking for stay of execution of the Judgment delivered by this court on 11th March, 2022, pending the hearing and determination of an appeal preferred against the said Judgment.
2. The Defendant adduced fourteen (14) grounds on the face of the application which were further reiterated in the supporting affidavit sworn by its advocate, George Otieno Ochich.
3. Nonetheless, the Defendant's case as brought out on those grounds is that being dissatisfied with this court's Judgment, it notified the court of its intention to seek an appeal vide a Notice of Appeal filed on 23rd March, 2022. That, in the said Judgment, the court awarded a colossal decretal sum of Kshs.45,253,513.05 which the Defendant thinks is erroneous, unconscionable, grossly defective and not supported by any material evidence.
4. The Defendant averred that the Plaintiff may take up execution of the decree which may in turn render the appeal nugatory and impossible to recover such a colossal sum. In the further affidavit sworn by the Defendant's counsel on 21st July, 2022, it was averred that the Defendant/Applicant is ready and willing to provide such security as the court may direct.



5. The application is opposed by the Plaintiff/Respondent vide the grounds of opposition dated 14th June, 2021. The case brought forward in those grounds is that the application does not meet the threshold for stay pending appeal as provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#). More-so, in failing to offer security and failing to establish a prima facie arguable appeal. The Plaintiff also alluded that the application was filed outside the 30days time frame provided for filing appeals hence the court is now functus officio.
6. The application was canvassed by way of written submissions as directed by court and as the record reflects, the Defendant/Applicant filed two sets of submissions dated the 15th June, 2022 and 21st July, 2022 whilst the Plaintiff filed only one set of submissions dated the 13th July, 2022. I have read through the said submissions in their entirety for consideration in the determination of this application.

Analysis and Determination

7. Having considered the application, the affidavit sworn in support, the grounds of opposition and the submissions by parties, the major issue arising for determination is whether Defendant/Applicant has made a case for grant of order of stay of execution pending appeal.
8. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) is the legal provision which grants this court the jurisdiction to make orders of stay execution pending appeal reads 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 Applicants 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 Applicants”.
9. A reading of the above provision thus confirms that an applicant seeking stay of execution of a Judgment, 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.
10. However, before delving into the substance of the application, a germane issue raised by the Plaintiff/Respondent as to whether the court is functus officio in view of the interim stay orders granted by this court immediately after the delivery of the Judgment has to be addressed first. According to the



- Plaintiff/Respondent, the court granted thirty (30) days stay of execution on the 11th March, 2022 which expired on the 12th April, 2022 whereas the application at hand was filed on 29th April, 2022 which was beyond the 30 days allowed by the court hence the court is functus officio.
11. On the other hand, the Defendant/Applicant was of the view that the court was not functus officio since at no point did the court consider a substantive application for stay. Indeed, the Defendant viewed the earlier interim stay granted by the court as a “quick fix” which merely allows a dissatisfied Judgment debtor to figure out whether to opt for an appeal, review or even stay of the Judgment.
 12. To this end, having considered the authorities cited by the parties, in as much as the court appreciates the sentiments therein, they are decisions of courts of similar jurisdictions which this Court can respectfully distinguish from. Be that as it may, the doctrine of functus officio expresses the principle of judicial finality. It prevents the court from re-opening a suit which it rendered a final decision thereon but does not bar the engagement of the court where in such a case, it has already pronounced the final decision. That is to say, the doctrine of functus officio only bars a merit-based re-engagement with a case where a final Judgment has been entered, and a decree thereon issued. (see also case of Telkom Kenya Limited –vs- John Ochanda [2014] eKLR).
 13. In this case, it is without doubt that a final Judgment was issued by this court in this matter on 11th March, 2022. However, the application before court merely seeks for stay of the said Judgment pending an appeal and in this Court’s view, has not invited the court to alter or at all tamper with the merits of the Judgment. Consequently, this Court is not persuaded that the doctrine of functus officio is applicable in view of the application under consideration which this Court now proceeds to consider on its merits.
 14. In considering the grounds set out under Order 42 Rule 6(2) as summarized above alongside the facts of this case, the court wishes to begin by considering whether the application was filed timeously. According to the Plaintiff, the Defendant filed the application after 62 days of delivery of the judgment which the Plaintiff terms to be inordinate delay. On the other hand, the Defendant has argued that they filed the application a day after the decree was issued in this matter and only about forty-nine (49) days after the delivery of the Judgment.
 15. The court record reflects with clarity on the foregoing. That the Judgment was delivered on 11th March, 2022 and a decree issued thereof on 28th April, 2022. The Defendant filed the instant application on the 29th April, 2022 which is after forty-nine days after the delivery of the Judgment. It must be noted that Order 42 Rule 6 does not stipulate the specific time limit in which an application for stay of execution might be filed but provides that the application must be made without undue delay.
 16. In this case, there was no explanation as to why the application for stay could not be filed earlier than after the said 49 days even though the Defendant was able to file the Notice of Appeal within fourteen (14) days from the date of Judgment as required by law. Nevertheless, the court is of the view that such delay, though unexplained, was not so prolonged or inordinate as to disentitle the Plaintiff from seeking a stay of execution.
 17. On whether the Defendant has demonstrated the risk of substantial loss, the Defendant submitted that the decretal amount in question is colossal and it may be difficult to recover the same from the Plaintiff should execution proceed. In this Court’s view, Substantial loss connotes loss with real value as opposed to merely a nominal one. And in this case, the Applicant argues that it is the Respondents inability to repay the decretal sum that would occasion him substantial loss. (See the case of Sewankambo Dickson –vs- Ziwa Abby HCT-00-CC MA 0178 of 2005).



