



**Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 others (Civil Appeal E156 of 2024) [2024] KEHC 12353 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E156 OF 2024  
JK NG'ARNG'AR, J  
OCTOBER 16, 2024**

**BETWEEN**

**UFANISI FREIGHTERS (K) LIMITED ..... APPLICANT**

**AND**

**PREMIER FLOUR MILLS LTD ..... 1<sup>ST</sup> RESPONDENT**

**ATTA (KENYA) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MILLING CORPORATION KENYA (2009) ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant filed a Notice of Motion application dated 6<sup>th</sup> June 2024 under Certificate of Urgency pursuant to Order 51 Rule 1 and Order 42 Rule 6 (1), (2) and (6) of the Civil Procedure Rules and Section 1, 1A and 3A, and Section 65 of the *Civil Procedure Act*.
2. The Appellant/Applicant seeks for an order of stay of execution of the ruling delivered on 24<sup>th</sup> May 2024 and proceedings in Mombasa CMCC No. 1477 of 2017, Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 Others, save for the order on payment of the auctioneer charges pending the hearing and determination of the appeal. The Appellant/Applicant also prayed for an order of temporary injunction to prevent, stop or restrain the release of attached goods being held by the auctioneer to the Respondents in Mombasa CMCC No. 1477 of 2017, Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 Others pending the hearing and determination of this appeal. That costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit of Shadrack Mayende Wasike, the Director of the Appellant/Applicant, sworn on 6<sup>th</sup> June 2024 that on 25<sup>th</sup> May 2024, the trial court delivered a ruling in Mombasa CMCC No. 1477 of 2017, Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 Others. That the Applicant being dissatisfied with part of the said decision has lodged an appeal.



4. The Applicant stated that unless an order of stay and temporary injunction are issued, the Applicant shall suffer irreparable loss as the second appeal and application to strike out the Notice of Appeal, both arising from the said judgment which has been reviewed by the magistrate's court, though pending before the Court of Appeal, shall be rendered superfluous and overtaken by events. That the Respondents' position on record in the primary suit is that all the goods at its premises and registered in its names do not belong to them but third parties on debentures, and there shall be no goods to attach should the appeal succeed. That the matter before the Chief Magistrate shall proceed for trial rendering this appeal nugatory.
5. The Applicant stated that they have an arguable appeal with overwhelming chances of success and deserve the right to ventilate their appeal. That the application has been made timeously and the Appellant is a financially stable company ready and willing to tender any security as may be determined by the court.
6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their respective Replying Affidavits sworn on 28<sup>th</sup> June 2024 by Sajid Esmail Abdalla, the Logistics Manager of the 1<sup>st</sup> Respondent, Victor Odhiambo Ouma, the Human Resource Manager for the 2<sup>nd</sup> Respondent and Laban Ashubwe, the in charge of quality control for the 3<sup>rd</sup> Respondent, stated that the trial court did not give any orders in its ruling delivered on 24<sup>th</sup> May 2024 capable of being stayed. That the court found merit in their applications for review and set aside judgment delivered on 18<sup>th</sup> May 2018 by the ruling delivered on 24<sup>th</sup> May 2024 which in itself is a negative order that is not capable of being executed. Consequently, the present application is an abuse of the court process and the same should be dismissed with costs to the Respondents. That the Appellant has not demonstrated what loss it would suffer which cannot be compensated by an award of damages if the stay of execution is not granted. That the Auctioneer charges, which are disputable are yet to be agreed on or assessed as ordered by the trial court in the same ruling delivered on 24<sup>th</sup> May 2024.
7. The Respondents averred that the continued detention of the attached goods belonging to them after delivery of the ruling on 24<sup>th</sup> May 2024, which in essence reviewed and set aside the judgment, is tantamount to infringement of its constitutional right to property and that there is no judgment and/or decree that exists by law to warrant the Appellant to detain the attached goods as against the Respondents. That the Respondents have non-derogable right to fair hearing as guaranteed under *the Constitution* and it is only fair and just that the case in the trial court is heard and determined on merit.
8. The Respondents further stated that the Appellant has not demonstrated that they have an arguable appeal which has overwhelming chances of success to warrant granting of the orders sought. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are willing and capable of settling the decretal sum together with the auctioneer charges, if any, should the court find that the appeal herein has merit. That the application to strike out the notice of appeal cannot and should not be a ground for grant of the orders of stay as the said appeal has since been dismissed by operation of law and no evidence has been adduced to show that the same is being prosecuted. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prayed that the Appellant/Applicant's Notice of Motion application dated 6<sup>th</sup> June 2024 be dismissed with costs.
9. The application was canvassed by way of written submissions. The Appellant/Applicant in their written submissions dated 17<sup>th</sup> July 2024 argued that the grounds for granting an order for stay pending appeal under Order 42 Rule 6 (4) are well settled in the case of *Ena Investment Limited v Benard Ochau Mose & 2 Others* (2022) eKLR that there has to be sufficient cause, that the Applicant stands to suffer substantial loss if the judgment is not stayed, that the application has been made without delay, and that the Applicant is ready to tender security as offered or any other security as may be ordered by court.



