



Directline Assurance Company Limited v Okwanyson & another (Civil Appeal E133 of 2023) [2023] KEHC 23041 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E133 OF 2023
RE ABURILI, J
OCTOBER 5, 2023**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

ELIJAH OMOLLO OKWANYSON 1ST RESPONDENT

NILAM ENTERPRISES 2ND RESPONDENT

RULING

Introduction

1. This ruling determines the notice of motion dated August 7, 2023 brought under certificate of urgency and filed by the applicant/appellant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That this honourable court be pleased to stay the execution of the judgement/decree obtained herein pending the hearing and determination of the appellant's/applicant's appeal filed herein.
 - f. That this honourable court allow the applicant to furnish the court with security in the form of a bank guarantee from the Family Bank.
 - g. That the application be heard inter partes on such a date and time as this honourable court May direct.



- h. That costs of this application abide the outcome of the appeal.
 - i. That this honourable court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances.
2. The application was supported by the rounds therein as well as the supporting affidavit deposed by one Effie Achieng.
3. It was the applicant's case that the trial court entered judgement against it on the July 6, 2023 for specific performance of the contract of insurance, loss of daily income at Kshs 10,000 per day and damages for failure to service the loan and accruing interest and that it lodged an appeal *vide* a memorandum of appeal dated August 4, 2023.
4. The applicant averred that the 1st respondent was likely to proceed and levy execution against it unless stay of execution is granted and that failure to grant stay of execution will render the appeal nugatory and expose the applicant to irreparable loss and damage.
5. The applicant further avers that the judgement entered against it was of a substantial amount and as such it was apprehensive that if it was successful in its appeal they may not be able to recover the same from the 1st respondent who had not disclosed nor furnished the court with any documentary evidence to prove his financial standing.
6. It was the applicant's case that it was ready, willing and able to furnish the court with a bank guarantee of a reasonable amount of the decretal sum as security.
7. The applicant further averred that the instant application had been brought without any undue delay and that the respondents would not suffer any prejudice if the same was allowed.
8. In response, the 1st respondent Elijah Omollo Okwanyson filed a replying affidavit sworn on the September 18, 2023 in which he contended that the application lacked merit and was meant to delay justice and prolong the 1st respondent's agony and suffering.
9. The 1st respondent further deposed that the application had not met the preconditions for granting the orders being sought as the applicant had failed to provide any security for the award but instead provided an incomplete application for a bank guarantee that was not executed or approved and had lapsed.
10. It was the 1st respondent's case that the applicant ought to deposit the decretal sum in a joint interest earning account pending the outcome of the case.
11. The application was argued orally on September 28, 2023 with counsel for the respective parties reiterating their respective positions in the grounds and depositions.

Analysis and Determination

12. I have considered the application herein and the corresponding pleadings and submissions. Section 1A(2) of the *Civil Procedure Act* provides that "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" while under section 1B some of the aims of the said objectives 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."



13. Order 42 rule 6(2) of the [Civil Procedure Rules](#) set out the principles that guide court in considering whether to grant stay of execution pending appeal.
14. The provision stipulates as follows:

“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.”
15. The provisions of order 42 rule 6 indicate two things. First, the court is empowered to order stay of execution pending appeal either in exercise of its inherent jurisdiction or under the provisions of order 42 rule 6 of the [Civil Procedure Rules](#). This position finds support in *Singh v Runda Estates Ltd* (1960) EA 263 and was reiterated by court in [Paul Kamura Kirunge v John Peter Nganga](#) [2019] eKLR.
16. However, this power is discretionary and must be exercised judiciously as was held in [Canvass Manufacturers Ltd v Stephen Reuben Karunditu](#), civil application No 158 of 1994, (1994) LLR 4853. This is because in the exercise of this power, the court has to balance between the right of a successful litigant to enjoy the fruits of his/her judgment with the right of appeal of a dissatisfied litigant whose appeal should not be rendered nugatory in case his or her appeal succeeds and the order of stay was not granted. After all the purpose of stay is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. See [Odunga’s Digest on Civil Case law and Procedure](#), 2nd Edition, Volume 4, Law Africa 2010 at 3749.
17. Secondly, the provisions of order 42 rule 6 anticipate that for an application for grant of stay to be successful, an applicant must prove the following conditions:
 - a. That substantial loss may result unless the order is made
 - b. That the application has been brought without undue delay and lastly
 - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
18. These conditions/criteria are central to the decision as to whether the order of stay of execution of decree/judgment may be granted by court. In [Masisi Mwita v Damaris Wanjiku Njeri](#) (2016) eKLR, the court while affirming these criteria held that:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely; - sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.”