18. In addressing similar facts, the court of Appeal in the case of *National Industrial Credit Bank Ltd – vs- Aquinans Francis Wasike*, Court of Appeal Civil Application No. 238 of 2005 explained thus:-

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegations that an appeal would be rendered nugatory because the Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

19. In this case, the Plaintiff/Respondent merely contended that there was no prima facie arguable appeal which may be rendered nugatory or in that case cause substantial loss upon the Defendant/Applicant. At this point, it must be reiterated that an arguable appeal is not necessarily one which must succeed, even one arguable ground of appeal is good enough to sustain the appeal as arguable. Having considered the grounds of appeal that have been advanced by the Defendant, the appeal cannot be adjudged un-arguable at this juncture.

20. Be that as it may, the Plaintiff/Respondent has not levelled the fears on the inability to repay the decretal sum should the intended appeal succeed and, in this Court’s view, that is sufficient enough to persuade the court that the Defendant/Applicant stands to suffer substantial loss if the stay of execution sought is not granted.

21. Lastly, as regards the willingness to offer security, the Defendant/Applicant submitted it was willing to offer security as the court may direct and further that the said security ought not to be one frustrating its right of appeal. Such would be (sic) security tantamount to which the Plaintiff/Respondents suggests. On that case, the Plaintiff suggested that the Defendant be directed to furnish Kshs.95,253,513.05 as security for the appeal being the decretal sum awarded by the court and interests thereon.

22. In the court’s opinion, it is paramount that a litigant who has lost his case is granted ample chance to exercise the right of appeal against the finding of the trial court. And until a matter goes through its due course upto the apex court, it cannot be deemed as concluded. Equally important is the successful party’s right to enjoy the fruits of his Judgment and the subject Judgment/Decree remains in force and capable of being executed unless it is set aside by the superior court. Therefore, the court is under a duty to balance the two competing rights and interests of both the Decree-Holder and Decree -Debtor.

23. This Court associates itself with the expression of court in the case of *Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates*, where Justice Gikonyo held as follows: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment-Debtor..... Civil process is quite different because in civil process the Judgment is like a debt hence the applicants become and are Judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

24. Thus, the pre-conditions set under Order 42 Rule 6(2) complement each other such that failing to meet either of them leads to the application being rejected. They should be considered sequentially and in the present case, the Applicant having met the first two conditions set above, should as well meet



the requirement to furnish security for due performance of the decree. The test here is objective and the Applicant must show the willingness to provide security or even propose the kind of security to satisfy this ground for stay.

25. In view of the above discussion, the court finds the Applicant herein has met the requirement on furnishing security. The Supplementary Affidavit indicates that the Applicant is willing to offer any form of security as this court may direct. Nonetheless, it is not the business of the parties to dictate what form of security a party should offer. It is the discretion of the court to determine the form and security to be offered based on the circumstances of this case.
 26. It is this Court's view that depositing the decretal sum awarded by the court into an escrow account would serve to protect the interests of both parties pending the hearing and determination of the intended appeal. In so doing, the Judgment sum shall be placed within the reach of both the parties and upon the determination of the appeal, the successful one shall not be subjected to the time-consuming process of execution.
 27. The upshot is that the court has found merit in the Defendant/Applicant's application dated 28th April, 2022 and it is persuaded to allow the same, however in the following terms: -
 - a. That a conditional order for stay of execution be and is hereby issued staying the execution of the Judgment and decree issued in this suit pending the hearing and determination of the intended appeal.
 - b. That Order (a) above is premised on the condition that the Defendant/Applicant deposits the Judgment sum amounting to Kshs.45,253,513.05 in an escrow interest earning account in the names of the advocates on record for the parties within forty-five (45) days from the date of this ruling.
 - c. That failure to comply with Order (b) above, the conditional orders for stay granted in (a) above shall automatically stand dismissed and the Plaintiff/Respondent shall be at liberty to execute.
 - d. The costs of the application to abide by the outcome of the intended appeal.
- It is hereby ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 8TH DAY OF...JULY..., 2024.

D. O. CHEPKWONY

JUDGE

DELIVERED, DATED, SIGNED IN NAIROBI THIS 11TH DAY OF JULY, 2024.

JOSEPHINE MONG'ARE

JUDGE

