



**Suraya Sales Ltd & another v Oduor (Civil Appeal E226 of 2024)
[2024] KEHC 15916 (KLR) (Commercial and Tax) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E226 OF 2024
JWW MONG'ARE, J
DECEMBER 16, 2024**

BETWEEN

SURAYA SALES LTD 1ST APPELLANT

MUGA DEVELOPERS LTD 2ND APPELLANT

AND

CAROLINE ACHIENG ODUOR RESPONDENT

RULING

1. The Appellants have by a Notice of Motion application dated 19th August 2024 filed under certificate of Urgency and supported by the Affidavit of Peter Kiarie Muraya sworn on even date moved this Honourable Court seeking the following prayers:-
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to stay the execution of the Ruling and/or Order of the Honourable Becky Cheloti Mulemia (PM) delivered at Nairobi on 16th day of August 2024 in Nairobi Chief Magistrate's Courts in Civil Case No. 3258 of 2020 and all other further/ consequent proceedings thereto, pending the hearing and determination of the Appellants/ Applicants appeal.
 - d. That the costs of this Application do abide by the results of the appeal.
2. On 5th September 2024, the Respondent filed her response opposing the said application. Both parties have filed their written submissions which I have carefully considered.



Analysis and Determination

3. Upon careful consideration of the Application herein and the rival written submissions by the parties, I note that this court is called to consider whether the Appellants have satisfied the legal threshold for a grant of the orders sought.
4. The Appellants fault the ruling of the trial court delivered on 16th August 2024 by Hon. Becky Cheloti Mulemia where they argue that the court committed the directors of the Appellants to civil jail without following the laid down procedures and further argue that they have filed an appeal to challenge the same vide the grounds set out in the Memorandum of Appeal filed herein.
5. The Appellants bring the present application to stay the implementation and execution of the impugned ruling as there is no automatic stay created by filing of an appeal under the provisions of the Civil Procedure Act. Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010 states that:-

“an appeal or second appeal will not automatically delay the execution of a decree or order that is being appealed. However, the court from which the appeal is made can order a stay of execution if there is a sufficient reason.

The court to which the appeal is made can also consider an application for a stay of execution, regardless of whether the court from which the appeal is made granted or refused the application. Anyone who is aggrieved by a stay of execution order made by the court from which the appeal is made can apply to the appellate court to have the order set aside.

To make an application for a stay of execution, the applicant must meet the following conditions:

 - a. The court must be satisfied that the applicant will suffer substantial loss if the order is not made.
 - b. The application must be made without unreasonable delay.
 - c. The applicant must provide security for the costs of performing the decree or order that may ultimately be binding on them.
6. The Respondent opposed the present application and filed a replying affidavit sworn on 3/9/2024. In the said replying affidavit the Respondent argues that the Judgment and Decree from whence the execution proceedings emanated in CMCC No. 3258 of 2020(Caroline Achieng Oduor vs. Muga Developers & Suraya Sales Limited) has not been appealed against and the same remains unchallenged and in the said judgment the Respondent was awarded by the court the sum of Kshs. 7,823,949.88/- plus costs, which sum continues to accrue interest as it remains unpaid. The Respondent has urged the court to find that the only sufficient order for security would be a deposit of the said decretal amount in court if the court is to grant the order of stay sought.
7. I have considered both arguments as put forth by the parties. I note that under order 42 rule 6 of the Civil Procedure Rules what the courts are called to consider, outside of the fact the application was filed with undue delay, is what substantive loss the applicant is likely to suffer if the order for stay is not granted and if the same is granted what is the protection available to the party whose execution of a decree is being stopped and or interfered with.
8. I have further considered the fact that the original judgment and decree remain unchallenged and the fact the only issue that is being appealed against is the post judgment mode of execution which includes a committal to civil jail of the directors of the judgment debtor, upon piercing by the court of the



corporate veil. I also note that the Appellants do not seek to challenge the original decision of the court or at all and make no proposals on how the same will be satisfied. The Appellants have also not offered any form of security other than to depone that they are ready to avail one.

9. It is the courts' view that an application under Order 42 Rule 6 of the Civil Procedure Rules stands or falls on the key considerations of substantial loss and security. This position was reinforced by the Court of Appeal in the case of Shell Ltd –vs- Kibiru & Another, Civil Appeal No.97 of 1996 where court held that:-

substantial loss to include prove of loss of money if the payment was made since the Respondent would not be able to repay the money. That is a potential loss that the Applicant has demonstrated and the Respondent has demonstrated that he is capable of refunding the money held in security if the appeal succeeds. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein.”

10. In the present case I reiterate that no appeal has been preferred against the Judgment of the court. Although the suit has been filed to forestall committal of the directors of the Appellants to civil jail for failure to settle the judgment debt, there is no demonstration or proof of substantial loss put forward to demonstrate what loss if any, will the Appellants lose since they are happy with the judgment issued by the court in the principal suit between the parties. I am therefore disinclined to allow the present application as the same will only act to obstruct the rights of the decree holder in a judgment that has not been challenged. I find and hold therefore that the present application for stay pending appeal has no merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 16TH DAY OF DECEMBER 2024

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J.W.W. MONG'ARE

JUDGE

In Presence of:

1. Mr. Ken Mugo holding brief for Bob Otieno for the 1st & 2nd Appellants/Applicants.
2. Mr. Meso for the Respondent.
3. Amos - Court Assistant

