



Howard Humpreys (East Africa) Ltd v Africa Geothermal International (K) Ltd (Commercial Case 406 of 2016) [2024] KEHC 12664 (KLR) (Commercial and Tax) (18 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 406 OF 2016
A MABEYA, J
OCTOBER 18, 2024**

BETWEEN

HOWARD HUMPREYS (EAST AFRICA) LTD PLAINTIFF

AND

AFRICA GEOTHERMAL INTERNATIONAL (K) LTD DEFENDANT

RULING

1. Before Court is the application dated 23/11/2023 which was brought under order 42 rule 6(1), order 51 rule 1 of the civil Procedure rules 2010, sections 1A, 1B, 3A and 34 of the *Civil Procedure Act* Cap 21. It sought stay of execution pending the hearing and determination of the intended appeal of the judgment delivered on 14/7/2023.
2. The application was based on the grounds set out in the Motion and in the affidavit of Dr. Fred Ojiambo MBS SC sworn on 23/11/2023. It was contended that the defendant intended to appeal against the judgment of Mshila J of 14/7/2023. That the memorandum of appeal raised significant triable issues and the defendant was concerned that if required to pay the decretal amount, recovering those funds from the plaintiff would be challenging if the appeal were to succeed.
3. That the plaintiff's counsel had threatened to initiate liquidation proceedings to recover the decretal amount. The defendant expressed willingness to deposit the decretal amount in an interest-bearing account under the names of both parties.
4. The application was opposed by the defendant in a replying affidavit sworn by Bernard Ochieng on 11/12/2023. The plaintiff contended that the Court had allowed the plaintiff's application on judgment on admission on 18.10/2018 for Kshs 8,818,761.50. That thereafter, the defendant filed a notice of appeal on 12/11/2019 which was defective as it was filed out of time and no extension was sought by the defendant.



5. That the said judgment was not challenged and payment on the same was not advanced to the plaintiff. That judgment was again issued on 14/7/2023 against the defendant for Kshs 5,414,932 with interest and the defendant filed a notice of appeal dated 19/7/2023. The plaintiff contended that the defendant had not made any payment of the decretal sum and the plaintiff should not be deprived the fruits of its judgment and especially the sum of Kshs 8,818,761.50 which has not been challenged.
6. The application was canvassed by way of written submissions which I have considered which I have considered.
7. The principles for stay of execution are provided for under Order 42rule 6(1) of the [Civil Procedure Rules](#). These are that substantial loss has to be demonstrated, offer of security and that the application should be made timeously.
8. In [Kenya Shell v Benjamin Karuga Kibiru & another](#) [1986] eKLR, the Court of Appeal held: -

“If there is no evidence of substantial loss to an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
9. No doubt, the application was made without any delay and the first principle has been achieved.
10. On substantial loss, the applicant contended that it had an arguable appeal and that failing to grant the orders would render the appeal nugatory, as respondent would not be able to refund the same. In response, the respondent pointed out that the initial judgment against the applicant for Kshs 8,818,761/- had not been satisfied to date and no competent appeal had been preferred against it.
11. It was also noted that the applicant chose to appeal the second judgment of 14/7/2023 without fulfilling its obligations regarding the first judgment. Counsel emphasized that the respondent should not be deprived of the fruits of its judgment.
12. In considering an application for a stay of execution pending appeal, the Court must balance the interests of all parties involved. On one side, the plaintiff has two judgments against the defendant, while on the other side, the defendant has the right to appeal.
13. Although the defendant has expressed concerns about the risk of the plaintiff being unable to refund the decretal sum, the respondent did not rebut that fact. It never demonstrated its ability to refund the same were the appeal to succeed. The Court therefore finds that if the orders sought are not granted, the plaintiff may execute the decree which could render the appeal nugatory.
14. Balancing these two interests the court notes that the defendant has offered to provide security for the satisfaction of the decree. The respondent prays that the sum for the 1st judgment made on 23/11/2019 for Kshs 8,818,761/- be paid to the plaintiff first and the balance be held in a joint interest earning account.
15. Given the above considerations the Court finds that this is a proper case for granting the orders sought.
16. Accordingly, the application for stay is hereby allowed on the following terms: -
 - a. The sum of Kshs. 8,818,761.50 which is undisputed paid to the decree Holder within 7 days and the sum of Kshs. 5,414,932/= be deposited in an interest earning account in the joint names of the advocates for the parties within 21 days of the date of this ruling. In default, the



stay shall lapse and execution to issue. The costs of the application to the decree-holder in any event.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

