



Flower City Limited v Poly tanks & Containers Kenya Limited (Commercial Civil Case E033 of 2020) [2021] KEHC 46 (KLR) (Commercial and Tax) (13 September 2021) (Ruling)

Neutral citation: [2021] KEHC 46 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E033 OF 2020**

JM MATIVO, J

SEPTEMBER 13, 2021

BETWEEN

FLOWER CITY LIMITED APPLICANT

AND

POLYTANKS & CONTAINERS KENYA LIMITED RESPONDENT

RULING

1. By a Notice of Motion dated 19th May 2021 expressed under the provisions of Section 1B, 3 and 3A and Section 63 and Order 42 Rule 6 of the Civil Procedure Act and under the inherent jurisdiction of this court, Flower City Kenya Limited, the applicant, Flower City Limited prays that these proceedings be stayed pending hearing and determination of Nairobi Court of Appeal, Civil Application No. Nai E 095 of 2021, Flower City Kenya Limited v Poly tanks & Containers Kenya Limited. The applicant also prays for costs of the application be provided for. Prayers (1) and (2) of the application are spent.
2. The application is premised on the grounds that the Respondent served the applicant with Statutory Demand for Kshs. 761,753/= for goods supplied. It states that it unequivocally denied the debt and sought to be furnished with *inter alia*, particulars of the goods allegedly supplied, local purchase orders and agreements for goods supplied, delivery notes, invoices and any documents in support of the amount claimed because it did not have a record of any supply of goods by the respondent. It states that the Respondent failed to provide the requested documents or any proof that the amount claimed was owed. Further the applicant states that it filed an application to seeking set aside the Statutory Demand on the ground that the debt is not owed. It states that the Respondent did not reply to the application.
3. Additionally, the applicant states that the Respondent's advocates did not attend court for the hearing of the application, but in a Ruling of 22nd February 2021 the court dismissed the applicant's *inter alia* on grounds that the denial of the debt could easily be rebutted; that the denial did not meet the test of "*bona fide*" and "substantially disputed debt"; that the applicant should have filed an application for



further and better particulars of the claim; that it did not discharge the balance of proof on a balance of probabilities; and that the statutory demand is effective even when unsigned by the creditor and served personally.

4. The applicant states that aggrieved by the said ruling, it filed a Notice of Appeal and requested for certified copies of the proceedings for purposes of appealing. Further, it states that in its intended appeal, it will argue *inter alia* that the judge erred in law and fact in applying provisions of bankruptcy of natural persons to Insolvency proceedings; that he erred in concluding that the applicant did not demonstrate that there were genuine and substantial grounds for disputing the debt; that he erred in declining to set aside a Statutory Demand in respect of a debt disputed on substantial grounds and in good faith; that he erred in holding that an application for further and better particulars of the claim would have demonstrated good faith instead of a request for particulars by way of e-mail. Further, that the judge erred in law and fact in upholding a Statutory Demand that was not signed by the Respondent and /or served upon the Respondent; and, lastly, he erred in not appreciating the damage to the appellant's reputation arising from unjustified negative publicity.
5. The applicant also states that it has filed an application in the court of appeal seeking stay of proceedings in this court pending the hearing of the intended appeal which is pending directions/ruling but it has been delayed due to shortage of judges in the Court of Appeal. Lastly, it states that the Respondent has filed liquidation proceedings against the applicant and unless this matter is certified as urgent and orders sought granted, the Respondent will proceed with the Petition which will cause irreversible and irreparable injury to the applicant and render the stay application and intended appeal nugatory. The said grounds are explicated in the supporting affidavit of Kanchanbhai Dahyabhai Patel, a director of the applicant.

Respondent's Replying affidavit

6. The Respondent's opposition to the application is contained in the Replying affidavit of Mr. Moffat Muchangi Muriithi, its Sales and Security Manager dated 7th June 2021. The nub of the affidavit is that he applied for stay in the Court of Appeal which is pending determination. Further, that it has now filed the instant application seeking similar orders; that it filed Replying affidavits in this court and the Court of Appeal annexing documents establishing the debt but despite having the said documents, the applicant has continued to file applications without mentioning the documents and that the said debt still remains undisputed. Further, that this matter is scheduled for hearing on 7th July 2021 (now past); that other parties have since joined the proceedings, and that the instant application is frivolous, vexatious and an abuse of court process.

