



**Prit Wholesalers Ltd v Mega Spin Ltd (Civil Appeal E082 of 2022)
[2023] KEHC 23606 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E082 OF 2022
HM NYAGA, J
SEPTEMBER 25, 2023**

BETWEEN

PRIT WHOLESALERS LTD APPELLANT

AND

MEGA SPIN LTD RESPONDENT

RULING

1. The Applicant vide an application dated 30th June, 2023 brought pursuant to Sections 1A, 1B, and 63 (c) and (e) of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules.
2. The application seeks for stay execution of the ruling and orders made in Nakuru Chief Magistrate's Court Case No. E 272 of 2020 on 30th May, 2022 and 8th June 2023 and stay of further proceedings in Nakuru Chief Magistrate's Court Case No. E272 of 2020 pending the hearing and final determination of the intended appeal. The Applicant also seeks costs of the Application.
3. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Kishor Kumar Gudha who describes himself as one of the Directors of the Applicant.
4. He deponed that on 30th May, 2022 the Magistrate's Court made a ruling in Nakuru Chief Magistrate's Court Case No. E 272 of 2020 citing the Applicant for contempt of court orders issued on 22nd November, 2022, lifting the Applicant's corporate veil and directing the deponent herein to be held personally liable for the contemptuous acts committed by the Applicant.
5. He averred that the court further summoned him to court to show cause why he should not be committed to civil jail for willful disobedience of the court order.
6. He deposed that on 8th June, 2023 the Magistrate's court in the aforementioned case allowed the Applicant's application dated 22nd August, 2022 by ordering the Applicant to deposit a total sum of



- Kshs. 1,000,000.00 in a joint interest earning account in the name of advocates within 30 days' failure to which the notice to show cause proceedings proceeds.
7. He averred that his advocate requested for typed proceedings but he has never obtained the same to date and that he was aware that the Appellant filed an Appeal against the ruling of the magistrate court dated 30th May, 2022 that is yet to be heard.
 8. He averred that the continuance of proceedings in the aforesaid suit is prejudicial to the Applicant especially himself as the orders of the impugned ruling dated 30th May, 2022 continues to revisit him.
 9. He believes the Applicant is insolvent having sold its assets to settle outstanding debts long before filing of this suit and as such it will suffer substantial loss if the ruling and orders thereto are executed.
 10. Shah Akash Kantilal Shah the Respondent's managing director swore a Replying Affidavit in opposition to the Application on 21st July, 2023.
 11. He deposed that the Applicant filed a similar application before the trial court in the aforementioned suit which was determined on 8th June, 2023 and as such the instant application is res judicata.
 12. He contended that before the above suit was fixed for hearing they noted the Applicant was concealing its assets and discreetly disposing and transferring the same to an entity affiliated to it with intent of avoiding judgment that could be passed against it and they swiftly instructed their advocate to file an application for security of decretal sum and the court in its ruling delivered on 21st November, 2021 directed the Appellant to deposit security of Kshs.6 million by 10th December, 2021.
 13. He averred that when the matter was mentioned for compliance on 17th December, 2021 the applicant had not complied with the above order and it was granted 45 days more days to do so. On the next mention date of 31st March, 2022 the Applicant had not complied and thus the respondent was necessitated to file an application that resulted into the impugned ruling dated 30th May, 2022.
 14. He averred that the Applicant subsequently rushed to this court seeking stay of the execution of the above ruling and when interim stay was not granted, it unilaterally withdrew the Application and filed a similar one before the trial court seeking similar orders and on 8th June, 2023 its application was allowed on condition that it deposits Kshs. 1,000,000/= in an interest earning account in a reputable bank held by advocates for both parties within 30 days' failure to which the hearing of notice to show cause to proceed.
 15. He deposed that after lapse of 30 days the Applicant filed the instant application. He contended that the Applicant is in contempt of the court order and has no audience until that contempt is purged.
 16. It was his further deposition that the instant application is an abuse of the court and should be dismissed with costs to the Respondent.
 17. Kishor Kumar Gudha, the Applicant's Director swore a further affidavit on 11th August, 2023 in response to the aforestated Replying Affidavit.
 18. He averred that the withdrawal of the application dated 27th July 2022 did not activate the bar of res judicata and as a result the applicant was not barred from instituting a similar application.
 19. He averred that pursuant to order 42 Rule 6(1) of the Civil Procedure Rules this Honourable court has an original jurisdiction to entertain an application for stay of execution even though the lower court allowed the appellant's application with conditions.