10. The Appellant/Applicant submitted on sufficient cause that a cursory look at the grounds of appeal in the Memorandum of Appeal shows that the appeal is meritorious and should the stay not be granted it will render the appeal nugatory in case it is successful and they relied on the decision in *Ena Investments Limited v Benard Ochau Mose & 2 Others* (2022) eKLR. That the lower court has no jurisdiction to order a retrial in an application for review which can only be done by the high court and that the trial court sat on an appeal in its decision instead of review which has limited parameters in the exercise of the court's discretion.
11. The Appellant/Applicant argued that they have demonstrated that they will suffer substantial loss if the stay is not granted. That the Respondents conceded in their Replying Affidavits that they will pay for the claim and auctioneer charges should the appeal be successful but their evidence on oath is to the effect that all their assets are not available for attachment due to debenture and charges against all their properties. That if the matter in the lower court proceeds for retrial and this appeal also proceeds, it shall result in two judgments over the same subject matter and an embarrassment to both courts making it impossible to execute the two decisions. That it is therefore not true that the order issued by the lower court is in the negative and incapable of being implemented as it has ordered a retrial. That the attached goods shall be released if stay is not granted and the alleged debenture shall take effect thus defeating the ends of justice. The Appellant/Applicant cited the case of *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* (2022) eKLR.
12. The Appellant/Applicant submitted on delay that the application was made promptly, the ruling having been delivered on 24<sup>th</sup> May 2024 and the application filed on 6<sup>th</sup> June 2024. On security, the Appellant/Applicant submitted that they are a financially stable company ready and willing to tender any security as may be determined by court. The Appellant/Applicant relied on decisions in the cases of *Ena Investments Limited v Benard Ochau Mose & 2 Others* (2022) eKLR, *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR, and *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* (2019) eKLR.
13. The Appellant/Applicant stated that the principles for granting injunction pending appeal were set out in the case of *Waithaka & 3 Others v Kenya Urban Roads Authority & Another* (Environment and Land Appeal E019 of 2023) (2023) KEELC 22107 (KLR) (5 December 2023) (Ruling). The Appellant/Applicant further submitted that they had satisfied the three principles in *Giella v Cassman Brown* (1973) E.A. 358 as a prima facie case has been set out, that irreparable damage shall be suffered and that the balance of convenience is in their favour as the judgment they had for 6 years was in their favour. The Appellant/Applicant therefore prayed for unconditional stay/injunction with costs in the cause.
14. The Respondents in their written submissions dated 5<sup>th</sup> August 2024 contended that the principles guiding the grant of stay of execution pending appeal are well settled. That they are provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 and that the court in *RWW v EKW* (2019) eKLR considered the purpose of a stay of execution pending appeal. That the order by which the Appellant seeks a stay of execution is a negative order given that the ruling issued on 24<sup>th</sup> May 2024 reviewed and set aside the judgment delivered on 18<sup>th</sup> May 2018. That there is nothing to be stayed since there is no executable decree known by law against the Respondents. The Respondents cited decisions of the court in *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* (2015) eKLR and *Kanwal Jarit Singh Dhiman v Keshavji Jivraj Shah* (2008) eKLR.
15. The Respondents submitted on substantial loss that the Appellant has not demonstrated what substantial loss it would suffer which cannot be compensated by an award of damages. That the Respondents are able and willing to pay any decretal sum in the unlikely event that the court finds



merit in the Appellant's appeal. On security for costs, the Respondents argued that the Appellant has failed to provide any security for the due performance of the decree or order as there lacks a judgment that would be binding on them.

