



Oasis Doctors Plaza Kakamega Limited v Richard (Civil Appeal E151 of 2024) [2024] KEHC 13044 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E151 OF 2024
AC BETT, J
OCTOBER 25, 2024**

BETWEEN

OASIS DOCTORS PLAZA KAKAMEGA LIMITED APPELLANT

AND

DR. OLUNGA RICHARD RESPONDENT

(Being an application for stay of execution pending hearing and determination of an appeal against a ruling dated 10th September 2024 issued by Hon. Dorcas O. Mac' Andere (SRM) in Kakamega MCCE No. E095 of 2024)

RULING

1. By a Notice of Motion dated 11th September 2024, the Applicant filed an application under Section 1A, 1B, 3A 63 (c) and (e) of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1, Civil Procedure Rules and Article 22, 23 and 159 of *the Constitution*. The application is for an order of stay of execution of the decree in Kakamega MCCE No. E095 of 2024 pursuant to a Judgment entered on 11th July 2024.
2. The grounds for the application is that judgment was entered against the Applicant after it failed to file a defence and its subsequent application to have the ex parte judgment set aside to pave way for the filing of a defence and inter partes hearing was disallowed. The Applicant attributed the default in filing defence to its former Advocates who entered appearance and failed to file a defence. The Applicant contended that it had a good defence which raised triable issues and should have been given an opportunity to be heard.
3. The application was supported by the Affidavit of one Baptisa Omondi who is the Head of Governance in the Applicant company. He deponed that as a result of the default judgment, the Applicant's properties had been proclaimed and if an order of stay is not issued, the Applicant stands to suffer prejudice. He contended that the Respondent may proceed and cart away its properties as proclaimed



- and drive it out of business. It had a good defence that raised triable issues which the trial Magistrate failed to consider in its ruling.
4. In response, the Respondent filed grounds of opposition dated 13th September 2024. He faulted the Appellant's application for inter alia, falling short of the mandatory requirements for grant of stay of execution as no security was offered. He stated that it is a principle of law that litigation must come to an end and averred that the Applicant was intent on protracting the litigation in order to hold the Respondent in abeyance from the fruits of its judgment.
 5. The application was canvassed through written submissions. The main issue herein is whether the Appellant's application for stay of execution pending appeal is merited.
 6. In its submissions, the Applicant urged the court to give effect to the overriding objectives as provided under Section 1(A), *Civil Procedure Act*. According to the Applicant, they had satisfied the three requirements for an interlocutory injunction. They cited a number of case law on injunctions including East African Industries -vs- Trufoods [1972] EA, Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358 and Nguruman Limited -vs- Joan Bonde Nielsen & 2 others [2014] eKLR, among others. The Applicant contended that the fact that the decretal sum of Ksh. 4,4335,900/= is a colossal sum was reason enough to render the issues triable and in dismissing its application to set aside ex parte judgment, thereby exposing it to execution, the trial court acted contrary to Articles 47, 50 and 159 of *the Constitution* of Kenya.
 7. The Applicant submitted further that it had satisfied the conditions for stay of execution pending appeal in that it had an arguable appeal this being one that is not frivolous but not necessarily one that will succeed. It relied on the Court of Appeal cases of Patrick Mweu Musimba -v- Richard Kalembe Ndile & 3 others [2013] eKLR, Judicial Commission of Inquiry into the Goldenberg Affair & 3 others -vs- Kilach [2003] eKLR and Ternic Enterprises Ltd -vs- Waterfront Outlets Limited [2018] KECA 764 (KLR).
 8. The Appellant also contended that the right to be heard is a valued right and a decision or adverse action taken in violation of that right would be nullified.
 9. The Applicant's further submission was that the appeal would be rendered nugatory if stay was not granted. Relying on the cases of Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 others [2013] eKLR, the Applicant invited the court to take note that on a number of occasions, the courts have taken the position that the term "nugatory" must be given its full meaning viz: - "It does not only mean worthless, futile or invalid, it also means trifling". Further, the Applicant said that it may be forced out of its healthcare business if the stay is not granted.
 10. With respect to the grounds of opposition, filed by the Respondent, the Applicant contended that the failure to file a Replying Affidavit to contest its assertion meant that the Respondent had admitted the facts deponed therein as the grounds of opposition only addressed issues of law and not of fact. The Applicant cited the case of Kennedy Otieno Odiyo & 12 others -vs- Kenya Electricity Generating Company Limited [2010] eKLR. It is their case that the Respondent did not demonstrate that he had the means to repay the decretal amount in the event he succeeded. The Applicant averred that it had satisfied all the conditions for grant of an order of stay of execution as set out in Order 42 Rule 6 of the Civil Procedure Rules.
 11. In his Submissions, the Respondent contended that the Applicant had failed to comply with the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules. According to him, the Applicant had failed to disclose the exact loss it stood to suffer. He further contended that the application is devoid of merit because the Applicant had not demonstrated that it had a good appeal with probable



chances of success. The Respondent relied on the case of Jessikay Enterprises Ltd -vs- George Kahoto Muiruri [2022] eKLR and contended that the Applicant in its submissions dwelt on principles of injunctions as opposed to principles of stay of execution. Nonetheless, he invited the court to equally consider the balance of convenience as relates to the parties by asking who between the Applicant and the Respondent stands to suffer the most prejudice. According to the Respondent, he is the one who stands to suffer the most prejudice by reason of non-payment for work done. As a corollary, the Respondent submitted that since the draft defence on record does not raise a triable issue, then the application for stay of execution on account of the pending appeal against an order declining the Applicant's application to set aside ex parte judgment must fail.

