



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL CASE NO 21 OF 2017**

**PINNACLE PROJECTS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PRESBYTERIAN CHURCH OF**

**EAST AFRICA NGONG PARISH.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE PRESBYTERIAN FOUNDATION...2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is an application for stay of execution pending appeal brought under Sections 1, 1A, 3, 3A of the Civil Procedure Rules. It seeks to stay execution of the judgment and decree of this court dated 4<sup>th</sup> February, 2020 and delivered on 21<sup>st</sup> February, 2020. The application is premised on the grounds on the face of the motion and affidavit of Isaac Omoke Miencha, sworn on 12<sup>th</sup> March, 2020.
2. According to the applicant, the respondent filed a suit for a declaration that they owed it Kshs. 25,835,565.71 with interest at 14%, and after a hearing, judgment was entered in favour of the respondent for that amount. The applicants were aggrieved with the judgment and now want to exercise their right of appeal and took steps towards that end and lodged and served a Notice of Appeal.
3. The applicants stated that they have an arguable appeal with high chances of success, and are apprehensive that should stay not be granted, their appeal will be rendered nugatory. It is the applicant's contention that should the appeal fail they will still settle the decree and, therefore, the respondents will not be prejudiced at all.
4. I have not been able to trace the respondent's replying affidavit on record despite effort made. They however filed written submissions.
5. Parties agreed to dispose of the applications by way of written submissions which were duly filed. The applicants submitted through their written submissions dated 14<sup>th</sup> December, 2020 and filed on 17<sup>th</sup> December, 2020, that whether or not to grant stay of execution, the court should consider the likely hardships or loss that may be occasioned. They relied on *Sewankambo Dickson v Ziwa Abby* HHCT-OO-CC MA 0178 of 2005, for the argument that substantial loss is a qualitative concept which refers to any loss great or small that is real worth of value, distinguishable from loss without value or loss that is merely nominal.
6. The also cited *Francis Kimeu Mutua and Ann Mbinya Mutua v Jason Macharia Mwangi* [2020] eKLR, that what is expected of the court is to ensure that the aims and intentment of the overriding objective as stipulated in Section 1A as read with Section 1B of the Civil Procedure Act are allowed. The court should take into account the likely effect of granting stay. It ought to weigh the likely consequences of granting stay or not doing so, and lean towards a determination which is not likely to lead to an undesirable or absurd outcome.
7. The applicants again cited *Siegfried Busch v MCSK* [2013] eKLR, for the proposition that a court to which an application has been made, must recognize and acknowledge the possibility that its decision for refusal to grant stay of execution could be reversed on appeal. It would therefore be best in those circumstances to preserve the status quo so as not to render an appeal nugatory.
8. They again relied on *Butt v Rent Restriction Tribunal* 1982 KLR 97, for the proposition that discretion ought to be exercised in a manner that would not prevent an appeal. They urged the court to agree with them that substantial loss will be suffered if stay is not granted.
9. Regarding the second requirement of timely filing of applications for stay, the applicants submitted that judgment was delivered on 21<sup>st</sup> February, 2020 while the motion was filed on 27<sup>th</sup> February, 2020 which was timely.

10. On security for costs, the applicants cited the decision in Absaloms Dova v Tarbo Transporters [2013] eKLR to argue that the discretionary relief of stay pending appeal is designed on the basis that no one should be worse off by virtue of an order of the court. As such, orders should not introduce any disadvantage but administer the justice that the case deserves.

11. According to the applicants, the Covid 19 pandemic has interrupted the economy, including income yet they still have to pay loans due. In the circumstances, ordering them to deposit the decretal sum, would condemn them to anguish, thus automatically deny them stay of execution. They urged the court to allow the application.

12. Respondents filed their written submissions dated and filed on 18<sup>th</sup> January, 2021. They submitted that the applicants had not met the test for granting stay of execution. According to the respondents, such an application requires the court to employ the overriding principle of probability and equality of arms and place parties on equal footing. The respondent's right to enjoy fruits of its judgment should also be considered and weighed against the applicant's right to appeal, and not in complete derogation of that right.

13. The respondents cited the decision in Machira t/a Machira advocates v East African Standard (No. 2) [2002] KLR 63 to support this argument. The respondent therefore argued that the applicants had not met the requisite conditions for grant of stay of execution under order 42 rule 6. They also argued that the court should not exercise its discretion in the applicants' favour and should compel the applicants to deposit security if amenable to granting stay pending appeal.

14. On substantial loss, the respondent argued that this is the cornerstone of the court's jurisdiction to grant stay, and an applicant should demonstrate that he will suffer substantial loss if stay is not granted. In its view, the applicants had not sufficiently demonstrated the substantial loss they would suffer. The respondent relied on Century Oil Trading Co. Ltd v Kenya Shell Ltd (HCMCA No. 156 of 2007) on the meaning of substantial loss; Samvir Trustee Ltd v Guardian Bank Ltd (HCCC No. 795 of 1997) that an applicant must satisfy the court that substantial loss would be suffered, and Kenya Shell Ltd v Kibiru [1986] KLR 410 and James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR on the same point.

15. The respondent contended that the applicants had not met the threshold for granting stay of execution on grounds of substantial loss; that they had failed to demonstrate willingness to deposit security as a precondition to granting stay and that no other sufficient reason had been demonstrated to warrant granting of the application. It urged that if the court was inclined to grant stay, the applicants should be ordered to pay half the decretal sum.

