



REPUBLIC OF KENYA



**Eagle Group International Limited & 2 others v Hamisi (Civil Appeal
E723 of 2021) [2023] KEHC 20081 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E723 OF 2021**

AN ONGERI, J

JULY 6, 2023

BETWEEN

EAGLE GROUP INTERNATIONAL LIMITED 1ST APPELLANT

AGBEKO ERIC 2ND APPELLANT

MENSAH BAFFOUR KYEI 3RD APPELLANT

AND

HADIJA CHERUTO HAMISI RESPONDENT

RULING

1. The application coming for consideration in this ruling is dated October 27, 2022 seeking the following orders;
 - i. That the application be and is hereby certified as urgent deserving priority hearing and ex-parte in the first instance.
 - ii. That an order be and is hereby issued directing that this application be placed before the Hon Justice Sergon on the earliest available date for hearing and determination.
 - iii. That The Interim Orders for stay of execution of the judgment and decree in MCC No 3637 of 2019 granted on September 23, 2022 to remain in force pending the hearing and determination of this application.
 - iv. That the court be pleased to vary and/or alter the conditional stay order issued September 23, 2022 on deposit of the decretal sum in court within 45 days and in its place accept a land title deed for land reference no Ngong/Ngong/5198 from the appellant/applicants as adequate security pending the hearing and determination of the intended appeal.



- v. That the costs of this application be provided for.
2. It is supported by the affidavit of Agbeko Eric in which it is deposed as follows;
 - i. That on September 23, 2022 this honourable court delivered a ruling granting the appellant/applicants a stay of execution against their properties on the condition that they deposit the entire decretal amount in a joint interest earning account in the names of both advocates within 45 days, failure to which the stay would lapse and the respondent would be free to execute.
 - ii. That the honourable court, in issuing the ruling, failed to consider the plight of the appellant/applicants whose gist in the appeal are to be allowed to be heard in their defence at the lower court where they shall prove even beyond a balance of probabilities that they had paid the respondent the amount she claims in totality.
 - iii. That the honourable court therefore failed to appreciate that the filing of this appeal by the appellant/applicants was mainly grounded on the fact that the respondent had been paid the whole amount she claims and that they were not accorded a chance to be heard which led to the impugned judgment.
 - iv. That in addition, the appellant/applicants are currently in financial distress and are unable to raise the entire decretal amount as directed within the 45 days as directed by the court.
 - v. That should they fail to raise the amount claimed, the earlier stay orders issued by this court will be vacated, and the appellant/applicants are apprehensive that the respondent may at any time execute against the formers' immovable and movable properties if the orders sought are not granted and such an action will render the intended appeal nugatory.
 - vi. That the above notwithstanding the appellant/applicants do pray that the court do vary the orders issued on September 23, 2022 and in its place accept a title deed registered in the appellant/applicant's names.
 - vii. That the respondent shall suffer no prejudice if the orders issued on September 23, 2022 are set aside and or vacated.
 - viii. That it is in the interest of justice that this application be allowed.
3. The respondent filed a replying affidavit dated November 16, 2022 in which it is deposed that this court considered all the facts that had been tabled by the parties and came to a proper conclusion in its ruling delivered on September 23, 2022. She averred that the applicant's allegation that its account was dormant is deceitful considering that the letter seeking reactivation was drafted on the same day that this application was filed. That further it does not indicate the account number that sought to be re-activated nor does it request for a statement of the unnamed account and neither is there proof of receipt of the said letter at the bank.
4. She averred that the applicants are claiming financial difficulties yet they were able to purchase the property sought to be used as security in 2022 and have also not disclosed the business they operate that was affected by the Russia-Ukraine war.



5. The parties filed written submissions as follows; the applicants submitted that the court should take into account the two fundamental principles of proportionality and equality of arms, which are intended to put the parties before the Court on an equal footing, and determine where the scales of justice lie given that it is the business of the court, to the greatest extent possible, to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice.
6. Further that the Court should always choose the option with the least likelihood of injustice when using its discretion as was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“...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 condition.”

7. The applicants argued that given that a conditional stay has already been granted in this case, it is unnecessary to evaluate whether any party herein will suffer a significant loss. That the court is required to put the parties on an even playing field, thus when a stay request is made, the court must weigh the parties’ interests against the primary goal of the case.
8. On review of the court’s direction with regard to the payment of the decretal sum the appellants submitted that Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* gives this Honorable court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. That in the current case they have indicated that they were unable to furnish the court with the decretal amount as ordered and in the alternative request that they are allowed to use title deed for LR No Ngong/ Ngong/ 5198.
9. The sole issue for determination is whether the order requiring deposit of the decretal sum as a condition for stay pending appeal should be varied .
10. The governing provision is Order 42 Rule 6 which states 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 Applicants 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 Applicants”.

11. The duty of this court is balance the interests of the parties. The appellant has a right of appeal while the respondent has a right to enjoy the fruit of his judgment.
12. The applicant submitted that the gist of the appeal was that the Trial court failed to appreciate that the filing of this appeal by the appellant/applicants was mainly grounded on the fact that the respondent had been paid the whole amount she claims and that the Appellants were not accorded a chance to be heard which led to the impugned exparte judgment.
13. I find that the respondent cannot suffer prejudice that cannot be compensated by an award of damages.
14. I allow the Appellant to deposit a land title deed for land reference no Ngong/Ngong/5198 from the appellant/ applicants as adequate security pending the hearing and determination of the intended appeal.
15. I grant stay pending appeal on condition that the appeal is fully prosecuted within 90 days of this date failure to which the appeal will automatically be dismissed for want of prosecution.
16. The Appellant to pay the Respondent thrown away costs of Kshs 20,000 before the appeal is set down for hearing.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF JULY, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the 3rd Appellant

..... for the Respondent