12. Finally, the Respondent while citing the case of Mwaura Karuga t/a Limit Enterprises vs- Kenya Bus Services Ltd & 4 others [2015] eKLR urged the court to order the Applicant to deposit the decretal sum in a joint interest earning account in the event an order of stay of execution is ordered.
13. The principles for granting stay of execution are provided under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which state as follows:-
 - “ 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.
 2. No order of stay of execution shall be made under Sub Rule (1) unless –
 - a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that
 - b) The application has been made without unreasonable delay; and
 - c) 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.”
14. Following the statutory provisions, for one to be granted an order of stay, he must satisfy the following conditions:-
 - (a) He must demonstrate that he may suffer substantial loss unless the order is granted.
 - (b) The application must be made without unreasonable delay.
 - (c) He must give such security as the court orders for the due performance of the decree or orders as may be ultimately binding upon him.
15. On the first condition, the decretal amount is no doubt an enormous amount. The Applicant has demonstrated that it is a substantial amount and the Respondent is likely to cart away and sell, in satisfaction of the decree, its moveable properties that the Respondent has already proclaimed; thereby causing the Applicant to suffer substantial loss. The order of stay of execution would forestall the substantial loss. On his part, the Respondent failed to demonstrate that he was in good financial standing and would be able to refund the amount in the event the Applicant's appeal succeeded. By choosing to rely on Grounds of Opposition and not a Replying Affidavit, he lost the opportunity to



prove his financial standing. I am persuaded by the holding of R. E. Aburili J. in the case of Edward Kamau & Another -vs- Hannah Mukui Gichuki & Another [2015] eKLR where she stated:-

“This court appreciates that the applicants being a party seeking favourable exercise of the court’s discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words, they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposited on her affidavit of means.

I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed. I am enjoined by the holding of the Court of Appeal in the case of National Industrial Credit Bank Ltd vs Aquinans Francis Wasike Court of Appeal Civil Application No. 238/2005, the Court of Appeal held:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a 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.”

16. On the second condition, the court confirms that the application was made without unreasonable delay since the trial court’s ruling dismissing the Appellant’s application to set aside ex parte judgment was delivered on 10th September 2024 while the present application was filed on 11th September 2024.
17. The Applicant did not offer to furnish security as is the normal practice. However, during the date of mention, the Applicant’s Advocate stated that they were ready to provide a bank guarantee. The Respondents were not amenable to the bank guarantee and relied on the persuasive case of Mwaura Karugu t/a Limit Enterprises -vs- Kenya Bus Services Ltd & 4 others [2015] eKLR in which the court declined an application for a substitute security while citing the case of Apar Industries Limited -vs- Joe’s Freighters Limited [2015] eKLR where the court held that:-

“From the extracted Decree the amount due on the judgment is Kshs.104, 577, 533/= in addition to costs and interest thereon. It is worth repeating that security in Order 42 rule 6 of the CPR is for the performance of the decree which might ultimately be binding on the judgment-debtor-Applicant. See the case of Visram Ravji Halai & Ano. vs. Thorntorn & Tupin [1963] Ltd Civil App. No. NAI 15 of 1990, where the Court of Appeal held that the court ought not to place the Plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered. Accordingly, I order stay of execution of the decree herein but on condition that the Applicant deposits the entire decretal sum as reflected in the decree herein in a joint escrow account at Kenya Commercial Bank, Milimani High Court Branch; Nairobi within 45 of today. The account should be interest earning account in the joint names of the counsels for the parties. The Applicant will also pay costs of the application. It is so ordered.”



18. In the case of Kenya Shell Ltd -vs- Kibiru & Another [1986] KLR 410, the court held as follows:-

“ 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

19. Relying on the above case, the court needs to balance the Applicant’s interest vis-à-vis that of the Respondent and consider whether to decline an order of stay would render the appeal nugatory. The court must be careful to render justice to both parties since the aim of the overriding objective is to be just in all situations. The oxygen principle was applied in Caltex Oil Ltd -vs- Evanson Njiiri Wanjihia [2009] KECA 93 (KLR) where the Court granted a conditional stay which would serve the interest of both parties owing to the fact that on a balance of convenience, the Respondent might have suffered greater hardship than the Applicant unless the court made an appropriate order.

20. Section 1A and 1B of the *Civil Procedure Act* which the Applicant relied on is clear that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of cases governed by the Act. It behoves the court therefore to render justice to all parties substantially and not by relying on technicalities.

21. I am of the view that the reliance on the principles of injunction rather than the principles of stay of execution by the Applicant did not render the application a nullity. In any event, the Respondent submitted on the said principles in response. Moreover, there is a significant similarity that is apparent when the two sets of principles are compared.

22. I am also careful of the constitutional guarantee of a fair trial under Article 50 (1). I am also mindful of Article 159 (2) (a) and (b) of *the Constitution* which places an obligation upon the court to do justice to all without undue regard to technicalities. In Directline Assurance Company Ltd -vs- Macharia [2023] KEHC 325 (KLR), the Court stated as follows:-

“To that end, I think that the present situation is one that can be cured by article 159(2) of *the Constitution* of Kenya that provides for administration of justice to all, without undue regard to procedural technicalities. Accordingly, I think the failure by Counsel to attend court is excusable.”

I have taken into account the fact that the applicant was not heard on its defence and therefore their appeal raises a triable issue.

23. After carefully weighing the interests of the two parties herein I hereby order that there be stay of execution of the judgment, decree and all consequential orders in Kakamega CMCC No. E095 of 2024 pending the hearing and determination of the appeal subject to the Applicant depositing the entire decretal sum in a joint interest earning account to be operated by the two Advocates on record within 45 days from the date of this Ruling. In default, the orders of stay shall automatically lapse.

24. The Respondent shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2024.

A. C. BETT



JUDGE

In the presence of:

Mr. Munyendo for the Applicant

Mr. Abok for the Respondent

Court Assistant: Polycap

