



**Birechi v Plastico Industries Limited & another (Civil Appeal
E618 of 2022) [2023] KEHC 593 (KLR) (Civ) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E618 OF 2022**

**JN MULWA, J
FEBRUARY 9, 2023**

BETWEEN

SARAH CHEPKURUI BIRECHI APPELLANT

AND

PLASTICO INDUSTRIES LIMITED 1ST RESPONDENT

SAMUEL NJERU MUHINDI 2ND RESPONDENT

RULING

1. This ruling is in respect to a notice of motion dated July 8, 2022 brought under section and 3A, 79G and 95 of the *Civil Procedure Act*; section 41, 42 and 43 of the *Small Claims Court Act*; and, order 22 rule 22, order 42 rule 6, order 50 rule 6 and order 51 rule 1 & 3 of the *Civil Procedure Rules*. The appellant/applicant seeks a stay of execution order of the judgment and decree delivered by Hon V M Mochache (Adjudicator) on July 8, 2022 in Small Claims Court COMM E783 of 2022 pending the hearing and determination of the intended appeal. She also prays that the costs of this application be in the cause.
2. The application is premised on the grounds on its face and a supporting affidavit sworn by the applicant.
3. The respondents responded to the application through a replying affidavit sworn by Nixon Kirui, an accountant of the 1st respondent company.
4. The court has considered the parties' respective affidavits in support of and in opposition of the application as well as the parties' respective written submissions.
5. The only issue for the courts determination is whether the appellant has satisfied the conditions for the grant of stay of execution pending appeal.



6. The conditions necessary for the grant of stay of execution pending appeal are laid out in order 42 rule 6(1) & (2) of the [Civil Procedure Rules](#) which provides that:

“ 6.

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub-rule (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.”

7. From the above provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.

8. In the instant case, there is no doubt that the instant application was brought without unreasonable delay as it was filed on the same day that the judgment of the small claims court was delivered.

9. As regards substantial loss, the appellant contends that she is insured by resolution Insurance Company Limited *vide* Policy Number P/200/0703/2018/0052. She states that the Insurer was placed under statutory management and a moratorium was declared on all suits against it and its policy holders in High Court case Civil Suit No E168 of 2022. She avers that being a policy holder therein, she is protected against execution by the existing moratorium. Further, she avers that there is a likelihood that she will be unable to recover the decretal sum from the 1st respondent in the event that her appeal succeeds and this will render her appeal nugatory. The 1st respondent on its part condemned the appellant’s reliance on the moratorium placed on her Insurer as a shield against execution. It averred that the appellant defended the suit in the small claims court in person and not through her Insurer.

10. The court notes that the appellant has not placed anything before this court to show that she is a policy holder at Resolution Insurance Company Limited. Further, nothing has been presented to this court to show that the said Insurer defended the suit on behalf of the appellant so as to entitle her to an automatic stay of execution in view of the moratorium. In addition, the appellant has not told this court the basis of her apprehension that she may be unable to recover the decretal sum from



the 1st respondent, which is a limited liability company in case the appeal succeeds. The court has been left to speculate whether the same is based on the 1st respondent's financial limitation or the relationship between the parties. Indeed, the evidential burden would only shift to the respondent once the appellant has laid sufficient basis. In the case of *Tarbo Transporters Ltd v Absalom Dova Lumbasi* [2013] eKLR, the court rightfully held that:

“The burden of proving that the respondent will not be able to refund to the applicant any sums paid to the respondent lies on the applicant. But where the records show some financial limitations on the part of the respondent, it may as well raise evidential burden on the respondent to file an affidavit of means. In this case, the respondent's income is such that it may not be sufficient to constitute ability to pay...”

11. Substantial loss is the cornerstone of an application for stay of execution. An applicant must establish what he stands to lose in case the stay is not granted and the Appeal happens to succeed. In the case of *James Wangalwa & Another v Agnes Naliaka* [2012] eKLR, Gikonyo J stated 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. This is what substantial loss would entail...”

10. In *Mukuma v Abuoga* (1988) KLR 645, the Court of Appeal stated that:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the instant case, it is the court's considered view that the appellant has not demonstrated the substantial loss she stands to suffer in the absence of stay of execution order.
12. On the third limb, the court notes that appellant has not offered any security for the performance of any decree that may eventually be found to be binding on her. Further, the court has not been furnished with either a copy of the judgment or decree of the small claims court to enable it appreciate the contents or establish the decretal sum that was ordered to be paid by the appellant, if at all. This condition has therefore not been satisfied.
13. For the foregoing, the court finds that the appellant's application dated July 8, 2022 lacks merit. The same is hereby dismissed with costs to the respondents.

Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

J.N. MULWA

JUDGE.