16. On whether the Appellant has met the conditions for grant of orders of temporary injunction, the Respondents submitted that an injunction is a discretionary remedy granted on the basis of the evidence and sound legal principles, in accordance with Order 40 of the Civil Procedure Rules. That the guiding principles for grant of temporary injunction are well settled in *Giella v Cassman Brown* (1973) E.A. 358 which position was reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR.
17. The Respondents argued that the Appellant has failed to satisfy the court that it has a prima facie case with probability of success on the basis that the grounds raised by the Appellant in the Memorandum of Appeal fails to raise triable issues with high chances of success. That the Appellant will not suffer any irreparable injury or loss as there is no executable judgment and/or decree against the Respondents and in case the appeal is successful, the Respondents are able and willing to compensate the Appellant. On the balance of convenience, the Respondents relied on the holding in *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Limited & 2 Others* (2016) eKLR that the balance of convenience tilts in the favour of the Respondents as a fraud had been committed by the Appellant and a substantial delay of 6 years was not sufficient for the court to ignore the issue.
18. I have considered the Notice of Motion application dated 6<sup>th</sup> June 2024, Replying Affidavits sworn by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 28<sup>th</sup> June 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
19. The Appellant/Applicant herein is seeking for an order of stay of execution of the ruling delivered on 24<sup>th</sup> May 2024 and proceedings in Mombasa CMCC No. 1477 of 2017, *Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 Others* and an order of temporary injunction to prevent, stop or restrain the release of attached goods being held by the auctioneer to the Respondents in Mombasa CMCC No. 1477 of 2017, *Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 Others* pending hearing and determination of the appeal.
20. On the prayer for stay of execution, Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution 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, 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 order set aside.
  - (2) No order for 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 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.



21. The Applicant is required to show that there is sufficient cause, that they may suffer substantial loss if the order sought is not granted, that the application was brought without unreasonable delay, and that the Applicant is capable and willing to furnish security and as may be directed by the court. However, the court in its discretionary power of granting the order of stay must balance the interest of both parties.
22. The Applicant, on the one hand, deposed that evidence of the Respondents on oath is to the effect that all their assets are not available for attachment due to debenture and charges against all their properties. That the attached goods shall be released if stay is not granted defeating the ends of justice. That if the matter in the lower court proceeds at the same time as the appeal, it shall result in two judgments over the same subject matter which will be impossible to execute.
23. The Respondent, on the other hand, maintained that the order which the Appellant seeks stay of execution is a negative order and that there is nothing to be stayed since there is no executable decree against the Respondents. That the Appellant has not demonstrated what substantial loss it would suffer which cannot be compensated by an award of damages. That the Respondents are able and willing to pay any decretal sum in the unlikely event that the court finds merit in the Appellant's appeal.
24. The trial court in the impugned ruling dated 24<sup>th</sup> May 2024 allowed the application for review and set aside the judgment that had been delivered on 18<sup>th</sup> May 2018. The Applicants therein were ordered to bear costs of the application and to pay auctioneer's charges as agreed and assessed, on the basis of the long delay which occasioned the Plaintiff costs including costs of execution. The trial court did not order parties to do anything or refrain from doing anything. It is the finding of this court that the impugned ruling delivered on 24<sup>th</sup> May 2024 is a negative order incapable of execution. This court therefore has no mandate to grant stay as prayed by the Applicant.
25. Emphasis was laid in the case of *Raymond M. Omboga v Austine Pyan Maranga*, Kisii HCCA No. 15 of 2010 that: -

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise ...”
26. On the prayer for temporary injunction, Order 42 Rule 6 (6) of the Civil Procedure Rules provides: -

Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
27. The locus classicus of *Giella v Cassman Brown* (1973) EA 358 and which has been cited by the parties herein sets out the principles for grant of temporary injunction as: -
  - a. The applicant must first establish a prima facie case with a probability of success.
  - b. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.



- c. Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.
28. While the Appellant submitted that they had satisfied the three principles, the Respondent disputed the position and that the Memorandum of Appeal fail to raise triable issues with high chances of success, that there is no executable judgment and/or decree against the Respondents and in case the appeal is successful, the Respondents are able and willing to compensate the Appellant, and that fraud had been committed by the Appellant and a substantial delay of 6 years was not sufficient for the court to ignore the issue.
29. On the first principle, in Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others (2021) eKLR, the Court of Appeal held that an arguable appeal is not one that must necessarily succeed, but one which merits consideration by the court. This court is therefore satisfied that the Applicant has an arguable appeal and therefore has a prima facie case with probability of success. On the second principle, this court is satisfied that if an injunction is not issued, the goods which the Respondents admitted to not being available for attachment due to debenture and charges will be released, leading to the loss of the substratum of the appeal which will render it nugatory. The Applicant has therefore met the threshold for grant of the order of temporary injunction.
30. In the upshot, I allow the Notice of Motion application dated 6<sup>th</sup> June 2024 in terms of prayer 5. A temporary injunction is hereby issued to prevent, stop or restrain the release of attached goods being held by the auctioneer to the Respondents in Mombasa CMCC No. 1477 of 2017, Ufanisi Freighters (K) Limited v Premier Flour Mills Ltd & 2 Others pending the hearing and determination of the appeal. The Applicant to file and serve record of appeal within 30 days from the date herein. Costs to abide outcome of the appeal.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

**In the presence of: -**

Kabole Advocate for the Appellant/Applicant

No appearance Advocate for the Respondents

Court Assistant – Mr. Samuel Shitemi

