



**Khamis v Zarum Investments Limited (Civil Appeal
E110 of 2022) [2023] KEHC 22217 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E110 OF 2022**

F WANGARI, J

JULY 7, 2023

BETWEEN

KHALIF MOHAMED KHAMIS APPELLANT

AND

ZARUM INVESTMENTS LIMITED RESPONDENT

RULING

1. This ruling relates to an application dated August 4, 2022 which sought for the following orders: -
 - a. That the application be certified as urgent and the same be heard ex-parte and service of the same be dispensed with in the first instance;
 - b. That there be a stay of execution of the ruling/order delivered on the July 28, 2022 pending hearing and determination of the application;
 - c. That there be stay of execution of the ruling/order delivered on the July 28, 2022 pending the hearing and determination of the Appeal filed herein;
 - d. That the date of inter-partes hearing be given;
 - e. That the costs of the application be provided for.
2. The application was opposed through a replying affidavit dated August 25, 2022 and filed on August 25, 2022.
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 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 appeal he 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. 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. Having perused the application and the response, I note that the issue relates to grant of letters of administration to the Applicant. If I delve on the said grant, I would be pre-determining the appeal and this is a conduct which ought to be abhorred at this stage.
7. 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...”

8. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss and nugatory, the Applicant submits that his entire livelihood and history may be at risk should the Respondent proceed to attach, sale and evict them. The subject matter of the appeal is said to be a property namely Plot No. 4871/MN (original 18175/03). The case of *Butt v Rent Restriction Tribunal* [1979] eKLR was cited for this proposition. At paragraph 6 of the Applicants’ affidavit in support of the application, the deponent avers that he stood to lose the only place of abode if stay is not granted. In response to the application, the Respondent stated that execution is a lawful process and was being undertaken in accordance with the law and that the Applicant was simply on a mission to deny the decree holder from enjoying the fruits of its judgement.
9. 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.
10. 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. I note that the subject matter is a house situate in a defined piece of land. On the other hand, the Respondent would have been kept away from the fruits of his judgement for more than fifteen (15) years as per the Respondent’s pleadings. 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...”
11. 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 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 he is likely to suffer loss were the Applicant’s interests in the subject matter be ignored and I so hold.
12. On the issue of delay, I note that the ruling subject of the appeal was delivered on July 28, 2022. The appeal was filed on August 3, 2022 and the current application was filed on August 5, 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.

13. 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...”

14. I agree with the Respondent that the Applicants have 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 the Applicant. This modeling of the law is to ensure the discretion of the court is not fettered. I note that the subject of appeal is whether or not a deceased's estate can be attached in settlement of a money decree. The Applicant contends that the estate is yet to be fully distributed as the order made by the Succession Court was conditional on certain aspects. Based on the above, I shall thus make orders accordingly on the issue of security.
15. 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.
16. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The application dated August 4, 2022 is merited and thus hereby allowed;
 - 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;

Ajigo Advocate for the Appellant

Omondi Advocate h/b for Khatib Advocate for the Respondent

Barile, Court Assistant