20. He deposed that he is willing to abide by any condition which this Honourable Court may impose regarding his attendance in court pending the hearing and final determination of the Appeal.
21. The Application was canvassed through written submissions.
22. The appellant submissions were filed on 21st August,2023 while the respondent's submissions were filed on 4th September,2023

Applicant's Submissions

23. The Applicant framed the following issues for determination: -
 - a. Whether the instant application is res judicata
 - b. Whether the applicant has satisfied the conditions for grant of stay of execution pending the hearing and determination of the appeal
 - c. Whether the proceedings in Nakuru Chief Magistrate's court case no. E272 of 2020 ought to be stayed pending the hearing and determination of the Appeal
 - d. Who should bear the costs of this Application.
24. On the first issue, the applicant submitted that upon withdrawal of an application dated 27th July 2022 seeking stay of execution of the orders of lower court dated 30th may,2022 before this court it was not barred from instituting a similar application as such withdrawal did not activate the bar of res judicata.
25. In buttressing its submissions, the Applicant relied on Section 7 of the *Civil Procedure Act* and the cases of John Florence Maritime Services Limited & another vs Cabinet Secretary, Transport and Infrastructure & 3 others [2021] & Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR
26. In regards to the second issue, the Applicant submitted that this court has an original jurisdiction to handle the application herein despite the lower court having issued orders of stay. In support of this proposition, reliance was placed on the case of Patrick Kalava Kulamba & another vs Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR
27. In regards to whether it will suffer substantial loss, the applicant submitted that proceeding with the hearing of the notice to show cause will render the appeal nugatory in the event the court sitting on appeal overturns the ruling delivered on 30th May, 2022.
28. On whether the instant application has been filed timeously, the applicant submitted in the affirmative.
29. In regards to security, the applicant submitted that it will be willing to abide by any conditions that this court will impose. The applicant argued that it is the court which determines the security upon ordering stay. To buttress this fact, reliance was placed on the cases of Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR & HGE vs SM [2020] eKLR.
30. With regard to the third issue, the applicant submitted that the question whether or not to order stay of proceedings is a discretionary one that ought to be exercised judiciously. For this proposition, the applicant relied on the case of Port Florence Community Health Care vs Crown Health Care Limited [2022] eKLR.
31. The applicant then submitted that the instant application has been filed without unreasonable delay and it stands to suffer substantial loss if the orders are executed since the respondent is declared



insolvent and has closed shop. That the appeal has a high chance of success and will be rendered nugatory if the proceedings are not stayed.

32. On the last issue, the applicant submitted that the respondent should bear costs. To buttress its submissions reliance was placed on the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others (2014) eKLR.

Respondent's Submissions

33. On whether the applicant is deserving audience before any Honourable Court, the Respondent submitted that the applicant is in breach of court orders issued on 21st November, 2021 and 8th June, 2023 and if this court continues to entertain the applicant without ordering him to purge contempt, then there is no guarantee that the appellant's director will still uphold the ruling of this court and all the proceedings and orders made shall be waste of judicial time and in vain. In support of its submissions, the respondent cited the case of Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR where the court held that inter alia that its orders must be obeyed.
34. In regards to whether the Applicant has satisfied all conditions set under Order 42 Rule 6(2) of the Civil Procedure Rules, precisely on substantial loss, the respondent submitted that the appellant has not demonstrated any loss that may be occasioned to it should the orders sought be declined. It was submitted that the contention that the applicant has become insolvent is a demonstration that the respondent stands to suffer great loss as it is being denied what is rightfully owed to it from a sale of goods transaction it had with the appellant and which the appellant has refused to pay. In support of its submissions the respondent relied on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR.
35. The respondent further submitted that the stay being sought is in a bid to stay hearing of the notice to show cause which is a lawful execution process. It argued that the appellant's director is being accorded a chance to explain why he has not paid the security of Kshs. 6,000,000/= as directed by the court and that staying the notice to show cause is pre-empting an outcome of the same when no decision has been made by the court.
36. On whether there is a meritable appeal, the respondent submitted that on the memorandum of appeal on its face is frivolous, unmerited and with no chances of success. It was submitted that the court should note that the applicant is not challenging the order issued on the 22nd November, 2021 and it does not deny contempt. The Respondent contended that the Applicant has not shown which loss it shall suffer if hearing of the notice to show cause is to proceed and as such its appeal will not be rendered nugatory if stay is not granted.
37. It was submitted that the hearing of the notice to show cause has already been set for 20th September, 2023 and therefore the stay orders sought is an exercise in futility.
38. On the issue of security, the respondent referred to the case of Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others (supra) for the proposition that security under order 42 Rule 6 of the Civil Procedure Act is for due performance of the such decree or order as may be ultimately binding on the applicants.
39. It was submitted in the instant case the applicant has not offered security for due performance of the order of this court if the appeal fails.
40. On the issue of unreasonable delay, the respondent submitted that the applicant has not demonstrated any efforts to follow up and obtain typed proceedings to enable it file a record of appeal and that the delay is deliberate to give the managing director more time to continue disposing and concealing the



assets of the defendant company in a bid to evade judgement. This court was referred to the case of Jaber Mohsen Ali & another vs Priscillah Boit & another [2014] eKLR.