19. These conditions are cumulative and mandatory in nature. As such, should an applicant fail in establishing a single criterion, then stay of execution cannot not be granted. This position finds support in *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR it was held that: -

“of all the four, not one or some, must be met before this court can grant an order of stay...”

20. Additionally, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted. This position was adopted by the High Court in *Butt v Rent Restriction Tribunal* [1979] and *Hassan Guyo Wakalo v Strassman EA Ltd* (2013) as follows: -

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.”

21. What amounts to substantial loss? Demonstrating that one is likely to suffer substantial loss in case an order of stay is not granted, is core in the grant of a stay order. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court observed:

“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.”

22. Similarly, in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No 1561 of 2007 the court stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that”

23. In my view, substantial loss must be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal. In *Silverstein v Chesoni* [2002] 1 KLR 867 the court held: -

“Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

24. In the instant case, the applicant avers that it stands to suffer substantial loss if stay of execution is not granted. It further avers that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The appellants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank.



25. On his part, the respondent has not addressed the issue of stay of execution but instead faulted the bank guarantee obtained by the applicant on the ground that the same is invalid as it is dated September 1, 2021.
26. 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.
- 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.”
27. In this case, the 1st respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicant’s counsel that they shall suffer substantial loss if stay is not granted, I am persuaded that substantial loss has been proved considering the colossal sums of money due on the decree which is impugned herein. I am fortified by several decisions on this point. In *Johnson Mwiruti Mburu v Samuel Machari Ngure* [2004] eKLR, the court stated that substantial loss could result to the applicant in view of the possible inability of the respondent to pay.
28. Further in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the court, while dealing with the same issue stated that:
- “Once an applicant expresses a reasonable fear that the respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is matter which is peculiarly within his knowledge ...”
29. Accordingly, I find and hold that the applicant has fulfilled the first condition for stay of execution of decree pending appeal.
30. On the second condition of whether the application has been filed without inordinate delay, I am also satisfied that there has been no inordinate delay in bringing the instant application and the appeal as the judgment and decree being appealed against was delivered on the July 6, 2023 and the memorandum of appeal filed dated August 4, 2023 and uploaded on the August 7, 2023 as per court E-filing System. The application for stay was filed on August 7, 2023 simultaneous with the filing of the memorandum of appeal. Accordingly, I am satisfied that there was no inordinate delay in bringing this application for stay of execution.
31. As to security for the due performance of decree as may be binding on the applicant, the appellants have made provision for a bank guarantee meaning, they are able and willing to comply with that condition on security for the due performance of the decree appealed from.
32. The 1st respondent has faulted the bank guarantee offered by the applicant on account of the same being invalid as its dated September 1, 2021. However, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into



account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

33. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under order 42 rule 6 (2) of the *Civil Procedure Rules*. I am satisfied that the application herein is merited.
34. Accordingly, I hereby allow the appellant's/applicant's application dated August 29, 2023 and grant stay of execution of decree in Kisumu CMCC 561 of 2018 pending the hearing and determination of this appeal on condition that the appellant shall within the next thirty days of the date of this ruling, furnish to this court an original and current bank guarantee for the decretal sum issued by a commercial bank of repute in Kenya.
35. Costs shall be in the cause.
36. I so order

Dated, Signed and Delivered at Kisumu this 5th Day of October, 2023

R.E. ABURILI

JUDGE

