



**Aero Marine Cargo v Cars United Kingdom Ltd (Civil Appeal
E207 of 2023) [2023] KEHC 23642 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E207 OF 2023
DKN MAGARE, J
SEPTEMBER 18, 2023**

BETWEEN

AERO MARINE CARGO APPLICANT

AND

CARS UNITED KINGDOM LTD RESPONDENT

RULING

1. The Application dated 2/8/2023 was filed to seek stay of execution and leave to appeal out of time from the Decision of D.W. Mburu given on 27/4/2023 in Mombasa CMCC 336 of 2020. The same was brought when the auctioneers served a Notice dated 27/7/2023.
2. The period for filing the Appeal lapsed on 26/5/2023. The Applicant took 2 months before filing the application. The Applicant has not given even a lame excuse for not filing the appeal in time. Without explaining the reason for delay, the court has no jurisdiction to extend time.
3. The only reason the application was filed was to get stay. The delay is unreasonable and without any explanation. The judgment was delivered in the presence of parties.
4. The Respondent filed a Replying affidavit on 11/8/2023. They state that there was an application filed in the CM's Court scheduled for hearing on 25/9/2023. They state that they issued a judgment notice on 22/5/2023. There is a parallel application for stay pending appeal dated 4/8/2023. This was filed after I declined to issue stay orders herein. Though a party is entitled to hedge his bet, he to disclose the same to court.

Analysis

5. An application for stay an equitable prayer. Parties need to disclose material facts. For example, Issuance of the orders for stay is not perfunctory. It is based on length of delay, reason for delay and animus. The



delay is for a whole three months. There is no reason given for the delay. In the case *Caliph Properties Limited -v- Barbel Sharma and Another* (2015) e KLR as follows:

“*Kyangaro v. Kenya Commercial Bank Ltd & Another* (2004) 1 KLR 126 as cited in *Patrick Waweru Mwangi & Another v. Housing Finance Co. of Kenya Ltd* (2013) eKLR at page 145 stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”

6. A notice of entry of judgment was served in May. This was not controverted. Nothing was done till the auctioneers hit the ground. The applicant does not appear serious. It is truly an afterthought. The parties cannot proceed as if auctions are bad. They are legal process that aid the courts execute its judgments.
7. The applications for stay must be made for a good reason and with full disclosure. In this matter, there is no attempt to explain or give reason for delay. The court cannot whimsically dish out orders of stay of execution at the slightest provocation. In the case of the case of James Wangalwa & Another V Agnes Naliaka Cheseto [2012]eKLR, where the court stated as doth: -

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

8. The order for stay pending appeal is based on Order 42, rule 6 which provides as follows: -

“Stay in case of appeal

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

9. The issue of stay will thus depend on the existence of a valid appeal. In the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court stated as doth: -

27. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. 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. What constitutes substantial loss is not just sale of movable property. Is that if payment is made, it will enter into a bottomless pit from which no recovery can be made. This is especially true where the Respondent has not demonstrated their means to refund. It is not for the Applicant to demonstrate.



This is because, only the respondent knows his true financial standing. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. Justice Gv Odunga as then he was, in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR held as doth: -

“9. In *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990* [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules (this is the current order 42 rule 6) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

10. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

12. In the case of *RWW v EKW Civil Suit No. 25 OF 2012 Nairobi* [2019] eKLR, where my sister Justice Asenath Ongeri, LJ, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.”

13. Hon Lady Justice F MUCHEMI in *Charles Mwangi Gitundu v Charles Wanjohi Wathuku* [2021] eKLR, while addressing the issue of stay stated as doth: -

“

“34. In *Patrick Kalaya Kulamba & Another vs Philip Kamosu and Roda Ndanu Philip (Deceased)* [2016] eKLR where Meoli J. held:-

“For the purpose of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty....to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof....

So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6(1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the *Githunguri Case* concerning the court’s original jurisdiction vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2)(b) (as it is now). The foregoing has a bearing on the interpretation of order 42 Rule 6(6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6(1) however does not preclude the applicant from approaching this court as it has done.

I would venture to add that the wording of Order 42 Rule 6(1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2)(b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6(1).

It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment in the lower court. To insist in this case that the applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing the duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 159(2)(d) of *the Constitution*.”

14. In this case, the application for stay is not merited as well as the application to extend time within which to appeal. In the circumstances, I am constrained to dismiss the application with costs of Kshs. 20,000/=.



Determination

15. The upshot of the foregoing is that I make the following orders: -
- a. The application dated 2/8/2023 is dismissed.
 - b. Costs of Kshs. 20,000/= payable in 30 days.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Kyalo for the Respondent

No appearance for the Applicant

Court Assistant - Brian