41. On who should bear the costs of the application, the respondent submitted that costs follow the event and urged the court to dismiss the application with costs.
42. I have considered the application, the reply as well as rival submissions. In my considered view, two issues arise for determination namely;
 - a. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal.
 - b. Whether this court ought to grant stay of proceedings in the lower court pending hearing of this appeal.
43. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:

“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 orders set aside.”

44. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 - a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
45. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

“The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

Secondly, the general principle in granting or refusing a stay is, 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.

Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order



security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.”

46. Under the head of substantial loss, an applicant must clearly state what loss, if any, it stands to suffer. This principle was enunciated in the case of Shell Ltd vs Kibiru and Another [1986] KLR 410. Platt, JA set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

47. The learned judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

48. The Applicant in this matter contends that proceeding with the hearing of the notice to show cause will render the appeal nugatory in the event this court overturns the trial court’s decision.

49. It is undisputed that the trial court on 21st November, 2021 directed the Applicant to deposit security of Kshs.6, 000,000/= by 10th December, 2021. The defendant did not comply and on 17th December, 2021 he was granted further 45 days to do so. By the next mention date of 31st March,2022 the Applicant had not complied prompting the Respondent to file an application seeking amongst other orders that the Applicant be cited for contempt of court orders , its corporate veil to be lifted and the managing director Kishor Kumar Gudhka be held personally liable for the contemptuous acts committed by the Applicant and summons be issued to the aforesaid director to show cause why he should not be committed to civil jail for willful disobedience of the court orders.

50. The trial court granted the above orders in its ruling delivered on 30th May, 2022. Being dissatisfied with the said ruling, the Applicant lodged an appeal against the same vide its memorandum of Appeal dated 14th June, 2022.

51. At this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.

52. I find that the applicant has succeeded on this particular limb.

53. On whether the application has been made without unreasonable delay, I have noted the impugned ruling was delivered on 30th May, 2022 and the Applicant thereafter filed an application 17th



- August,2022 seeking stay of the said rulings and it was allowed by the trial court on 8th June,2023. Subsequently the Applicant filed its memorandum of appeal and the present application on 29th June, 2022 and 30th June, 2023. Considering the time, the trial court delivered its ruling on stay and the time the present application was filed, it is apparent that the present application was filed without inordinate delay.
54. Regarding the issue of security for costs, the applicant submitted that it is willing to abide by any conditions that the court may impose.
55. The determination of what amounts to a suitable security is a matter of court's discretion. In *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another* [2018] eKLR, the court stated that:
- “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security....”
56. The Applicant has similarly succeeded on this limb by submitting itself to the discretion of the court.
57. It is not in doubt that this Court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See *George Oraro vs Kenya Television Network Nairobi* HCCC No. 151 of 1992.
58. It was therefore held in *Jadva Karsan vs Harnam Singh Bhogal* [1953] 20 (1) EACA 74 that:
- “It is true that there is a wider power under section 97 [now 3A of the *Civil Procedure Act*] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process.”
59. In *David Morton Silverstein vs Atsango Chesoni* Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296 the Court of Appeal citing *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another* Civil Application No NAI 50 of 2001 held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In *Niazons (Kenya) Ltd. vs China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani)* HCCC No. 126 of 1999 *Onyango-Otieno, J* (as he then was) held that:
- “Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”
60. In the present case, it was not disputed by the applicant that it had, on 8th June,2023, obtained orders of stay of execution pending appeal before the lower court where the matter was first heard and further that as a condition for the stay, the applicant was to deposit the sum of Ksh. 1,000,000/= in a joint interest earning account in a bank held by both advocates within 30 days. The said orders have to date not been varied or set aside. It is not clear why the Applicant opted not to comply with the stay orders issued by the trial court and proceed expeditiously with the hearing of the Appeal.
61. However, in light of my above holding that the Appeal raised triable issues I am satisfied that the interests of justice in this case demand that there be stay of the execution proceedings to allow the Applicant prosecute its appeal.



62. For the foregoing reasons, the upshot of this court's decision the Application dated 30th June, 2023 has merit and the same is hereby granted in terms of prayers (3) on the condition that: -
- a. The Appellant shall file and serve his Record of Appeal within forty-five (45) days from the date of this Ruling.
 - b. The Applicant to deposit security of Ksh. 1,000,000/= in a joint interest earning account in the names of both advocates within 30 days hereof.
 - c. Costs of the Application to abide the outcome of the Appeal.
 - d. If any of the conditions is not complied with, the stay orders shall automatically lapse without further reference to the court.
63. As for stay of the entire proceedings, I am of the view that the prayer is untenable. The orders issued by the trial court were interlocutory and were made pursuant to the court finding merit in the plaintiff's application for the defendant company to offer security for the amount sued for. The suit itself is yet to be heard and so an order of stay will prejudice its determination.
64. Therefore, I decline to grant a stay of the proceedings as sought. That means that the suit itself can go on even as the appellant appeals against the ruling in question.

DATED, SIGNED AND DELIVERED AT NAKURU 25TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Ekesa for Konosi for Appellant

Ms Kimuge for Kauraj for Respondent

