



**Enworld Holdings Limited v Riley Falcon Security Limited (Civil Appeal E155 of 2024) [2024] KEHC 14319 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14319 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E155 OF 2024  
RE ABURILI, J  
NOVEMBER 13, 2024**

**BETWEEN**

**ENWORLD HOLDINGS LIMITED ..... APPELLANT**

**AND**

**RILEY FALCON SECURITY LIMITED ..... RESPONDENT**

*(An appeal arising out of the Judgement and Decree of the Honourable G.C. Serem in the Small Claims Court at Kisumu delivered on the 23rd July, 2024 in SCCCOMM No. E391 of 2024)*

**RULING**

1. The applications dated 11<sup>th</sup> October 2024 and 24<sup>th</sup> September 2024 which were heard together respectively seek for stay of execution of decree in *Kisumu SCC No. E391 of 2024* pending hearing and determination of this appeal and review of the conditional order of stay of execution of decree pending the hearing and determination of the application for stay inter partes.
2. In the initial application dated 24<sup>th</sup> September 2024, which was filed under certificate of urgency, the Applicant was directed to serve the Respondent for interpartes directions on 18<sup>th</sup> October 2024. The Court also granted temporary orders of stay of execution of decree, of taking possession of and sale of the proclaimed properties vide the proclamation dated 23<sup>rd</sup> September 2024 on condition that the applicant deposits into court the decretal sum of Kshs.1,083,471.67 within 14 days thereof.
3. The conditional stay was not complied with even after the order was published on 30<sup>th</sup> September 2024 in the Case Tracking System (CTS). The fourteen days granted elapsed. On 11<sup>th</sup> October, 2024, the applicant filed another application for stay of execution and for review of orders of conditional stay of execution of decree to allow the appellant to furnish a Bank Guarantee for Kshs.500,000 instead of depositing into court the decretal sum and that the subsequent reviewed order be extended for a further 30 days from the date of the ruling for reasons that the applicant was unable to raise the decretal sum although it was willing to comply with the said orders.



4. That the applicant had made the application without unreasonable delay and that the Respondent will not suffer any prejudice if the orders sought are granted.
5. The applications are supported by the sworn affidavit of Neeral Panchmatta reiterating the grounds on the face thereof.
6. The Respondent filed a replying affidavit sworn on 28<sup>th</sup> October 2024 by Elijah Kulova contending that the application for stay was not merited as the provisions of Order 42 of the Civil Procedure Rules had not been complied with and that neither had the applicant complied with direction of 30<sup>th</sup> September 2024.
7. That no Bank Guarantee was annexed to the affidavit. That the applicant had since the delivery of the impugned judgment, filed several applications for stay including the one for review of the orders for conditional stay granted by this Court.
8. That the order of 27<sup>th</sup> September 2024 directed the applicant to deposit into court the entire decretal sum within 14 days which condition has never been complied with and that the applicant had instead filed an application to review that order to allow it deposit security that they are comfortable with hence the applicant has not complied with conditions for stay of execution.
9. That stay of execution is in the discretion of the court and execution is a lawful process which cannot be prejudicial to the judgment debtor. That no prejudice has been shown to occur if stay is declined and that this court is not bound by any Bank Guarantee or form of security offered for the due performance of decree.
10. That since money depreciates, it should be fixed in an interest earning deposit account. That the application dated 11<sup>th</sup> October 2024 is seeking to have this court sit on its own appeal and is intended to delay enforcement of the decree.
11. The Respondent urged the court to dismiss the application.
12. The two applications were argued simultaneously with the parties' counsel reiterating their positions as pleaded and responded to in deposition.

### **Analysis and Determination**

13. I have considered the application, the grounds and the supporting affidavit. I have also considered the response by the respondent and the respective parties' counsel's arguments for and against the application for stay of execution of decree pending hearing and determination of the appeal.
14. The principles upon which this Court may grant stay of execution pending appeal are well-settled as stipulated in Order 42 Rule 6 of the Civil Procedure Rules, which require an applicant seeking a stay of execution pending appeal to demonstrate that:
  - a. Substantial loss may result to the applicant unless the order was made;
  - b. The application was 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 as been given by the Applicant.



15. Additionally, courts have over time emphasized that a stay of execution of judgment/decreed should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* [2015] eKLR Gikonyo J opined that:

“Stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules.”

16. An Order of stay of execution pending appeal is in the discretion of the Court. This was demonstrated in the case of *Butt v Rent Restriction Tribunal* (1982) KLR where the Court guided on how such discretion should be exercised and stated as follows:

- “1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The Court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

17. The Primary purpose of stay of execution of decree or order appealed from is to preserve the status quo pending the hearing of the appeal and to ensure that the appeal, if successful, should not be rendered nugatory. In *RWW v EKW* [2019] eKLR, it was observed that:

“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.”

