



Otieno t/a Awesome Foods v Mweiga Estate Limited (Civil Appeal E046 of 2024) [2024] KEHC 14228 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E046 OF 2024
DKN MAGARE, J
NOVEMBER 14, 2024**

BETWEEN

LYDIA WARUGURU OTIENO T/A AWESOME FOODS APPELLANT

AND

MWEIGA ESTATE LIMITED RESPONDENT

RULING

1. This is a ruling on an applications dated 11/10/2024. The application seeks the following orders:
 - i. Spent
 - ii. That there be stay of execution of the Interlocutory Judgment entered on 30/5/2023 in Nyeri CMCC No. E410 of 2021 and consequential orders pending the hearing and determination of the appeal.
 - iii. That the costs of this application be in the cause.
2. The application is supported by the affidavit of the Applicant premised on the grounds stated inter alia as follows:
 - i. The Ruling was delivered on 11/7/2024 dismissing the Applicant's application dated 15/8/2023 seeking to set aside interlocutory judgment entered in the lower court suit on 30/5/2023.
 - ii. The Applicant is aggrieved and filed this appeal.
 - iii. The appeal will be rendered nugatory.
 - iv. The Respondent will suffer no prejudice.



3. The Respondent filed Grounds of Opposition dated 25/10/2024 and opposed the application materially on the ground that the Applicant had not satisfied the conditions for grant of stay of execution.

Submissions

4. The Applicant relied on Order 42 of the Civil Procedure Rules as follows:
 - (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
 - (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
 - (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.
5. The Respondent reiterated the Replying Affidavit and submitted that the Appellant had not satisfied the conditions for granting stay of execution.

Analysis

6. The issue is whether the application should be granted in the circumstances. The path to stay pending appeal is a well-trodden road. It has scorpions and snakes but also fish and potatoes. This depends on the menu one orders. The Applicant has chosen a rather mixed grilled chips and scorpions. To enable the court grant stay pending appeal, an applicant must meet the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules:

“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.
7. There is a third limb, that is, the Applicant will suffer irreparable loss if the orders are not issued. Stay may only be granted for sufficient cause. The court in deciding whether or not to grant the stay, must have regard to the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*. The court is thus enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

1A the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”



Section 1B. The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

8. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given as stated in the case of Antoine Ndiaye v African Virtual University [2015] eKLR, where Gikonyo J, stated as doth: -

- (14) On the basis of the above, the Applicant has not established that substantial loss will occur unless stay of execution is made. The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of Jason Ngumba [2014] eKLR that:

Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.

But what was stated in the case of Absalom Dova vs. Tarbo Transporters [2013] eKLR is relevant, 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 which is not a question of discrimination”.

How, therefore, will the court balance the rights of parties in the circumstances of this case?

9. It is evident that there is no security offered for due execution of the decree herein. It is only from the affidavit in support of the application that it is deposed that should the order of stay be declined, the Applicant stands to suffer substantial damage after execution takes place. The Respondent on the other hand strongly argues that the Applicant has not demonstrated substantial loss to warrant the grant of stay.
10. 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. Therefore, the issue of substantial loss is the cornerstone. Substantial loss for purposes of Order 42 Rule 6 of the Civil Procedure Rules was discussed in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, 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.”

11. Having considered the application vis-à-vis the response thereto, the applicant has not demonstrated that she will suffer substantial loss in the event the appeal succeeds.

12. The decretal sum is Ksh. 5,868,968/=. There is no indication on what serious defence will be dealt with at appeal level. It is stated that substantial loss does not have to be a lot of money as stated in the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, where the court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

13. This application was filed in October, in spite of dismissal in August. There is no security offered. A sum of Kshs. 300,000/= was offered from the bar, timeously. That is not sufficient security.

14. The court thus inevitably weighs the Applicant’s right to appeal against the success of the Respondent who should not be deprived of the fruits of the interlocutory judgment. The court in RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

15. In this case this was a monetary decree. The only defence is that there were other partners in the business. This implies that there are more potential payers and refunders. Without security an application for stay becomes otiose and lacks merit. It is not the duty of the court to force the kind of security an applicant must offer. Offering less than 10% of the decree amount is the zenith of lack of seriousness and is meant to obfuscate issues and engage the court in unending imbroglio meant to keep the Respondent away from the decree. There was no demonstrable effort to expedite the appeal, in any case.

16. In the circumstances, the application lacks merit and is accordingly dismissed with costs.



Determination

- a. The upshot of the foregoing is that the Notice of Motion dated 11/10/2024 lacks merit and is accordingly dismissed with costs.
- b. The appeal be prepared for admission.
- c. Directions on 19/3/2025.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF NOVEMBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Nyakio Machira for the Appellant/Applicant

Mr. Ngugi for the Respondent

Court Assistant – Jedidah