The applicant's advocates submissions

7. Mr. Mitugi, the applicant's argued that this court declined to set aside the Statutory Demand and that the applicant has appealed to the Court of Appeal against the said ruling. He relied on the grounds on the face of the application and argued that this court has the discretion to grant the orders sought. He placed reliance on the authorities in his list of authorities, particularly case numbers 2 and 3 in the said list. He submitted that the pertinent question is whether it is in the interests of justice for the court to exercise its discretion and grant the orders sought without imposing conditions. He stated that he filed the Notice of Appeal expeditiously and if the stay is refused, it may be impossible to reverse the process.

The Respondent's advocates submissions

8. The Respondent's counsel Mr. Mbaabu argued that the debt is not disputed, and that the applicant is not denying that it was in business with the Respondent. He argued that the applicant is using tactics to delay the Petition. He argued that they severally offered the applicant the chance to settle in vain.



He urged the court to impose conditions in the event it grants the stay. He pointed out that even in the cases cited by the applicant, the court imposed conditions for the stay.

Determination

9. Order 42 Rule 6 (1) & (2) of the *Civil Procedure Rules, 2010* 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 as may ultimately be binding on him has been given by the applicant
10. It's now an established position that the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting stay pending hearing and determination of an appeal. The tests were best explained by the Court of appeal in *Butt v Rent Restriction Tribunal*¹ as follows: -
11. Its correct to say that a reading of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 shows that the corner stone of the jurisdiction of the court under the said Rule is three-fold. One, that substantial loss would result to the applicant unless a stay of execution is granted.² Two, that the application has been made without unreasonable delay. Three, that 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.
 12. Numerous court decisions by our superior courts have explicated the above proposition to the extent that it can be said with certainty that the law is well settled (much as I ascribe to the view that the law is dynamic and courts should interpret the law in a manner that promotes

¹ Civil App No. NAI 6 of 1979

- a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
- c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
- d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

² See Gikonyo J in HCC No. 28 of 2014, *Trans world & Accessories (K) Ltd v Commissioner of Investigations & Enforcement*



its development). In *Andrew Okoko v Johnis Waweru Ngatia & another*³ the High Court had this to say:-

10. In *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.}} To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "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" while under section 1B some of the aims of the said objective are; 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.
11. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice..."

³ {2018} e KLR.



12. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position}} in *Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others* Civil Application No. Nai. 31 of 2016 in which it cited the Nigerian Court of Appeal decision of *Olusi & Another vs. Abanobi & Others* [suit No. CA/B/309/2008] that:...”

13. What constitutes substantial loss was broadly discussed in *James Wangalwa & Another v Agnes Naliaka Cheseto*⁴ as follows: -

“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... 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni*,⁵ ...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”

14. Also, in *Equity Bank Ltd vs Taiga Adams Company Ltd*,⁶ the court stated: -

15. Similarly, in *Elena D.Korir v Kenyatta University*⁷ the court had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd*⁸ where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- **Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

⁴ HC Misc. No. 42 of 2012, {2012} e KLR

⁵ {2002} 1 KLR 867

⁶ {2006} e KLR

“ The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant.”

⁷ {2012} e KLR

⁸ {1993} KLR 365



In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*⁹(2013) as follows:-

“ In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand ... and failure to prove one dislodges the other”.