18. In this case, the question is whether the applicant has established the above essential elements to warrant stay of execution of decree pending the hearing and determination of the appeal herein.



19. The first consideration is whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on 23<sup>rd</sup> July 2024 allowing the respondent's claim and dismissing the appellant's counterclaim. The trial court also granted a stay of execution of decree for thirty days from the date of judgment. The thirty days stay elapsed without any payment being made but on 12/8/2024, the appellant filed this appeal which was within 30 days as stipulate in section 79G of the [Civil procedure Rules](#) on the time for filing of an appeal from the magistrate's Court to the High Court in civil cases. On 2<sup>nd</sup> September, 2024, the applicant filed a Notice of motion seeking for stay of all proceedings in the Small Claims Court.
20. However, the application for stay pending appeal which is dated 19<sup>th</sup> August 2024 is the one that the Court dealt with during the recess by (D.K.Kemei J) of Bungoma High Court and he declined to grant any stay orders.
21. Another Notice of Motion was filed, dated 24<sup>th</sup> September, 2024 seeking, under Certificate of Urgency, stay of execution of decree. This was after proclamation was done on the applicant's properties. This court granted an interim stay and directed that the entire decretal sum be deposited in court within 14 days of the said order. There is no compliance with that order. Instead, the applicant filed the application dated 11<sup>th</sup> October 2024 seeking stay and review of that order to allow deposit of a bank guarantee for Kshs 500,000 and the compliance to be extended by another 30 days for the bank guarantee to be deposited.
22. Therefore, albeit the application for stay was filed in time after filing of the appeal and after the elapse of the stay granted in the lower court, the applicant has not endeavoured to comply with directions given by the court on the conditional stay.
23. In the proclamation of 23/9/2024, there are two old lorries that were attached with a combined value of Kshs 930,000.
24. The Applicant asserts that it will be prejudiced if execution is levied and that the appeal shall be rendered nugatory. Further, that it is unable to raise the decretal sum to deposit as security for due performance of decree hence the application for review of the order for depositing of the decretal sum to be substituted with an order for depositing of guarantee in the amount of Kshs 500,00. The question is, does Kshs 500,000 amount to security for the due performance of decree?
25. It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In [Machira t/a Machira & Co. Advocates v East African Standard](#) (No 2) [2002] KLR 63, the Court of Appeal considered what amounts to substantial loss and held 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.”
26. Has the applicant demonstrated that it will suffer substantial loss if execution is levied? I find no such proof of substantial loss let alone any loss that it will suffer, noting that this is a money decree and



any money paid to the decree holder can be recovered if the appeal is allowed. It has not been stated or demonstrated that the respondent is impecunious and penniless and that if it is paid the decretal amount, it will be unable to refund the applicant should the appeal be successful. Additionally, the applicant has not disclosed to this Court the reasons as to what makes it unable to raise the decretal sum.

27. The other consideration is security for the due performance of decree, which I have alluded to above. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] e KLR, it was held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

28. The Applicant in this matter has offered to provide security in the nature of a bank guarantee in the sum of Kshs 500,000 which is less than half of the decretal amount which in essence does not guarantee performance of decree.
29. The offer is also contrary to the directives given by this court that the entire decretal sum be deposited into court within 14 days of the stay earlier granted. In addition, the offer seeks to vary the period of compliance to 30 days from the new date.
30. As to what security to offer, it is in the discretion of the court which discretion must be exercised judiciously, not to render the decree holder a pious explorer in the judicial process.
31. As correctly submitted by the respondent’s counsel, the applicant cannot dictate to court what convenient security to offer for the due performance of decree. The security must be capable of being redeemed to secure the decree. In this case, no such security that is tangible has been offered. A request for reduction of security to an intangible bank guarantee to be secured in the future, with no evidence that such Bank Guarantee exists cannot be security at all. There is no evidence of the appellant’s creditworthiness with the Bank for this Court to trust the offer for Bank Guarantee which has not been secured. In other words, the so-called security offered by the Applicant is not available to this Court for consideration.
32. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though filed the application for stay and review without undue delay, has not demonstrated any sufficient reason for this Court to exercise discretion in its favor.
33. In my view, it is the respondent who stands to suffer substantial loss of not executing decree and to enjoy the fruits of its lawfully obtained judgment if stay is granted in favour of the applicant whose offer of security for the due performance of decree is uncertain.
34. In the end, I find that the two applications are devoid of any merit and are hereby dismissed with costs to the respondent to be assessed in the appeal.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024**



**R.E. ABURILI**  
**JUDGE**

