



Itco Investements Limited v KCB Bank Kenya Limited & another (Commercial Case E575 of 2022) [2024] KEHC 14622 (KLR) (Commercial and Tax) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E575 OF 2022
PM MULWA, J
NOVEMBER 19, 2024**

BETWEEN

ITCO INVESTEMENTS LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

KAMAL ANANTROY BHATT 2ND DEFENDANT

RULING

1. There are two applications to be determined before this court. The 1st application is a Notice of Motion by the Plaintiff dated 9th May 2024 in which the applicant sought an order of the stay of execution pending hearing and determination of the intended appeal.
2. The application was supported by the sworn Affidavit of Alnoor Kanji who stated that the Appeal has very high chances of succeeding and will be rendered nugatory unless the court grants the order for an extension of stay of execution. That the Applicants are bound to suffer irreparable prejudice, loss and damage unless the court grants the ordered sought herein.
3. The 2nd application is a Notice of Motion by the 1st Defendant dated 28th May 2024 (supported by the sworn affidavit of Oscar Obuna) seeking orders that the court sets aside, discharge, and/or vacate the ex parte orders issued on 12th May 2024.
4. Further, that the court strikes out the Plaintiff's Notice of Motion dated 7th May 2024 on grounds that it is scandalous, vexatious and is otherwise an abuse of the court process.
5. That in the alternative, the court to direct the Plaintiff to provide security for the stay of execution of the Ruling dated 25th April 2024 and for the court to order the preservation and inspection of the



assets and business of Pinewood Beach Resort and Spa by the 2nd Defendant for the purpose of taking an inventory and a record of the same.

6. In response to this application, the Plaintiff filed a replying affidavit dated 21st June 2024 and stated that the instant application be allowed as prayed otherwise the applicant will be greatly prejudiced as their intended appeal shall be rendered nugatory. The Plaintiff's suit was dismissed together with the application as such the Plaintiff did not have an opportunity to deal with the substantive issues.
7. The two applications were heard concurrently by way of written submissions and the determination of the issues raised will address both.
8. Having considered the two applications, responses and the written submissions the court frames the following issues for determination;
 - a. Whether stay of execution pending appeal should issue.
 - b. Whether the court should set aside, discharge and/or vacate the ex-parte order issued on the 12th May 2024.
9. The application dated 9th May 2024 primarily sought the extension of stay of execution issued on 25th April 2024 pending the hearing and determination of the intended appeal. Subsequently, the court granted a stay on 12th May 2024. The 1st Defendant filed an application dated 28th May 2024 primarily seeking to set aside, discharge and/or vacate the ex-parte order issued by the Court on the 12th May 2024.
10. In an application for a stay of execution pending hearing and determination of the appeal, the Court of Appeal set out the guiding principles in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR (Madan, Miller and Porter JJA) who upon considering an application had the following to say:
 - “i). 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.
 - ii). 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.
 - iii). 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.
 - iv). The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.”
11. The applicable law for grant of stay of execution pending appeal is found under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which stipulate that:
 - (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.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been made when under the Rules of that Court notice of appeal has been given.
 - (6) Notwithstanding anything contained in sub-rule (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.”
12. It is undisputed that the application meets the criteria condition under Order 42 Rule 6 of the Civil Procedure Rules that requires an applicant for stay of execution pending appeal to file the application without unreasonable delay. The impugned Ruling was issued on 25th April 2024 and the stay application filed on 9th May 2024 thus there was no undue delay in filing the present application.
 13. On the issue of substantial loss, the applicant argued that it is the primary source of livelihood of thousands of Kenyans both directly and indirectly and is apprehensive that in the absence of a stay of execution, the livelihoods of those Kenyans shall be at jeopardy at no fault of their own. This is tantamount to substantial loss which cannot be remedied by way of damages.
 14. In addition, the Plaintiff contended that the subject matter is weighty and involves colossal sums of money, that the Plaintiff is a going concern which has dutifully managed Pinewood Resort and Spa; and that the Plaintiff has lodged an appeal which is yet to be determined
 15. In contrast, the respondents submitted that the applicant did not discharge its onus of showing that there is an order capable of being stayed and if not stayed the applicant will suffer substantial loss. The 1st respondent reiterated that the order sought to be stayed must be a positive order unlike the order herein which is a negative order given that the Ruling issued on 25th April 2024 dismissed the applicant’s suit and Notice of Motion dated 5th November 2023.
 16. In the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR it was held as follows:

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with...”



17. In *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 the court stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

18. The court does not agree with the respondents that the impugned Ruling is a negative order and is incapable of execution as was stated. The applicant has demonstrated factors which show that any execution will create a state of affairs that will irreparably affect or negate the very essential core of the Plaintiff as the successful party in the appeal. The issue of substantial loss is central. It is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory (see *James Wangalwa and another v Agnes Naliaka Cheseto* [2012] eKLR).

19. Guided by the above authorities above, I find that the Plaintiff has satisfied this court that they will suffer substantial loss if the orders sought are not granted and the appeal succeeds.

20. As regards deposit of security, the courts have variously observed that the objective of the legal provisions on security was never intended to fetter the right of appeal. That it is in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. And that it must be appreciated that the order for security for the due performance of decree is not a matter of willingness by the applicant but for the court to determine (see *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR).

21. In the motion dated 28th May 2024, the 1st Defendant sought, in the alternative, that the Plaintiff be directed to provide security for the stay of execution as well as an order for the preservation and inspection of the assets and business of Pinewood Beach Resort and Spa by the 2nd Defendant for the purpose of taking an inventory and a record of the same.

22. The basis for the requirement of security is that the Court must consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its right of appeal, and in the event it were to succeed, it should not be faced with a situation in which it would be unable to get back its money. Likewise, the respondent who has a decree in its favour should not, if the applicant were to be unsuccessful in its appeal, find it difficult or impossible to realize the decree.

23. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the court expressed itself thus:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms, bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial... The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal.”

24. Although the Plaintiff did not offer to provide security, I am persuaded by the holding in the above case. Taking all relevant factors into consideration and in order not to render the intended appeal illusory,



I proceed to exercise my discretion to balance the rights of the parties and allow the orders sought in the application dated 9th May 2024.

25. Consequently, stay of execution pending hearing and determination of the intended appeal is granted on condition that:
- i. The Applicant provide a Bank Guarantee from a reputable Bank in the sum of Kshs. 20,000,000.00 within 30 days from the date herein.
 - ii. In default of (i) above, the stay of execution orders will stand discharged.
 - iii. The costs of the applications will be in the cause.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Maloba & Mr. Nduati for plaintiff/applicant

Ms. Manich h/b for Ms. Lubano for 1st respondent

Court Assistant: Carlos

