



REPUBLIC OF KENYA



East African Institute of Certified Studies Ltd v Mayfair Holdings Ltd (Civil Appeal E066 of 2023) [2023] KEHC 23545 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E066 OF 2023
RE ABURILI, J
OCTOBER 13, 2023**

BETWEEN

EAST AFRICAN INSTITUTE OF CERTIFIED STUDIES LTD APPLICANT

AND

MAYFAIR HOLDINGS LTD RESPONDENT

RULING

1. The application before this court is one dated 22nd May 2023 in which the applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing of this appeal, there be a stay of execution of the decree given on the 11th May 2023 in Kisumu CMCC No. E442 of 2021.
 - d. That the costs of this application be provided for.
2. The application was supported by the rounds therein as well as the supporting affidavit deposed by one Daniel Macharia.
3. The applicant averred that being dissatisfied with the decree and judgement issued in Kisumu CMCC No. 442 of 2021, had preferred an arguable appeal that had chances of success.
4. It was further averred that the respondent had applied for the decree and would at any time proceed with execution which would render the intended appeal nugatory and further expose it to substantial loss.



5. The applicant further stated that it was willing to provide security for any judgement binding upon it by depositing the decretal sum into court or a joint interest earning account in the name of the advocates for both parties.
6. In response, the respondent grounds of opposition dated 16th June 2023 raising the following grounds;
 - i. That the application is lacking in merit.
 - ii. That the appellant has not offered any security for the appeal
 - iii. That there is no proper appeal as per the appellant has also filed an application for review of the judgement in the lower court.
 - iv. That the appellant is guilty of laches.
 - v. That costs of the lower court are yet to be taxed and the respondent has not applied for a decree.
7. The applicant subsequently filed another application dated 22nd August 2023 seeking stay of execution of the decree in Kisumu CMCC No. E442 of 2021 pending the hearing and determination of the application dated 22nd May 2023 on the grounds that the respondent had obtained warrants of execution from the lower court and was ready to execute decree before the application dated 22/5/2023 was heard hence the need to arrest the execution.
8. In their oral submissions before court, Dr. Chokaa counsel for the applicant argued that the respondent had executed for Kshs. 1,520,000 leaving a balance of Kshs. 484,000. It was submitted on behalf of the applicant that the money collected be deemed to be enough security for the appeal.
9. Mr. Ojuro counsel for the respondent submitted that the amount executed for was Kshs. 2,803,617 whereas the applicant had only paid Kshs. 1,000,000 and had not told court how they intended to settle the amount due. He urged the court to dismiss the applications brought forth by the applicant

Analysis and Determination

10. I have considered both applications herein that both seek stay of execution. The second application dated 22nd August 2023 was filed by the applicant after the respondent obtained warrants of attachment while the first application was yet to be heard and determined and yet the court was on recess.
11. It is noteworthy that though there were no interim orders of stay pending the hearing of the applicant's initial application for stay of execution dated 22nd May 2023, the parties were negotiating the form of security to be deposited by the applicant and the said application was set for mention on the 18th September 2023 and therefore in my view, the respondent jumped the gun by proceeding to obtain warrants of attachment, a day before the mention date well aware of the pending hearing of the application for stay.



12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides that:

“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.”

13. Further, a 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.

14. 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.”

15. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (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. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

16. As to what substantial loss is, it was observed 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.”



17. In the instant case, the applicants aver that they stand to suffer substantial loss if stay was not granted as it had already paid the respondent Kshs. 1,520,000 leaving a balance of Kshs. 484,000. The applicant has also pleaded that they are able to comply with any order as to security of costs and that failure to grant stay will render their appeal nugatory.
18. On its part, the respondent has averred that the applications by the applicant lacks merit and ought to be dismissed and further that the applicant has not demonstrated how it intends to satisfy the decretal sum.
19. I observe that there is no indication whether the respondent assessed costs of the lower court before execution and or whether they drafted and send a draft decree and send it to the applicant's counsel for approval prior to the execution of such decree being undertaken. This is what Order 21 Rule 8 of the Civil Procedure Rules contemplate in mandatory terms. Any attempt to execute decree which is not subjected to the procedure under the above provisions was, in my view, irregular and subject to setting aside by the court. The irregular process would also lead to the auctioneer who engages in the irregularity not getting his costs from the judgment debtor because an auctioneer is an officer of the court who ought to know the law and procedure relating to execution of decrees and not to proceed in ignorance.
20. The purpose of stay of execution of decree pending appeal was well captured in the case of RWW v EKW [2019] eKLR, 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.”
21. In this case, the Respondent has not given any material as to its ability to repay the decretal sum in case the appeal succeeds although the applicant has paid a substantial sum in satisfaction of the decree following an ambush by the respondent by way of attaching property of the applicant while the application for stay was due for mention as the parties were still negotiating on what security to deposit in court and in light of the depositions by the applicants' counsel that they shall suffer substantial loss if stay is not granted, I am persuaded that substantial loss has been proved.
22. I am also satisfied that there has been no delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the 11.5.2023 and the Memorandum of Appeal filed four days later on the 15.5.2023 and the application for stay of execution filed on the 22.5.2023, within the 30 days of filing of the appeal.
23. As to security of costs, the applicant informed court that they had already paid the respondent Kshs. 1,520,000 and were open to get any directions from the court on where to deposit the balance of Kshs. 480,000. The respondent submitted that the applicant had only given them Kshs. 1,000,000.
24. In my view, the applicant is able and willing to comply with that condition on security for the due performance of the decree appealed from. 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.

25. 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 of the Civil Procedure Rules.
26. Accordingly, I allow the applicant/appellant's applications dated 22.5.2023 and 22.8.2023 and grant stay of execution of decree made in Kisumu CMCC No. E442 of 2021 *Mayfair Holdings Limited v East Africa Institute of Certified Studies* pending the hearing and final determination of this appeal conditional upon the applicant depositing in a joint interest earning account to be held by both advocates for the parties namely, V. Chokaa Advocates & Co. and Otieno, Yogo, Ojuro & Co. Advocates, the sum of Kshs 500,000 within thirty days of this ruling.
27. I make no orders as to costs.
28. Mention on 13/11/2023 to confirm availability of the lower court file for admission of the appeal.
29. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF OCTOBER, 2023

R.E. ABURILI

JUDGE

