



Waititu & another v Oloo t/a Indomitable Auctioneers (Miscellaneous Civil Application E023 of 2022) [2023] KEHC 2510 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E023 OF 2022**

JK SERGON, J

MARCH 22, 2023

BETWEEN

ZACHARIA NGIGE WAITITU 1ST APPLICANT

MATUNDA (FRUIT BUS SERVICES LTD) 2ND APPLICANT

AND

PETER OKOTH OLOO T/A INDOMITABLE AUCTIONEERS ... RESPONDENT

RULING

1. The crux of the instant matter is a ruling dated May 17, 2022 against the decision of the taxing master who taxed auctioneers cost at Kshs 70,815/=. The applicants found that the learned trial magistrate had erred by awarding Kshs 30,000/= as advocates fees yet the same is foreign not provided for in the auctioneers rules and further that the trial magistrate allowed attachment costs of Kshs 16,793/=, whereas the respondent only proclaimed and never attached the applicant's motor vehicle.
2. Subsequently, the applicant lodged an application in the High Court seeking leave to appeal out of time against the decision of the taxing master delivered on May 17, 2022 and for stay of execution pending appeal which application was dismissed with no orders as to stay of execution on October 7, 2022. The applicants were consequently exposed to the risk of execution. The applicants being aggrieved with the ruling made on October 7, 2022, filed a notice of appeal and intend to lodge an appeal in the Court of Appeal.
3. It is against such background that the applicants filed the instant application seeking for an order for stay of execution of the decree/order pending appeal *vide* a notice of motion dated November 17, 2022. In the aforesaid application, the applicants sought for the following orders;
 - i. That this honourable court be pleased to order a stay of execution of the ruling dated May 17, 2022 in Misc civil application No 13 of 2021 pending the hearing and determination of the intended appeal.



- ii. That there be a stay of execution of the judgment and/or decree emanating from the judgment and decree in Misc civil application No 23 of 2022 pending hearing and determination of the intended appeal.
 - iii. That the honourable court be pleased to order that the applicant do offer security in form of a bank guarantee.
4. The applicants in support of the application argued that the application herein was filed timeously and that since there was no stay of execution in force, they would suffer substantial loss and/or damage if the orders sought were not granted and further that the intended appeal would be rendered nugatory.
 5. The applicants argued that the respondents would not be prejudiced if the orders sought herein were granted.
 6. The applicants reiterated that they were ready, willing and able to furnish such reasonable security as the court would deem fit.
 7. The respondent opposed the application and filed grounds of opposition dated December 5, 2022 contending that the instant application was misconceived, bad in law and was tantamount to an abuse of court process.
 8. The respondent filed submissions dated February 13, 2023 further opposing the instant application. The respondent conceded that the applicants had a right to appeal against the ruling dated October 7, 2022 however, they failed to do so within the stipulated timeframe and ought to have sought for leave to appeal out of time before filing the instant application.
 9. The respondent contended that the applicant had shown sufficient cause and/or substantial loss.
 10. The respondent further faulted the applicant for failing to annex a draft memorandum of appeal which would assist the court to ascertain whether the applicant had sufficient cause.
 11. The respondent also contended that the application was frivolous, lacked merit and ought to be dismissed with costs.
 12. I have considered the grounds of opposition and the rival submissions herein. The sole issue for the court's determination is whether the application for stay of execution pending appeal is meritorious.
 13. The principles guiding the grant of stay of execution are well settled and are also provided for in order 42 rule 6 (1) and (2) of the [Civil Procedure Rules](#) which states as follows;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

14. In *Visbram Ravji Halai v Thornton & Turpin* civil application No Nai 15 of 1990 [1990] KLR 365, the Court of Appeal held as follows; “...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 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. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.”
15. Taking all the above factors into account, I find and hold that the applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under order 42 rule 6 of the *Civil Procedure Rules*.
16. In *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 the court stated as follows; “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... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. 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.”
17. As to security of costs, the appellants have proposed to provide a bank guarantee as security for the due performance of the decree appealed from. I find the proposal to provide a bank guarantee to be reasonable.
18. Accordingly, I hereby allow the applicant/appellants’ application dated November 17, 2022 and grant an order for stay of execution of decree made in Misc civil application No EO23 of 2022 pending the hearing and determination of the intended appeal on condition:-

The applicants/appellants shall deposit the entire decretal sum into an interest earning account in a reputable commercial bank, to be held by both advocates for the parties to this appeal, within 45 days of this ruling, In default, the order for stay of execution shall automatically lapse.

Cost of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 22ND DAY OF
MARCH, 2023**



J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Applicants

..... for the Respondent