16. In *Bansidhar v Pribhu Dayal*¹⁰ it was held that substantial loss should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances. The applicant should go a step further to lay the basis upon which court can make a finding that the it will suffer substantial loss. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted. It is not merely enough to repeat the words of the *Civil Procedure Act* and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure.¹¹ It is not sufficient for the applicant to claim that his operations will be adversely affected if it satisfies the decree.}}
17. An applicant is required to place before the court sufficient evidential support, establishing substantial losses. The words "substantial loss" cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.¹² There is no impeding execution in this case. The applicant seeks to stay hearing of the insolvency proceedings pending hearing of its intended appeal against its the ruling refusing to set aside the Statutory Demand. The applicant is worried about possible bad publicity if the hearing proceedings. It argues that the process cannot be reversed.
18. I am unable to be persuaded that if the hearing proceeds, the applicant will suffer substantial loss. One, regarding the fear of adverse publicity, it is my position that insolvency proceedings are class actions by their very nature. This is the reason why the proceedings are advertised. In fact, since the commencement of these proceedings other parties have since joined the proceedings. A secured Creditor has already filed an affidavit. Others may possibly join. Keeping insolvency proceedings in secrecy just for fear of adverse publicity goes against the statutory requirement that such proceedings be publicized. Its an invitation to this court to adopt a position that defeats a core statutory requirement.
19. Two, keeping such proceedings in secrecy when the law requires otherwise is tantamount to ignoring the interests of the public whom the law protects by requiring that such proceedings be advertised so that those dealing with the parties may do so from an informed position.
20. Three and more important, whereas widespread knowledge that a company is subject to a creditor's winding up petition can cause that company serious harm, where the creditor's winding up petition is warranted, this harm may just be an unfortunate consequence of a valid legal process being pursued against it. However, where the creditor's winding up petition is unwarranted, and is eventually dismissed because it is unwarranted, its dismissal will be 'cold comfort' to the company where, in the intervening period between presentation and dismissal, the company has suffered irreparable

⁹ {2013} e KLR

¹⁰ AIR 1954 Raj 1, Learned Judge Dave

¹¹ Ibid.

¹² See Anandi Prashad v. Govinda Bapu, AIR 1934 Nag 160 (D), Judge Vivian Bose A. J. C.



reputational and operational damage. Any damage thereby caused to the company is just a natural and unavoidable consequence of the winding up process. That is an element which must occur in every insolvency case and since the civil procedure rules expressly prohibits stay of execution as an ordinary rule, it is clear the words "substantial loss" must mean something in addition to and different from that¹³ what the applicant is suggesting. Applying the foregoing jurisprudence to the material placed before me, I find that the applicant has not established substantial loss.

21. The next issue is whether if the stay is not granted, the appeal, if successful, would be rendered nugatory. As was held in *Hassan Guyo Wakalo vs Straman EA Ltd*:¹⁴

“... the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”

22. The Court of Appeal in *Reliance Bank Limited v Norlake Investments Limited*¹⁵ stated that-“what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.” The appeal is against a ruling refusing to set aside a statutory demand. No argument was presented before me to suggest that the appeal will be rendered nugatory.

23. The other relevant consideration is whether the appeal has a good chance of success. First, the appeal is yet to be filed. Second, there was no argument before me to suggest that the unfiled appeal has a likelihood of success. No stay can be granted unless an applicant satisfies the court that if successful, the appeal would be nugatory. This proposition finds backing in *Chang-Tave v Chang-Tave*¹⁶ which held that under the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the court that he will be ruined without a stay of execution. This requirement finds emphasis in *Atkins v Great Western Railway Co*¹⁷ where the court held thus as a general rule, the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds. The applicant has failed to satisfy this condition.

24. The other test is whether the application was brought without delay. This ground was not disputed. I am satisfied that there was no delay in filing the instant application.

25. Also, an applicant is enjoined to provide security.¹⁸ There is no offer of security from the applicant. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay}}.¹⁹ The offer for security must come from the applicant as a price for stay. (See *Carter & Sons*

¹³ Ibid.

¹⁴ {2013} e KLR

¹⁵ {2002} 1 E.A. 227.

¹⁶ {2003} SLR 74, the Supreme Court

¹⁷ {1886} 2 T.L.R 400.

¹⁸ See *Republic vs Commissioner for Investigations & Enforcement*, Misc. App no 51 of 2015 (NBI),

¹⁹ Ibid



Ltd. v Deposit Protection Fund Board & 2 Others.²⁰) In *Equity Bank Ltd v Taiga Adams Company Ltd*²¹ it was held: -

“...of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” This proposition of the law was applied in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*.²²

26. As was held in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others*²³ that: -

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

27. This position was reiterated in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates* that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

28. Order 42 Rule 6 (2) is explicit that no order for stay of execution shall be made unless the conditions in paragraphs (a) & (b) are complied with. The applicant before me did not comply with the said provision.

