



**Suntra Investment Limited v Mohamedali & another (Civil Appeal
E387 of 2022) [2023] KEHC 19158 (KLR) (Civ) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19158 (KLR)

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

CIVIL

CIVIL APPEAL E387 OF 2022

CW MEOLI, J

JUNE 12, 2023

BETWEEN

SUNTRA INVESTMENT LIMITED APPLICANT

AND

MUSTAFA SHAUKATALI MOHAMEDALI 1ST RESPONDENT

ALIASGAR SHAUKATALI MOHAMEDALI 2ND RESPONDENT

RULING

1. The motion dated June 8, 2022 by Suntra Investments Limited (hereafter the Applicant) seeks among others that pending the hearing and determination of the appeal, the court be pleased to stay execution of the orders issued in favour of Mustafa Shaukatali Mohamedali and Aliasgar Shaukatali Mohamedali (hereafter the 1st and 2nd Respondent/Respondents) in Nairobi Milimani CMCC No 9529 of 2018 (hereafter the lower court suit), pending the determination of this appeal. The motion is expressed to be brought under Section 1A, 3A and 63(e) of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*, *inter alia*, on grounds on the face of the motion as amplified in the supporting and further affidavit sworn by Mark Kariuki Maina who describes himself as the head of customer-care and agents co-ordination at the Applicant company, hence conversant with the facts and duly authorized to depose.
2. To the effect that being aggrieved with the ruling of the lower court delivered on May 27, 2022, the Applicant has preferred an appeal that is arguable as evidenced by the grounds in the memorandum of appeal, which appeal will be rendered nugatory if execution was to proceed. That such an eventuality would cause irreparable loss and damage to the Applicant as the Respondents have no know assets and restitution will be illusory.



3. The Respondents oppose the motion by way of replying affidavit dated July 15, 2022 sworn by the 2nd Respondent, with the asserted authority of the 1st Respondent. The deponent attacks the motion by asserting that the Applicant is being economical with the facts with a view to misleading the court into granting an order that would effectively defeat the course of justice. He takes issue with the appeal as being time barred as it essentially challenges the decree of the lower court issued on September 18, 2019 but is disguised as an appeal against the ruling issued on May 27, 2022.
4. He goes on to depose that the grounds in the memorandum of appeal do not challenge the ruling delivered on May 27, 2022 in any manner whatsoever and thus raises no triable issues for the court's determination. He views the motion as intended towards frustrating the Respondents from enjoying the fruits of justice. He concludes by asserting that it is in the interest of justice that the court dismisses the motion as it lacks merit and is an abuse of the court process.
5. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored her submissions on the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) and the decisions in [Antoine Ndiaye v African Virtual University](#) [2015] eKLR and [Francis K. Chabari & Another v Mwarania Gaichura Kairubi](#) [2022] eKLR on the prerequisites to be fulfilled for an order of stay pending appeal to issue. Addressing the court on the issue of substantial loss, counsel reiterated the material in the supporting affidavit and called to aid several decisions including [Kenya Shell Ltd v Kibiru & Another](#) [1986] eKLR, [Rhoda Mukuma v John Abuoga](#) [1988] eKLR, and [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) [2006] eKLR.
6. Counsel contended that the Applicant has an arguable appeal and stands to suffer loss and irreparable harm if stay is not granted, as the dispute relates to transfer of shares whose value is yet to be verified. The risk being that the shares could be traded by the Respondents to a third party making it impossible for the Applicant to recover the same should the appeal succeed. That the Applicant is apprehensive of the Respondents' capacity to refunding the value of the shares should the appeal succeed.
7. Lastly, about security it was argued that the circumstances of this case do not lend themselves to the requirement of security as the subject matter does not involve a liquated sum. More so as the value of shares is still unverified hence there is no proper basis upon which the court can determine the amount of security payable. The decision in [Alpha Fine Foods Ltd v Horeca Kenya Ltd & 4 Others](#) [2020] eKLR was cited in respect of the foregoing. The court was thus urged to allow the motion with costs.
8. On the part of the Respondents counsel equally anchored his submission on the provision of Order 42 Rule 6 of the [Civil Procedure Rules](#) on the prerequisites that ought to be fulfilled in respect of the instant motion. In response to the Applicant's submissions on substantial loss, the Respondents cited the decision in [HGE v SM](#) [2020] eKLR. They countered that no substantial loss was likely to be suffered by the Applicant as the intended appeal does not challenge the decree of the lower court issued on September 18, 2019, hence the same would not be rendered nugatory as purported.
9. Further they contended that the instant application is premised on the grounds of verification of the value of dividends paid out by Safaricom Plc and purported refusal by the Respondents to activate its CDSC account so that shares could be remitted. The Respondents further asserted that the court ought to require provision of security. The decision in [Gianfranco Manentbi & Another v Africa Merchant Assurance Company Ltd](#) [2009] eKLR was cited. In conclusion, the court was urged to dismiss the motion with costs.
10. The court has considered the material canvassed in respect of the motion. This court notes that from the respective affidavit material and submissions relied on by the parties herein, they have prematurely addressed issues related to the substantive appeal, which are a preserve of the appellate court. At this



