



**Haco Industries Limited & another v Doshi Iron Mongers Limited & another
(Civil Suit 108 of 2006) [2023] KEHC 22198 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 108 OF 2006
F WANGARI, J
JULY 7, 2023**

BETWEEN

HACO INDUSTRIES LIMITED 1ST APPLICANT

SOCIETE BIC 2ND APPLICANT

AND

DOSHI IRON MONGERS LIMITED 1ST DEFENDANT

KENYA BUREAU OF STANDARDS 2ND DEFENDANT

RULING

1. This ruling relates to an application dated March 23, 2022 which sought for orders including;
 - a. Stay of execution of the judgement rendered on March 9, 2022 in this suit, pending the hearing and determination of this application
 - b. Stay of execution of the judgement rendered on March 9, 2022 in this suit, pending the hearing and the determination of the intended appeal before the Court of Appeal.
 - c. Costs of the suit
2. The application was opposed through a replying affidavit dated 24/5/2022 and filed on 25/5/2022 stating that the Applicants have not met the threshold for the grant of the stay of execution orders.
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.
4. The Applicants filed a Rejoinder Submissions dated and filed on 1/11/2022. On 2/11/2022, Oluga advocate for the 1st Respondent sought to have the said submissions struck out as they had been filed without the leave of the court. Miss Mutune advocate having been instructed by Itusa advocate for the Applicants stated that leave had been granted on 25/7/2022.



5. I have perused through the court proceedings and more specifically for 25/7/2022 and no such leave was granted to the Applicants. Under the circumstances, the Applicants Rejoinder Submissions having been filed without the leave of the court are hereby struck out from the court's records.

Analysis and Determination

6. I have considered the application, response, 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/Applicant has made out a case for grant of orders of stay pending hearing and determination of this application and the intended appeal. Corollary to this finding is the issue of costs.
7. 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.
8. At this stage, the court should not delve into the merits of the appeal and should only concern itself with the material presented before it on whether to grant stay or not. 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.
9. 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...”

10. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss and nugatory, the Applicants submit that they stand to suffer substantial and irreparable loss if the Respondents commence execution for the decretal amount due to the Respondents for Ksh. 150,000,000 for breach of agreement and Ksh. 690,800 being legal fees incurred. The colossal amount would affect the operational cash flow of the 1st Applicant thus jeopardizing the livelihoods of its workers.
11. In response, the 1st Respondent submitted that the Applicants did not demonstrate how the payment of the decretal sum would cause substantial loss to the 1st Applicant. The 1st Respondent submitted that they should not be denied the fruits of their judgment pending appeal. In the event the appeal succeeds, they had the financial capacity to refund the decretal amount. They produced a copy of title deed to a property alleged to be much more worth than the decretal sum in support of their financial capability.
12. 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...”

13. It is my considered view that were this court to deny the Applicant an order for stay of execution, it would place them at a more prejudicial position than the 1st Respondent. While it is unfortunate that the Respondents will have to wait a little bit longer to enjoy the fruits of the judgement, the Applicants have adequately demonstrated that they are likely to suffer loss were the Applicants’ interests in the subject matter be ignored and I so hold.
14. On the issue of delay, I note that the judgment subject of this appeal was delivered on March 9, 2022. The Notice of Appeal was filed on March 11, 2022 and the current application was filed on March 28, 2022. Without belaboring much on this limb, I have no hesitation in holding that the application was filed timeously and I need not say more on this limb.
15. Lastly, the Applicants are 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 v 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...”

16. In their supporting affidavit, the Applicants stated that they were willing to provide security in from a bank or insurance. This was countered by the 1st Respondent in their submissions stating that that was a question of evidence and cannot be introduced through written submissions, and it was also a way of countering the 1st Respondents evidence on their financial capacity as stated herein above. On the willingness by the Applicant to provide security, I find it as a sign of good faith on their part. Nevertheless, in accordance to Order 42 rule 6(2) (b) of the *CPR*, it is the court that orders the kind of security the Applicant should give as may ultimately be binding on the Applicant. 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.
17. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In the present circumstances, the appeal is yet to be heard and thus the order that commends itself is an order for costs to abide the outcome of the appeal.
18. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The application dated March 23, 2022 is merited and thus hereby allowed on the following conditions;
 - i. That the Applicants do provide a Bank Guarantee of Ksh. 50,000,000 from a reputable bank, within the next 30 days.
 - ii. That the Record of Appeal be filed within the next 45 days.
 - iii. That in default of (i) and (ii) above, the application stands dismissed.
 - b. Costs shall abide the outcome of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Sigilai Advocate h/b for Itusa Advocate for the Applicants

Machogu Advocate h/b for Oluga Advocate for the Respondent

Barile, Court Assistant

