



**Awadh v Narayan Bulders Limited (Civil Appeal 182 of 2021)  
[2023] KEHC 27603 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 27603 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 182 OF 2021**

**F WANGARI, J**

**JUNE 2, 2023**

**BETWEEN**

**ESHE SALIM AWADH ..... APPELLANT**

**AND**

**NARAYAN BULDERS LIMITED ..... RESPONDENT**

**RULING**

1. This ruling relates to an application dated 31<sup>st</sup> March, 2022 which sought for the following orders: -
  - a. Spent;
  - b. Spent;
  - c. That upon inter parties hearing of this application, the Honourable Court be pleased to order a stay of execution of the ruling/judgement/decreed and or order delivered herein on 17<sup>th</sup> September, 2021 pending the hearing and determination of this appeal filed by the Applicant/Appellant against the ruling/judgement decree and or order of the Subordinate Court in Mombasa CMCC No. 1957 of 2018.
  - d. That any other order the court deems just and fit be granted
  - e. That costs of this application be provided for.
2. The application was opposed through a replying affidavit dated 9<sup>th</sup> May, 2022 and sworn by the Respondent's office administrator.
3. The application was disposed off by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.



## Analysis and Determination

4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant has made out a case for grant of orders of stay pending hearing and determination of appeal she has preferred. Corollary to this finding is the issue of costs.
5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides 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 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.
  - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”
7. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicant submitted that her land Mombasa/Mwembelegeza/1457 is in danger of being attached and sold by the Respondent. At paragraph 6 of the Applicant’s affidavit in support of the application, the deponent therein avers that the Respondent has



commenced the process of execution and she stood the risk of losing her land. Warrants of attachment and sale have been exhibited.

8. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court while considering a similar application as the current one had the following to say; - “...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... This is so because execution is a lawful process...” Therefore, the fact that the Respondent has set in motion the process of execution does not of itself amount to substantial loss. As was held in the above case, 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.
9. In the same decision above, the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. As stated elsewhere in this ruling, I have no doubt that the Applicant’s liberty property is at risk of being sold as evidenced by the annexures submitted by the Applicant. The Applicant states that if stay is not granted, she will lose her investment thereby resulting to a substantial loss were stay not to be granted. On the other hand, the Respondent would have been kept away from the fruits of its judgement. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

10. It is my considered view that were this court to deny the Applicant an order for stay of execution, it would place her at a more prejudicial position than the Respondent. While it is unfortunate that the Respondent will have to wait a little bit longer to enjoy the fruits of its judgement, the Applicant has adequately demonstrated that she is likely to suffer loss were her property be sold and I so hold.
11. On the issue of delay, I note that the application was filed on 1<sup>st</sup> April, 2022. The Lower Court judgement was delivered on 17<sup>th</sup> September, 2021. According to the Respondent, this was a period of 193 days after which it submits to be unreasonable. Looking at it from the outside, the Respondent’s view holds sway. However, I note that what precipitated the application are the warrants of attachment and sale. Even though judgment was delivered on 17.09.2021, there was no imminent threat of execution and thus I am satisfied that the application was filed timeously.
12. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...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...”

13. I agree with the Respondent that the Applicant has not offered or proposed any security for the due performance of the decree of the Lower Court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security the Applicant should give as may ultimately be binding on her. This modeling of the law is to ensure the discretion of the court is not fettered. I shall thus make orders accordingly on the issue of security.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The application dated 31<sup>st</sup> March, 2022 is hereby allowed on the following conditions: -
    - i. The Applicant/Appellant shall deposit a sum equivalent to 50% of the decretal sum in a joint interest earning account in the names of Counsel on record for the parties herein within a period of thirty (30) days from the date hereof;
    - ii. The Applicant to compile, file and serve a Record of Appeal within sixty (60) days from the date hereof;
    - iii. In default of either (i) or (ii) above, the application dated 31<sup>st</sup> March, 2022 shall stand dismissed;
    - iv. Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF JUNE, 2023.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Asige Advocate for the Applicant/Appellant

Wachira Advocate for the Respondent

Guyo, Court Assistant