stage the court is not concerned with the merits of the appeal. That said, it is trite the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.

11. The Applicant's prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* which provides that:

- “(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”.

12. The cornerstone consideration in the exercise of the discretion is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of the superior courts including some of those cited by the parties in their submissions. Holdings 2, 3 and 4 of the Kenya Shell Ltd Case are especially pertinent. These are that:

- “1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”



13. The decision of Platt Ag JA, in the Kenya Shell Ltd Case, in my humble view sets out two (2) different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”

14. The learned Judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the 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 cornerstone of both jurisdictions for granting 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.” (Emphasis added)

15. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson Vs Church* (No 2) (1879) 12ChD 454 at page 458 where he said:-

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

16. The Applicant has reiterated in its affidavit material that it has an arguable appeal which will be rendered nugatory in the event that execution was to proceed resulting in irreparable loss and damage to the Applicant, the Respondents’ means being unknown. The Respondents have countered this position by arguing that no substantial loss would be suffered by the Applicant as the intended appeal does not challenge the decree of the lower court issued on September 18, 2019.

17. Execution in satisfaction of a decree is a lawful process, and the Applicant is duty bound to demonstrate specifically how substantial loss would arise, by showing, either that if the appeal were to succeed, the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of his money. The Applicant has precisely expressed the apprehension of the Respondents inability to refund any monies paid to them whereas



the Respondents other than challenging the motion and merits of the appeal have not tendered material in rebuttal.

18. Nevertheless, the decree/order herein is not expressly a money decree. The court has taken the liberty of perusing the judgment delivered on September 18, 2019 together with the impugned ruling dated May 27, 2022, the latter which forms the subject matter of the instant appeal. The judgment of lower court required the Applicant to perform certain actions in favour of the Respondents. The Applicant from their memorandum of appeal, appear to assert and inability to perform the decree of the court.
19. In the court's view, even if execution were to proceed, the act of verification and activation of the CDSC accounts has to be performed by either or both of the parties notwithstanding the impugned ruling of the court. While a activation of the said CDSC account will necessarily involve both parties, the verification of the shares rests with a 3rd Party pursuant to the judgment of the lower court delivered on September 18, 2019. Substantial loss in its various forms is the cornerstone of the court's jurisdiction for granting stay, and what has to be prevented. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder fruits of their successful litigation.
20. Therefore, the court is not persuaded that the Applicant have established the likelihood of the appeal being rendered nugatory and hence likelihood of substantial loss. Without this evidence, it is difficult to see why the execution process should be stayed. In the circumstances, the motion dated June 8, 2022 is devoid of merit and is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Kiama h/b for Mr. Ngatia

For the Respondent: Mr. Maina

C/A: Carol

