



**Tyl Limited v Freightwell Express Limited (Civil Appeal E075 of 2024)
[2024] KEHC 12352 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E075 OF 2024
JK NG'ARNG'AR, J
OCTOBER 16, 2024**

BETWEEN

TYL LIMITED APPELLANT

AND

FREIGHTWELL EXPRESS LIMITED RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion application dated 19th March 2024 under Certificate of Urgency pursuant to Order 51 Rule 1 and Order 42 Rule 1, 2, 6 (1), (2) and 7 of the Civil Procedure Rules, Section 1A, 1B, 3A, and 79 G of the Civil Procedure Act. The Applicant seeks for orders of stay of execution of the ruling/order delivered on 8th March 2024 pending the hearing and determination of the appeal. The Applicant also prays that this court reinstates the orders issued on 15th September 2023 allowing the Defendant/Applicant to prosecute its defence, and that costs of this application be provided for.
2. The application is premised on grounds on its face and the Supporting Affidavit sworn by Boniface Mwaura, the Managing Director of the Applicant, that on 8th September 2023, court directed that ruling of the application dated 26th March 2019 and the Preliminary Objection dated 16th August 2019 would be delivered on 15th September 2023. However, on the material date for delivery of the ruling, there was no attendance by the Applicant's former advocates and court gave directions for the Applicant to pay throw away costs of Kshs. 20,000 to the Respondent within 30 days and in default the orders reinstating the case for hearing would automatically be vacated. That the Applicant failed to comply because of their absence in court which compromised the Applicant's good defence locking them out from the seat of justice.
3. The Applicant further stated that in a bid to correct the anomaly, the former advocates filed an application dated 17th November 2023 to stay the impugned ruling delivered on 15th September 2023 but the same was subsequently dismissed with costs vide a ruling delivered on 8th March 2024. That



the Applicant is ready to pay the throw away costs and abide by any conditions the court may deem fit under the circumstances. That mistakes of the former advocate should not be visited upon an innocent litigant who is desirous of defending the claim on merit.

4. The Applicant averred that the said mistake has caused the Applicant to miss an opportunity to defend the claim on merit, to lose Kshs. 2,000,000 that it had deposited in a joint interest earning account at NCBA Bank, currently facing execution for a sum of Kshs. 43,000,000, which the Applicant has a good defence against, and that the Respondent has threatened to execute the orders of 8th March 2024. That if this court does not intervene, the Applicant is likely to suffer irreparable loss and damage.
5. The Respondent in their Replying Affidavit sworn on 26th June 2024 by D. Muyaa, an advocate on record for the Respondent, in opposition stated that the Appellant's application in the trial court was dismissed by the ruling issued on 8th March 2024, the orders of 15th September 2023 having taken effect. That this court cannot act in vain by reissuing orders that have already been effected. The Respondent averred that the Appellant has unnecessarily entangled the Respondent in litigation for over 11 years with numerous attempts to delay recovery of the award. That litigation must inevitably come to an end and that there is no appeal as no leave to appeal was sought either orally or by formal application. The Respondent stated that the Appellant's failure to comply with orders of the court amounts to an abuse of the court process which disentitles them of any discretionary remedy of this court. The Respondent prayed that the application is dismissed, the appeal rejected and the defective Memorandum of Appeal struck out with costs. That if at all the appeal is allowed to proceed, the application should be declined with costs.
6. The Application was canvassed by way of written submission. The Applicant in their submissions dated 11th July 2024 argued that the court in exercising its jurisdiction to grant stay of execution as provided under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, the High Court must be satisfied that the applicant will suffer substantial loss if stay is not granted, that the application for stay has been brought without undue delay, and that the applicant has provided security for due performance of the decree.
7. The Applicant submitted that the application has been filed without unreasonable delay as the ruling was delivered on 8th March 2024 while the current application was filed on 19th March 2024, which was within one week. On substantial loss, the Applicant submitted that the interest being pursued is Kshs. 43,000,000 out of the interest principle sum already paid with interest which is a substantial amount that could paralyze the Applicant's business operations. On what amounts to substantial loss, the Applicant relied on the holding in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR. The Applicant contended that the appeal has high chances of success and they relied on the position of the court in *MFI Document Solutions Ltd v Paretto Printing Works Limited* (2021) eKLR where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution. The Applicant prayed that this court grants the orders as sought.
8. The Respondents chose not to file submissions and requested the court to rely on their Replying Affidavit sworn on 26th June 2024 and its annexures.
9. I have considered the Notice of Motion application dated 19th March 2024, the Respondent's Replying Affidavit sworn on 26th June 2024 and the Applicant's submissions dated 11th July 2024. The issues for determination are: -
 - a. Whether the application is merited for grant of stay of execution of the ruling/order delivered on 8th March 2024 pending the hearing and determination of the appeal.
 - b. Who should bear costs of this application.



10. The principles guiding the grant of stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) 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.
11. On substantial loss that may result if the stay orders are not granted, the Applicant has stated that they may miss an opportunity to defend this claim on merit, that they stand to lose Kshs. 2,000,000 that has been deposited in a joint interest earning account at NCBA Bank, and that they are currently facing execution for a sum of Kshs. 43,000,000 which the Applicant has a good defence against. That the Respondent has already threatened to execute the orders of 8th March 2024 vide a letter dated 8th March 2024 and that if the court does not intervene, the Respondent may proceed to attach the Applicant's items which will cause complete paralyzation of the Applicant's business operations.
12. On the second principle, this court has confirmed that ruling was delivered on 8th March 2024 and the application herein filed on 19th March 2024. The application was therefore made without undue delay.
13. On security, the Applicant stated that they are ready to pay the throw away costs and abide by any conditions the court may deem fit under the circumstances.
14. The Respondents on their part have not addressed conditions for grant of stay of execution pending appeal but instead discussed merits of the Memorandum of Appeal and the appeal in general.
15. However, the court in exercising its discretion is required to balance interests of both parties. The Court of Appeal in *Absalom Dova v Tarbo Transporters* (2013) eKLR held that: -
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
16. In consideration of the conditions above and with the aim of not locking out the Appellant/Applicants from the wheel of justice as well as rendering the intended appeal nugatory, I find that the Applicants have satisfied the requirements under Order 42 Rule 6 of the [Civil Procedure Rules](#) for grant of stay of execution pending appeal.
17. Accordingly, I allow the Notice of Motion application dated 19th March 2024 and grant stay of execution of the ruling/order of 8th March 2024 in Mombasa Civil Suit No. 1036 of 2013, *Freightwell Express Limited v Tyl Company Ltd* in the following terms: -
- a. The Appellant/Applicant shall pay thrown away costs of Kshs. 20,000 within 30 days from the date herein.



- b. The Appellant/Applicant shall file and serve the Record of Appeal within 30 days from the date herein.
- c. Failure to comply with conditions (a) and (b) above, the stay orders shall automatically lapse and the Respondent shall be at liberty to proceed with execution.
- d. Costs of this application shall abide by the outcome of the appeal.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF OCTOBER, 2024

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Osieno Advocate for the Appellant/Applicant

No appearance Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

