



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL CASE NO. 25 OF 2021**

**GUARDIANS KENYA LIMITED**

**NICOLA CACCIATORI.....APPLICANTS**

**VERSUS**

**BISCO INVESTMENT LIMITED.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Kilonzo & Aziz Advocates for the Appellants**

**Kibunja & Associates Advocates for the Respondent**

**RULING**

This is an application for leave to file an appeal out of time, and secondly for stay of execution against the judgement of the trial court in ***Cmcc No. 195 of 2017***. It is expressed to be brought under section 79, (G), 95, 1A, 1B and 3A of the Civil Procedure Act, order 22 Rule 22, order 42 rule 6 of the Civil Procedure Rules and Article 159 of the Constitution. The application was supported by the affidavit of the applicant in which the grounds of the applicant were buttressed.

At the hearing both counsels argued and submitted orally on the prayers sought in the Notice of Motion. The principles underpinning this equitable remedy are to be formed in a plethora of cases including the case of ***Salat V Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR***.

In that case, ***“it was observed that extension of time is not a right of a party. That remedy is only available to a deserving party at the discretion of the Court. A party who seeks for extension has the burden of laying a basis to the satisfaction of the Court. The court ought to exercise the discretion to extend time on a case-to-case basis. The delay and reasons that occasioned it ought to be explained to the satisfaction of the Court. The Court should also consider whether there would be any prejudice suffered by the Respondent if extension is granted”***.

In the instant case, the applicant pointed out that he was dissatisfied with the entire judgement but the delay was occasioned by the fact of the subject judgement being delivered electronically. The said judgement was therefore not received as dispatched via – email rendering the lapse of time. Regarding the prayer I hold the view that the applicant has explained himself on the length of the delay and the reasons which made him not to meet the statutory timeline that is provided for under section 79 (G) of the Civil Procedure Act.

From the principles in the ***Salat case*** and that application to the facts of this case, I have no doubt in my mind the explanation on the default apparently is persuasive for the relief on expression of time to be granted.

Secondly at the hearing of the same application, it was urged upon this Court to grant stay of execution as captured in the motion and affidavit in support. It follows therefore that under order 42 Rule 6 of the Civil Procedure Rules for an applicant to succeed he has to demonstrate that;

- a) The application has been lodged without unreasonable delay.***
- b) That substantial loss may result to the applicant unless the stay of execution if granted.***
- c) That the applicant has given security for due performance of the decree or order as may be ultimately be binding upon him.***
- d) That there is a serious threat to execution of the decree and if stay is not granted the intended appeal would be rendered***

nugatory.

*e) That the applicant has given security for the due performance of the decree.* See the principles as elucidated in *Stephen Wanjohi V Central Glass Industries Ltd Nairobi Civil Case No.6726 of 1991 Nduhiu Gitahi V Warugongo [1988]e KLR 621 Council of Legal Education & Another V Ritta Biwott [1994] LLR.*

Regarding the instant case the application has been made without unreasonable delay. This has been clearly indicated in the affidavit by the applicant. The applicant has demonstrated that from the date he became aware of the judgement efforts were made to secure a copy therefore so as to raise grounds in the memorandum of appeal. I find this principle has been complied with by the applicant.

The concept of stay of execution of the judgement of a court as espoused in the case of *Antoine Ndiaye vs African Virtual University, Nairobi Civil Suit No. 422 of 2006* provides the factors the Courts will consider in granting or refuse an application for stay of execution as expressed herein under:-

*“So, the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove (sic). Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.” (Emphasis added). This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See Harlsbury’s Law of England on this subject. In my view, substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment-debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money. ....I say all these things because both parties have rights; the Applicant to his appeal which includes prospects of success; and the Respondent to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient cause to do so. 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? Despite my findings above, I reckon that the Applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may ultimately be binding on the Applicant...”*

The onus is for the applicant applying for a stay pending appeal to satisfy that in the particular circumstances of the case the enforcement of the Judgement will leave in financially ruined if the appeal succeeds. One important consideration is in the preservation of the subject matter so as not occasion substantial loss or render the appeal nugatory.

On these conditions I rely on the affidavit which avers that in the event of an execution the applicant is likely to suffer irreparable loss and damage. That averment remains uncontroverted from the respondent. It is clear from these paragraphs that the applicant is likely to suffer substantial loss if execution is not stayed.

Thirdly, there is the issue of the appeal being rendered nugatory. The subject matter of the impugned judgement is a colossal sum of Kshs.2,571,207.25cts. This is tied to the ground on substantial loss. The effect of execution as contemplated in law is to cause settlement of the decree. It is sufficient to establish that the subject matter is no longer within the jurisdiction of the Court. It is my considered view that there are circumstances the applicant has shown that the appeal if successful will be rendered nugatory.

Fourth, an application for stay is fashioned around the question of whether, the applicant has an arguable appeal. In this condition it does not follow that the applicant has to demonstrate that he has a successful appeal but one which is not frivolous. A casual look at the draft memorandum indicates that there are issues, the applicant is dissatisfied about in the whole judgement of the trial court. For example, the failure to lift the veil of Incorporation as provided for under the Company’s Act. The issue such as this is an arguable one and that in the event of the appeal succeeding, in the absence of stay the success of it might be rendered nugatory. I am persuaded that the balance of balance tilts in favour of the applicant.

Finally, security for due performance of the decree or order that is binding on the applicant has to be given a stay of execution orders. The

objective of this condition is not fetter the discretion of the Court or punish the applicant for exercising his constitutional right of appeal. It is intended to ensure in the event the appeal not succeeding the execution of the decree is not delayed unreasonably.

That being the general rule, the Court finds no tangible facts to exclude the applicant from depositing the decretal sum as security for the due performance of the decree. The said requirement is never a substitute of the deposit of the passport as already ordered by the Court.

For the reasons stated above the Court accepts submissions by both counsels and consequently makes the following orders; -

- 1. That leave for extension of time is granted to the applicants.***
- 2. The draft memorandum of appeal be deemed to be filed within time and served upon the respondents.***
- 3. The Deputy Registrar to cause the certified record of the trial court to be served upon both parties to the appeal.***
- 4. That there be a stay of execution be granted against the judgement of the trial court in Cmcc No. 195 of 2017 pending the hearing and determination of the appeal.***
- 5. In the interim and until the appeal is heard and disposed off the applicant shall deposit security for due performance of the decree in the sum of Kshs.1,920,000/- in the joint interest earning account of both counsels within 40 days from today's date.***
- 6. In the event of default, the stay orders lapses and the applicant shall be at liberty to pursue the appeal without stay order. Costs of this application abide the outcome of the appeal.***

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 7TH DAY OF JUNE, 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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