



**Warm & Barnhill Company Limited v Emakhwale Construction Company Limited
(Civil Appeal E010 of 2021) [2024] KEHC 14420 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E010 OF 2021
S MBUNGI, J
NOVEMBER 14, 2024**

BETWEEN

WARM & BARNHILL COMPANY LIMITED APPLICANT

AND

EMAKHWALE CONSTRUCTION COMPANY LIMITED RESPONDENT

RULING

1. The applicant filed an application under Certificate of Urgency dated 02.10.2024 in this court seeking the following orders:
 - I. That this Honorable Court be pleased to Stay the Execution of the Judgment and/or Decree in this cause pending prosecution of an Intended Appeal against the said Judgment.
 - II. That the Respondent be granted leave to file a Notice of Appeal out of time in respect of Judgment delivered on the 17th day of February 2023 in this cause.
 - III. That costs be provided for.
2. The application was premised on the following grounds:
 - a. That the purpose of the application herein will be defeated and rendered nugatory should the respondent herein proceed with the imminent execution of the judgement.
 - b. The applicant herein had learnt that a judgement was delivered in favor of the respondent which they were not aware of.
 - c. That Notice to show cause had been issued against the applicant which comes up on 23/10/2024.
 - d. That the Applicant was not aware of the delivery of the judgement of 17/2/2023.



- e. That for the failure to file appeal and pray for stay was not a deliberate act but due to factors beyond the Appellant's / Applicants' control.
 - f. That Unless this application is certified urgent, and in the meantime, the interim Orders granted, the respondent will proceed with the said notice to show cause which is scheduled on 23/10/2024.
3. The application was supported by an affidavit sworn by one David Omusotsi Wamatsi.
 4. During interpartes hearing on 23.10.2024 the respondent, in open court through one Ms. Nanjala, appearing for the respondent orally opposed grant of stay, citing that the judgment was delivered on 17.02.2023 and they served the applicant with a bill of costs so they were aware of the judgment. The court granted a stay of execution pending the outcome of this ruling and ordered that the application be canvassed by way of written submissions.

Applicant's Case.

5. Vide submissions dated 25.10.2024, the applicant's counsel sought for stay pending appeal, citing the reasons set out in the applicant's affidavit sworn on 09.10.2024.
6. The applicant submitted that it was unaware that judgment had been entered against him, until when the respondent served it with a notice to show cause as to why it's director should not be arrested.
7. The applicant further submitted that it was willing to deposit a security of Kshs. 1,000,000/- in a joint account as per the provisions of Order 24 Rule 6 of the Civil Procedure Rules.
8. It was the applicant's submission that delay in filing the appeal was not intentional since the former advocate failed to inform the client of the outcome and the mistake of the counsel should not be visited upon him. They referred the court to the case of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR.

Respondent's Case.

9. Vide submissions dated 22.10.2024, the respondent stated that despite the applicant's averments that it was unaware of the judgment delivered since it was never informed by its then advocate on record, the applicant has not shown any attempts it made to find out the position of the matter from the advocate and referred the court to the case of Bi-Mach Engineers Limited vs James Kahoro Mwangi(2011)eKLR.
10. The respondent further submitted that the applicant was represented in the matter post-judgment, hence could not lay claim that they were unaware of the delivery of judgment. Moreover, the bill of costs was drawn and served upon the applicant's counsel. The respondent submitted that the applicant's counsel was also present during taxation and delivery of the ruling thereafter.
11. It was the respondent's submission that the applicant is seeking stay of execution one year and seven months after judgment was delivered and the matter is at execution stage, hence does not meet the threshold of Order 42 Rule 6(1) and (2) which provides that there must not be undue delay in making the application, urging that the application be dismissed with costs and that the directors of the applicant be compelled to appear before court and give an appropriate proposal on payment of the decretal sum.



Analysis and Determination.

12. I have looked at the judgment delivered by this court on 17.02.2023, the application and submission by counsels for both parties.
13. The issue of determination is whether the application by the applicant meets the threshold for this court to grant stay of execution pending appeal.
14. Stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides:
Stay in case of appeal [Order 42, rule 6.]
 - (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 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) 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.
15. Further, in the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court held that:

“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. 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.”

16. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court’s decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).
17. The judgment was delivered by this court on 17.02.2024 in the absence of both parties. The applicant has stated the failure by the applicant to file the appeal or notice of appeal on time within the prescribed time after the judgment was because both parties were unaware of the judgment until when the respondent served the applicant with a notice to show cause on 16.09.2024 and filed this application on 02.10.2024. It is true that the judgment was delivered in the absence of the parties on 17.02.2023 whereas the initial date of delivery was 23.01.2023. There is no indication whether parties had been notified of the new date of delivery of the judgment. I shall give the applicant the benefit of doubt on this.
18. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted. In the case of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR the court stated as follows -:

“Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted.”
19. In the case of *James Wangalwa & Another v Agnes Naliaka Chesto* (2012] eKLR the court 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.”
20. The applicant avers that the decretal sum has accrued to the region of Kshs. 9,000,000/- or thereabout. Therefore, should the stay against the decree be declined, the applicant is likely to suffer irreparable loss as the respondent is an entity incapable of repaying the said decretal sum in event the intended appeal at the Court of Appeal succeeds.
21. The respondent did not file a replying affidavit so the court cannot tell whether it is capable of repaying the Kshs. 9,000,000/- or thereabout in case the appeal succeeds in the Court of Appeal. I will agree with the applicant in such an event, it will suffer substantial loss.
22. On the issue of security, the applicant has also submitted their willingness and readiness to comply with the directions to be given by this honorable court as to the provision of security and they offered



the cost of Kshs. 1,000,000/- in a joint interest earning account in the names of the counsels of the parties herein.

23. In the case of Joseph Schmaderer (supra), the court stated as follows with regard to security: - "... On the other hand, the Applicant's in their Supporting Affidavit at paragraph 8 have stated that they are ready to furnish such reasonable security as shall be ordered by court. 33. The offer of security by the Applicant is bona fides that the stay application is not a mere exercise to deny the Respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay. This is as was held in the case of Focin Motarcycle Co. Limited v Ann Wambui Wangui & another (2018] Eklr..."
24. The court in the case of Richard Muthusi (supra), stated as follows on the issue: "...It is deposed in supporting Affidavit that applicants are ready and willing to offer such security as the court may deem fit, proper and just in the circumstances, including depositing the decretal sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal. 19. This will secure the interests of both parties without and bias. The Defendants/Applicants have satisfied the threshold required for an application to be allowed."
25. The above analysis makes me find that the applicant has made out a case to warrant this court to exercise its discretion in its favor. I will allow the application in terms of prayer (1) and (2).
26. The applicant to deposit the decretal amount of Kshs. 2,604,000/-, awarded by this court in its judgment delivered on 17.02.2023, in a joint interest earning account in the names of the advocates representing the parties pending the outcome of the intended appeal in the Court of Appeal. The decretal amount to be deposited within the next 90 days from this date of the ruling.
27. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF NOVEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Applicant present

Ms. Nanjala holding brief for Atulo for the appellant present

Wanyonyi for respondent present online

Court Assistant – Fred Owegi

