



REPUBLIC OF KENYA



KENYA LAW
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Omondi v Mukanda (Civil Appeal E046 of 2023)
[2023] KEHC 21652 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21652 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E046 OF 2023
FG MUGAMBI, J
JULY 21, 2023

BETWEEN

FARAJ HADJAN OMONDI APPELLANT

AND

HAMISI MUKANDA RESPONDENT

RULING

Brief Facts

1. Before the court is the application dated March 6, 2023 brought under Order 42 rule 6, Order 51 rule 1 of the *Civil Procedure Rules* 2010 and sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the Law.
2. The application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the intended appeal, there be a temporary stay of execution enforcing the whole of the ruling delivered by Honourable Rawlings Liluma Museiga on the March 6, 2023 in Civil Suit No 10436 of 2018 Hamisi Mukanda v Faraj Hadman.
 - iv. That the costs for this application be provided for.
3. The application is supported by the grounds on the face of it, the supporting affidavit sworn by the applicant Faraj Hadnan Omondi on even date and written submissions dated April 12, 2023. The



applicant's case was that the lower court had on March 6, 2023 delivered a ruling dismissing the applicant's review application and allowing the respondent's application for contempt of court.

4. Consequently, a committal order was issued against the applicant upon which a warrant of arrest was to issue. The applicant averred that he is aggrieved by the ruling of the lower court and intends to file an appeal against the same. The applicant further submitted that the appeal raised triable issues and should the execution process commence he would suffer irreparable loss and damage. The applicant confirmed willingness to furnish security for due performance of the order pending intended appeal.
5. The application was opposed by the respondent through a replying affidavit dated March 15, 2023 sworn by Hamisi Mukanda. The respondent's case was that the applicant could not pursue an appeal and a review at the same time, since the applicant had on two occasions applied for review and the same was dismissed by the court. Further, it was contended that the conditions for stay of execution had not been met by the applicant who was hell bent on frustrating the respondent from enjoying the fruits of their judgment.

Analysis

6. I have carefully considered the pleadings, rival submissions and authorities filed by parties herein. There are two issues for determination, the first being whether the application for stay of execution pending appeal against the ruling of the lower court is correctly before the court and secondly, whether the court should grant the orders sought.
7. Is the intended appeal legitimate? The respondent argues, and correctly so, that the appellant cannot pursue a review and an appeal against the same orders. Order 45 rule 1(a) and (b) of the [Civil Procedure Rules](#) sets out orders and rules against which an appeal would lie. Section 80(a) and (b) is clear that when one opts for a review they cannot exercise the option of an appeal.
8. The evidence presented before me indicates that the applicant filed an application seeking to review the judgment of December 17, 2020 based mainly on the reason of an error on the face of the record. The same was premised on the fact that the default judgment was allegedly entered in default of appearance and in the absence of a statement of defence, although the same had been filed.
9. The lower court dismissed the application for review. The appellant now disagrees with the decision that dismissed that application for review and has sought to appeal against it. In other words, the applicant is before this court to tell this court why the application for review should have been allowed so that the matter before the lower court could be heard on its merits. The power of review is not the same as the power exercisable on appeal. I find that the intended appeal is properly before court.
10. Having so found, Order 42 rule 6(1) of the [Civil Procedure Rules](#) enunciates the principles that ought to guide the court in granting orders for stay of execution. There are 3 key requirements:
 - (i) The court must be satisfied that substantial loss may result to the applicant unless the order is made;
 - (ii) The court must satisfy itself that the application has been made without unreasonable delay; and
 - (iii) 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.”



11. This court is cognizant of the purpose of stay of execution orders as this has been a subject of judicial pronouncements including *RWW V EKW*, [2019] eKLR where it was held that:

“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.”

12. Turning to the present case against the law as I have set it out, I am aware that the general consideration should be that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.

13. I do agree with the appellant that if the order for stay of execution is not granted, the appeal would be rendered nugatory and he would be highly prejudiced. I say so noting that the applicant seeks to stay his imminent arrest and committal to civil jail which would make the appeal meaningless once he has been denied his liberty. I have also considered the draft memorandum of appeal presented before court and the orders sought to be appealed against. I find that the applicant has satisfactorily demonstrated substantial loss.

14. The second principle for consideration in application for stay is security of costs. In addressing the issue of security, the court in *Mwaura Karuga t/a Limit Enterprises V Kenya Bus Services Ltd & 4 Others*, [2015] eKLR, stated that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost.

That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2)(b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

15. The applicant confirms that he is ready and willing to abide by any orders of the court on deposit of security. Finally, I am satisfied that this application has been brought without any delay.

Determination and orders

16. In light of the foregoing, I find that the appellant has met the threshold for the court to exercise its discretion to grant stay of execution pending the intended appeal. Accordingly, I find that the application has merit and is allowed on the following terms:

- i. Stay of execution of the ruling delivered by Honourable Rawlings Liluma Musiega on March 6, 2023 in Civil Suit No 10436 of 2018 be and is hereby granted pending the hearing and determination of the intended appeal, on the following conditions:
 - a. That the applicant does deposit a sum of Kshs 500,000/= in a joint account held together with counsel for the respondent in an interest earning account, in a bank to be mutually agreed, within 30 days of the date of this order, in default of which this order shall stand vacated and the respondent will be at liberty to execute;



- b. That the record of appeal shall be filed within 45 days from the date of this order.
- ii. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 21ST DAY OF JULY, 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri

