



**Benarlot Company Limited v Pwani Oil Product Limited (Civil Appeal E105 of 2022) [2023] KEHC 22272 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22272 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E105 OF 2022  
OA SEWE, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**BENARLOT COMPANY LIMITED ..... APPELLANT**

**AND**

**PWANI OIL PRODUCT LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Notice of Motion dated July 25, 2022. It was filed by the appellant under Article 159(2)(d) of *the Constitution of Kenya*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 40 Rule 1 and Order 51 Rules 1 and 2 of the *Civil Procedure Rules*. The appellant thereby seeks orders that:
  - (a) Spent;
  - (b) Spent
  - (c) Pending the inter partes hearing and determination of this Appeal, the Court be pleased to set aside the ruling delivered on June 27, 2022 and all other consequential orders.
  - (d) Spent
  - (e) Pending inter partes hearing and determination of this Appeal an order of stay of execution be issued restraining the respondent whether by itself or its agents and/or servants from in any way acting on the interlocutory judgment delivered on October 13, 2022.
  - (f) That the costs of the application be provided for.
2. The application was premised on the grounds that, by a ruling delivered in Mombasa CMCC No 1140 of 2021 on June 27, 2022, the lower court gave orders that were adverse to the appellant; and that the appellant is apprehensive that unless the respondent is restrained as sought herein, it will



proceed and execute the aforementioned interlocutory judgment to the prejudice of the appellant. In the Supporting Affidavit sworn on the appellant's behalf by Benard Hurmphrey Guya on July 25, 2022, it was averred that the impugned ruling was delivered in utter disregard of the provisions of the Arbitration Act, No 4 of 1995 and the rules of fair hearing; and therefore that, unless the orders sought are granted, the appeal will be rendered nugatory.

3. In response to the application, the respondent relied on the Replying Affidavit sworn by Mr. Geoffrey Kilonzo, Advocate, sworn on August 4, 2022. He deposed, *inter alia*, that the said application lacks merit, is bad in law and has been overtaken by events in that final judgment was entered against the appellant on October 13, 2021. He further deposed that, since the decree is a money decree, the appellant is not entitled to stay of execution; more so because the respondent is capable of refunding the decretal sum in the event of a successful appeal.
4. Upon directions being given on August 4, 2022 that the application be canvassed by way of written submissions, Ms. Kariuki for the appellant filed her written submissions dated October 17, 2022 proposing one issue for determination; namely, whether the Court should grant the stay of execution sought herein pending the hearing and determination of the appeal. She relied on Order 42 Rule 6(1) of the Civil Procedure Rules and the cases of Butt v Rent Restriction Tribunal [1979] eKLR, R W W v E K W [2019] eKLR and James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, as to the purpose of an order of stay and the prerequisites that must be met before the Court can grant such an order.
5. It was further the submission of Ms. Kariuki that the interlocutory judgment entered by the trial court was erroneous in so far as the appellant was denied the right to be heard. She added that the Court ought to look at the interests of both parties and grant orders that are geared towards engendering fairness in the interim, pending the hearing and determination of the Appeal.
6. On behalf of the respondent, written submissions were filed herein on October 14, 2022 by Ms. Nyabuto. She submitted that the application is a nullity as it was brought by an Advocate in disregard of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, in that leave was not obtained by the firm of M/s Mbugua Ndiritu & Co Advocates to come on record after judgment. She relied on Tarwadi v Veronica Mueblemann [2019] eKLR in which a suit was struck out on the same ground. However, since this is an interlocutory application, the Court is not seized of sufficient information at this stage to make a determination in this regard, noting that the lower court record is yet to be availed.
7. On the merits of the application, it is significant to point out that some of the prayers sought therein are already spent; and that the outstanding one are:
  - (a) that pending the inter partes hearing and determination of this Appeal, the Court be pleased to set aside the ruling delivered on June 27, 2022 and all other consequential orders;
  - (b) that pending inter partes hearing and determination of this Appeal an order of stay of execution be issued restraining the respondent whether by itself or its agents and/or servants from in any way acting on the interlocutory judgment delivered on October 13, 2022; and,
  - (c) That the costs of the application be provided for.
8. Prayer [a] above being a substantive prayer belonging to the Appeal itself, can only be granted after hearing the parties in respect of the Appeal. It is therefore not a prayer available to the appellant at this interim stage. Accordingly, the only prayer for my consideration is Prayer [b] above; and therefore the single issue for determination is whether the appellant has made out a good case for the issuance of an order of stay pending appeal. In this regard, counsel for the respondent submitted that the appellant failed to satisfy the conditions for stay as set out in Order 42 Rule 6 of the Civil Procedure Rules, namely:



- (a) that substantial loss may result to the appellant unless the order sought is made;
  - (b) That the application was filed without unreasonable delay;
  - (c) That such security as may be ordered by the Court has been provided for the due performance of the decree.
9. Counsel relied on *Kenya Shell Limited v Kibiru* [1986] KLR 410, *Visbram Halai v Thornton & Turpin Ltd* (1963) Ltd [1990] KLR 365 and *Standard Assurance Co Ltd v Alfred Mumea Komu* [2008] eKLR among other authorities, to buttress her submissions that the appellant was duty-bound to prove substantial loss in a tangible manner; and that having failed to do so, the Court’s jurisdiction to grant stay has been improperly invoked. Counsel also relied on *Machira T/A Machira & Co Advocates v East African Standard* (No 2) [2002] KLR 63 for the proposition that a successful party is entitled to the fruits of his judgment.
10. Counsel also pointed out that the appellant had neither offered any security nor pleaded willingness to deposit security for the due performance of the decree. She accordingly urged the Court to find that the appellant has failed to demonstrate the existence of the three conditions precedent to warrant the grant of an order of stay. She added that the Appeal has no chances of success; and that the same was filed merely for the purpose of buying time and to block the respondent from enjoying the fruits of its judgment. Thus, counsel urged for the dismissal of the application and concluded her submissions by quoting from *Republic v Attorney General & Another, Ex Parte James Alfred Koroso* [2013] eKLR in which Hon. Odunga, J. (as he then was) held:

“Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to roadblocks placed on their paths by actions or inactions of others.”

11. I have given due consideration to the application in the light of the facts presented herein. Although it was expressed to have been brought under Order 40 Rule 1 of the *Civil Procedure Rules*, it is manifest from the Replying Affidavit and the written submissions filed on behalf of the respondent that the intention was to cite Order 42 Rule 6 of the *Civil Procedure Rules*, which provides that:

- “(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.

12. The provision presupposes that there be either a decree or order in respect of which precipitate action is looming. In this case the ruling and order in question is the Ruling delivered by Hon. Nyariki, RM, on June 27, 2022 in Mombasa CMCC No 1140 of 2021. A copy thereof was annexed to the appellant's Supporting Affidavit, and it is manifest that the outcome thereof was a negative order. The learned magistrate concluded his ruling thus:

“The issues raised in the Notices of Motion Applications hold no merit as the suit in question has been concluded and a judgment entered. The arbitration clause 20 in the agreement between the parties also permitted the Plaintiff to lodge a case in the instance where they felt the contract had been breached which is the instance in this case. I must also indicate that a quick perusal of the file clearly indicates that there had not been any effort by the Defendant to have their application dated August 20, 2021 fixed for hearing, even though its prayers were reflected in the Notice of Motion application dated February 9, 2022. It is therefore the finding of this Court that the Notice of Motion applications dated August 20, 2021 and February 9, 2022 are devoid of merit and are both dismissed with costs.”

13. It is now trite that a negative order is incapable of execution and therefore not amenable to stay for purposes of Order 42 Rule 6 of the *Civil Procedure Rules*. Thus, in *Raymond M. Omboga v Austine Pyan Maranga*, Kisii HCCA No 15 of 2010, Hon. Makhandia, J. (as he then was) held:

“...The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

14. Similarly, in *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63, a decision of the Court of Appeal for Eastern Africa that was followed by the Court of Appeal in *George Ole Sangui & 12 Others v Kedong Ranch Ltd* [2015] eKLR, it was held thus:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs...The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction.”

15. And in *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal (per Hon. Kantai, J.A.) had occasion to restate that:

‘An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly



been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal No 13 of 1984) where it was stated:

‘...an order for stay of execution must be intended to serve a purpose ...’ (emphasis supplied).

16. There is a second reason why the application for stay is untenable and it is this. The Appeal is in respect of the ruling and orders issued by the lower court on June 27, 2022, yet in the instant application, the appellant essentially seeks stay of an interlocutory judgment delivered on October 13, 2021. Accordingly, in *Raymond M Omboga v Austine Pyan Maranga* (supra), it was held:

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree...It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant’s appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court’s judgement or decree.”

17. In the premises, it is my finding that the appellant’s application is incompetent; and that no useful purpose would be served by engaging in a merit consideration thereof from the standpoint of Order 42 Rule 6 of the *Civil Procedure Rules*. Accordingly, the appellant’s Notice of Motion dated July 25, 2022 is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**OLGA SEWE**

**JUDGE**

