



Nila Pharmaceuticals Limited v Wasike & another (Both t/a Afya Royal Clinics) (Civil Suit 365 of 2010) [2024] KEHC 12456 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 365 OF 2010
PM MULWA, J
OCTOBER 17, 2024**

BETWEEN

NILA PHARMACEUTICALS LIMITED PLAINTIFF

AND

**DR CHARLES SOLOMON GODWIN WASIKE AND DR ADELAIDE
MASAMBU KITUYI BOTH T/A AFYA ROYAL CLINICS DEFENDANT**

RULING

Introduction

1. This suit was heard and on 7th June 2019, judgment was entered for the Plaintiff against the Defendants jointly and severally for the sum of Kshs.3,983,006.70 plus interest thereon at court rates from the date of filing suit until payment in full and costs of the suit. The Plaintiff commenced the process of executing the subsequent decree issued including filing a Notice to Show Cause why the Defendants should not be committed to civil jail for failing to pay the decretal sum amounting to Kshs. 10,072,201.59. On 14th September 2023 the court's Deputy Registrar, Hon. Nyan'gara Osoro found that the Defendants had failed to demonstrate sufficient cause as to why they should not be committed to civil jail and issued warrants of arrest against them.
2. The Defendants have evinced their intention to appeal against this ruling and they have now approached the court by way of the Notice of Motion dated 7th December 2023 made, inter alia, under Order 10 Rule 11, Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1A, 1B and 3A of the *Civil Procedure Act*. Principally, they are seeking to stay the execution of the ruling pending hearing and determination of the intended appeal. The application is supported by the grounds set out on its face and the supporting affidavit of Maina Njuguna, an advocate in conduct of this matter for the Defendants, sworn on 28th September 2023.



3. The Defendants contend that they have an appeal on merit with a very high chance of success and if a stay of execution is not granted the appeal will be nugatory. That their civil liberties are at stake and that the Hon. Deputy Registrar went ahead to issue warrants of arrest against them in complete disregard of Court decisions which that abhor and discourage the curtailment of civil liberties on account of a civil debt.
4. The Defendants averred that there was grave and imminent danger that execution may occur prior to the hearing of this application, that they have not been indolent in prosecuting the appeal and have undertaken the necessary steps to have the appeal lodged in the Court of Appeal, that they are willing to abide by the conditions for stay granted by the Court, that it is in the interest of justice that the Court exercises its discretion and allow the application as prayed, that the application has been brought without inordinate delay and that there is no prejudice that will be occasioned to the Plaintiff should this application be allowed.
5. The application is opposed by the Plaintiff through the replying affidavit sworn on 23rd November 2023 by its Managing Director, Dr. James Irungu. It is deposed that the intended appeal is on the order to arrest the Defendants and not an appeal against the substance of the judgment of 7th June 2019 and hence as far as the Plaintiff is concerned, the judgment is still valid as it has not been challenged. The Plaintiff contends that the Defendants were given an opportunity to show cause why they should not be committed to civil jail and failed to do so. It avers that the present application is an afterthought coined up to deny it the fruits of its judgement.
6. According to the Plaintiff the deprivation of liberty sanctioned by Sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of *the Constitution*. The only caveat being that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and the Rules thereof, which provide the due process safeguards essential to making limitation of the right to liberty acceptable in a free and democratic society.
7. The Plaintiff claims that the proper procedure as set out by the law was followed and that committal to civil jail of one who is able to pay but has refused to do so is lawful and does not amount to violation of rights and fundamental freedoms. And that the application herein ought to be dismissed for being misconceived, vexatious and an abuse of the court process.
8. The court directed that the application be canvassed by way of written submissions which are on record.

Analysis and determination

9. I have gone through the rival pleadings and depositions of the parties together with the written submissions on record. In order to succeed in an application for stay of execution pending an appeal, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. These principles are codified under Order 42 Rule 6 (2) of the Rules and have been buttressed by decisions of superior courts where it was added that the power to order stay of execution is discretionary and must be exercised in such a way that the appeal is not rendered nugatory. The discretion is based on the facts and circumstances of each case (see *Halai and Another v Thornton and Turpin* [1990] KECA 65 (KLR)).



10. I have no doubt that the Defendants’ application is timely having been filed just days after the Hon. Deputy Registrar’s ruling. On substantial loss, the court in *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] KEHC 4845 (KLR) cited the position of Warsame J., (as he then was) in *Samvir Trustee Limited V Guardian Bank Limited* [2007] KEHC 2438 (KLR) where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

11. It is abundantly clear that for the Court to grant stay of execution, the Defendant needs to satisfy the Court that it will suffer substantial loss. From the Defendants’ deposition, they are apprehensive of losing their liberties owing to the impending arrest ordered by the court. Whereas they also submit that the arrest would occasion a loss of their wages and curtail their efforts to pay the decretal sum, they have also admitted in their submissions that in as much as they have tried settling the debt since 2022, they have been unable to do so due to their strained financial position.
12. The Defendants have been enjoying interim orders for close to one year now and they have still not made efforts to liquidate even part of the decretal sum which means that they have not been earning any wages that can help in liquidating the decretal sums. Failure by the Defendants to demonstrate viable options of clearing the decretal sum leaves the Plaintiff with little choice but to apply for their committal to civil jail as a last resort and it cannot be faulted for proceeding in that manner.
13. In any event, I find that the Plaintiff satisfied the conditions and processes set out in Section 38 of the *Civil Procedure Act* by filing the Notice to Show Cause and the Defendants were given an opportunity of showing cause why they should not be committed to civil jail and the Deputy Registrar recorded the reasons for her finding in the ruling. To this end, I have serious doubts over the strength and chances of success of the intended appeal. I also agree with the Plaintiff’s submission that the merits of an appeal are not factors to be considered in determining whether the court can grant a stay and are irrelevant to their application herein (see *Kiarie v Njihia* [2023] KEHC 23093 (KLR)).



14. On the issue of security, since the challenge is on the committal to civil jail and not the decretal sum, it will add no value to order for the same (see Benson Ogina Ogallo v Samson Omuombo Odido [2021] KEHC 5032 (KLR)).
15. From the above, it is evident that the Defendants have not fulfilled all conditions necessary for the court to grant them stay of execution pending the appeal. It should not be lost that these conditions must be fulfilled conjunctively, that is, all three conditions must be met simultaneously in order to satisfy the provisions of Order 42 Rule 6 (see Morris Guchura Njage t/a Morris Njage and Company v Liza Catherine Wangari Mwangi [2018] KEHC 2053 (KLR)).
16. Thus, whereas the Defendants might have brought the application without undue delay, I find that it has failed to demonstrate the substantial loss they will suffer if the stay is not granted and that furnishing of security is not available to them owing to the challenge which is on committal to jail. In the foregoing, I find that the Defendant has not made out a case for the grant of an order of stay of execution of the court's ruling.

Disposition

17. The upshot is that, I find that the Defendants' application dated 28th September 2023 lacking in merit and is dismissed in its entirety. The Court however will exercise its discretion and suspend the warrants of committal to civil jail issued against the Defendants for a period of sixty (60) days from the date herein to enable the Defendants settle the decretal sum and file their appeal, failing which the warrants will be automatically stand reinstated and the Plaintiff will be at liberty to execute them. The Plaintiff will have costs of the application assessed at Kshs. 20,000.00.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Kabue for plaintiff

Ms. Nini h/b for Mr. Maina for defendants

Court Assistant: Carlos