29. Next is the question whether the applicant has demonstrated grounds for this court to exercise its discretion in its favour. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e., statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law. Whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of ‘discretion’ by Lord

²⁰ Civil Appeal No. 291 of 1997

²¹ Supra

²² Supra note 14

²³ {2015} e KLR.



Mansfield in *R. v Wilkes*²⁴ that 'discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular.'

30. Discretionary power should be exercised judicially, or as was held in *Smith v Middleton*²⁵ in a selective and discriminatory manner, not arbitrarily or idiosyncratically otherwise as Lord Diplock said in *Cookson v Knowles*²⁶ the parties would become dependent on judicial whim. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.²⁷ Discretion must be exercised in accordance with sound and reasonable judicial principles.
31. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances.²⁸ The exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.²⁹ As was held in *Global Tours and Travels Ltd*:³⁰

“... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

32. It is my finding that there is no basis at all upon which I can exercise my discretion and allow the application.

Conclusion

33. It should be clarified that the mere preferring of an appeal does not operate as stay of the decree or order appealed against. The power to grant stay is discretionary. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on an appellant. A court is not ordained to grant

²⁴ 1770 (98) ER 327

²⁵ {1972} SC 30.

²⁶ {1979} AC 556.

²⁷ Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, paragraph 1381.

²⁸ *Norbis v Norbis* [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.

²⁹ See Sir Dinshah F. Mulla, *Supra*, at page 1381.

³⁰ WC No. 43 of 200 (UR).



an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the court, while passing an order of stay, must try and put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

34. My evaluation of the decided cases discussed above, derives the following principles. First, the court must take into account all the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. Fifth, the court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.³¹
35. The proper approach must be to make that order which best accords with the interest of justice.³² If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.³³ Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.³⁴ This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.³⁵
36. The grant of the order of stay pending hearing of an appeal is not as a matter of course, though a discretionary remedy³⁶ which must be exercised both judiciously and judicially.³⁷ The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order sought is to stay proceedings. Stay of proceedings is a drastic step which must be taken only in deserving cases. There must therefore, in order to succeed in an application for stay of proceedings pending appeal, be a cogent, substantial and compelling reasons to warrant the depriving the other party the right to proceed with his case. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.³⁸
37. The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances which have received judicial approval are: -³⁹ (a). Destroy

³¹ {2011} EWHC 3544 (Fam)

³² Philips LJ in *Linotype-Hell Finance Limited v Baker* [1992] 4 All ER 887, at page 3

³³ *Ibid*

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ *Vas wani Trading Company v Savalak & Co* (1972) 12 SC. 77

³⁷ *Mobil Oil (Nig) Ltd. v Agadowagbo* (1988) 12 NWLR (Pt 77) 383, *Marina v Niconnar Food Co. Ltd.* (1988) 2 NWLR (Pt 74) 75, *Balogun v Balogun* (1969) 1 All NLR 349, *Olunloyo v Adeniran* (2001) 14 NWLR (pt 734) 699, *Okafor v Nnaife* (1987) (1987) 4 NWLR (pt. 64) 129

³⁸ *Onzulobe v Commissioner for Special Duties Anambra State* (1990) 7 NWLR (pt 161) 252.

³⁹ *UNIPORT vs. Kraus Thompson Organization Ltd.* (1999) 11 NWLR



the subject matter of the proceedings. (b). Foist upon the court a situation of complete helplessness. (c). Render nugatory any order or orders of the appeal Court. (d). Paralyze in one way or the other his constitutional right of appeal. (e). Provide a situation in which even if the appellant succeeds in his appeal there could be no return to the status quo.

38. Considering the circumstances of this case, it is my finding that the applicant has not met any of the tests to qualify for the stay sought. The upshot is that the applicant's Notice of Motion dated 19th May 2021 is unmerited. I dismiss the said application with costs to the Respondent.

Orders accordingly

Signed, dated and delivered via e-mail at Nairobi this 13th day of September 2021

JOHN M. MATIVO

JUDGE