16. I have considered the application, the response and submissions by parties. I have also considered the decisions relied on. An application for stay of execution is granted or denied under well settled principles..

17. Order 42 rule 6 provides:

**“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 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 of stay 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 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 may ultimately be binding on him has been given by the applicant”(emphasis).**

18. It is convenient to deal with the issue of whether the application was filed timeously first. The rule requires an application for stay to be filed without delay. In this case, the impugned judgment was delivered on 21<sup>st</sup> February 2020 while the application for stay was filed on 13<sup>th</sup> March 2020, a period of less than one month. There can be no argument, therefore, that the motion was filed timeously.

19. The rule also requires an applicant to show to the satisfaction of the court, that he will suffer substantial loss, and that it has offered security for the due performance of the decree should the court deem it fit.

20. when considering the grounds for granting stay pending appeal in Butt v Rent Restriction Tribunal (Civil App No. NAI 6 of 1979), the Court of Appeal observed **that that power** is discretionary and should be exercised in such a way as not to prevent an appeal. The court added that in exercising the discretion whether to grant or refuse an application for stay, it has to consider the special circumstances of the case and its unique requirements.

21. It is clear from Order 42 rule 6 as well as the above decision, that in an application for stay the court exercises judicial discretion; has acted judicially and has also to consider the circumstances of each case. The guiding principle is that an applicant should show that he will suffer substantial loss if stay was to be denied.

22. Regarding what substantial loss is, the Court stated in James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR;

**“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”**

23. In *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, the Court again stated that the only way of establishing substantial loss is by showing that if the decretal sum was paid to the respondent, that is; execution proceeded or was carried out, and in the event the appeal succeeded, the respondent would not be in a position to pay or reimburse because he has no means of doing so.

24. The court made it clear in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] 2 KLR 63, that in attempting to demonstrate that substantial loss was likely to be suffered, the applicant would be under duty to do more than merely repeating words of the relevant statutory provision or rule, or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance.

25. The court emphasized that; **“it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.”**

26. I have carefully read through the application and the supporting affidavit. The applicants argued that they have an arguable appeal and that they would which has high chances of success and that if stay was not granted, they would suffer substantial loss. The applicants did not state what substantial loss they would suffer if stay was not granted.

27. The respondent did not file a replying affidavit and, if they did, it was not traced in the file. It however submitted that the applicants had not demonstrated that they would suffer substantial loss.

28. No replying affidavit by the respondent was traced on record. That respondent did not show that it is in a position to refund the decretal sum if it was paid and the appeal succeeded. That notwithstanding, the law places a duty on the applicant seeking stay of execution to demonstrate to the satisfaction of the court, that he will suffer something special and that the respondent may not be able to put him back to the position he was were execution to proceed, to amount to substantial loss.

29. As **Platt, Ag. JA**, stated in *Kenya Shell Ltd v Benjamin Karuga Kibiru & Others* (supra):

**“...It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings.**

**It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”**

30. **Hancox, J. A**, added in the same case that there was no justification whatsoever for holding that there was likelihood that the respondents would not repay the decretal sum if the appeal was successful and that appeal would be rendered nugatory.

31. More recently, the Court of Appeal stated in *Kenya Pipeline Co. Ltd v Zakhem International Construction Ltd*, (Civil Application No E029 of 2020), the Court reiterated that as execution being in regard to a liquidated amount, there was no way the appeal, if successful, would be rendered nugatory.

32. That notwithstanding, it is also a requirement that a court considering an application for stay, must bear in mind that there exists the possibility that the decision to refusal stay of execution could be reversed on appeal and, therefore, preserve the substratum of the appeal. The court has to take into account what the likely effect of granting or declining to grant stay; weigh the likely consequences either way, and lean towards a determination that is not likely to lead to an undesirable or absurd outcome.

33. As the Court of Appeal stated in *Butt v Rent Restriction Tribunal* (supra), the court’s discretion ought to be exercised in a manner that would not prevent an appeal. In other words, the court has to balance interests of the applicant and those of the successful respondent who has a judgment in his favour. (see *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [ (supra).

34. Flowing from the above principles, whether or not to grant stay of execution is a matter of discretion which should be exercised judicially. The applicants are exercising their statutory right of appeal. On the other hand, the respondent has a decree in its favour which it would like to execute.

35. The respondent urged that the applicants should deposit the decretal amount. To the applicants, that would amount to denying them stay given the economic situation as a result of the Covid19 pandemic. To balance interests of both sides, a conditional stay will be appropriate in the circumstances of this case.

36. Consequently, the application dated 12<sup>th</sup> March 2020 is allowed and I make the following orders:

**a. Stay of execution of the judgment and decree delivered on 21<sup>st</sup> February, 2020 is hereby granted pending the hearing and determination of the intended appeal.**

**b. The applicants do deposit Kenya Shillings ten million (Kshs. 10,000,000) in a joint interest earning account in the names of the advocates for the parties within sixty (60) days from the date hereof.**

**c. In default of (b) above, the application shall stand dismissed.**

**d. Each party do bear their own costs of this application.**

**DATED SIGNED AND DELIVERED AT KAJIADO THIS 12<sup>TH</sup> DAY OF MARCH, 2021.**

**E. C MWITA**

**JUDGE**