



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO 58 OF 2009

STAR FLOWER INTERNATIONAL. B.V1ST PLAINTIFF/APPLICANT

STAR FLOWER KENYA LTD.....2ND PLAINTIFF/APPLICANT

CW STAR BEHEER B.V3RD PLAINTIFF/APPLICANT

VERSUS

MOHAMED HASANALI ABDULLA.....1ST DEFENDANT/RESPONDENT

MAHMUD MOHAMED ABDULLA.....2ND DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated **11th January 2021** filed on **15th January 2021** seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to grant an order of stay of execution of the judgment and the Decree/ consequential orders pending the hearing and determination of the intended appeal.
 - d. That the costs of and incidental to this application be provided for.
2. The application is premised on the following grounds.
 - i. *That the honourable court delivered judgment and resultant therefrom is a threat of a decree and certificate of costs in favor of the respondents herein which is about to be executed.*
 - ii. *That the applicant/appellant herein has already filed a notice of appeal with intent to lodge an appeal and the record whereof within the shortest available time.*
 - iii. *That the automatic stay execution orders were granted for a limited period of 20 days, which are already due and if the orders sought herein are not granted and the Decree is executed, irreparable harm shall be occasioned*
 - iv. *That such extreme and highly prejudicial consequences before the lodgment, hearing, and determination of the intended appeal would subvert the ends of justice and render the appeal nugatory.*
 - v. *That the applicant has moved diligently and expeditiously in bringing this application and intends to expedite the lodgment of the record.*
 - vi. *That the applicant is willing to abide by any conditions set by this Honourable court for the grant of the orders sought herein.*
 - vii. *That it is therefore in the interest of justice and fairness that the prayers sought in the application filed herewith be granted.*
3. The application is supported by the affidavit of **Star Keys** reiterating the grounds of the application.

4. The defendants/respondents opposed the application on the following grounds: -

- a. *That the said application is bad in law, mischievous, frivolous, vexatious, totally incompetent, and should be struck out.*
- b. *That the applicant has not annexed the required written Authority to Act as required under **Order 4 Rule 1(4) of the civil procedure rules, 2010** nor does it include the resolution by the companies' respective boards to file the applicant.*
- c. *That the applicant does not meet the threshold for grant of stay of execution as desired under **order 42 rule 6(2) of the civil procedure rules 2010** as they have not annexed to their supporting affidavit sworn by star Keys on the 11th January 2021, a Draft memorandum of appeal demonstrating an arguable appeal.*
- d. *That the said application offends the provisions of **Order 42 Rule 6(2) of the Civil Procedure Rules 2010**, as the applicants have not annexed the Decree from which the stay of execution is sort to show the threatened execution.*
- e. *That the applicants have not verified that the Defendants/Respondents are men of straw who would be incapable of refunding the decretal sum once paid.*
- f. *That the plaintiffs/applicant have failed to establish that they will suffer substantial loss should this application be denied.*
- g. *That the said application is just an attempt by the plaintiff/applicants to deny the Defendant/ respondent an opportunity to enjoy the fruits of their judgment in the claim which has been in court, for now, a decade.*
- h. *That the applicants are silent on the issue of security which is a crucial element in seeking for stay of execution pending appeal.*
- i. *That allowing this application would be prejudicial to Defendant herein.*
- j. *That the application should be dismissed with costs to the defendants.*
- k. *That without prejudice to the above, if the court exercises its discretion in favor of the applicants, then order for security of costs should be made to the effect that the plaintiffs do pay the defendants half the decretal award and deposit the other half in a joint interest-earning account in the name of their advocates within 30 days.*

5. The application Proceeded by way of written submissions.

APPLICANTS SUBMISSIONS

6. The applicant submitted that the operating law guiding grant of stay orders is **Order 42 Rule 6(2)**. On the issue of substantial loss, the applicant submitted that the decretal amount is astronomically high; that the amount is to be paid in euros and the conversion rate is in flux for the foreseeable future due to economic uncertainty. Further that depositing the said sum will require realization from other ventures and the core business of the applicants would be greatly impacted as the business has not been a going concern for the 10 years the proceedings have subsisted and the applicant will suffer tangible loss.

7. The applicant further submitted that the respondents have not demonstrated they are able to refund the money in the event the appeal succeeds and cited the case of **National Industries Credit Bank Ltd vs. Aquinas Francis Wasike &Anor (2005) eKLR** where the court held as follows: -

“once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

8. The applicant submitted that the court should exercise caution as the decretal sum is Kshs 49,087,804.74 and the respondents have not proved they are in a position to refund the same.

9. The applicant submitted that there is no delay in bringing the current application and on the issue of security, they are ready and willing to pay security as and to the extent the court may order but added that the payment of security at this time would be burdensome and difficult to realize and urged this court to allow the application and grant stay.

DEFENDANTS SUBMISSIONS

10. The defendant submitted that judgment was delivered on 26th November 2020, dismissing plaintiff's claim and allowing the counterclaim of defendant in the sum of Kshs. 378,629.38 Euros.

11. The defendant submitted that the issue of stay pending appeal was discussed in the case of **Chris Mungai N. Bichage vs Richard Nyagaka Tongi & 2 others (2013) eKLR** where the court stated as follows: -

“..... the law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first his appeal or

intended appeal is arguable, that is to say, it is not frivolous, secondly, that if the application is not granted, the success of the appeal was it to succeed would be rendered nugatory. These two limbs must both be demonstrated and it would be enough that only one is demonstrated...”

12. The defendant submitted that the applicant has failed to attach a Memorandum of Appeal that will help the court in determining if the appeal is arguable and relied on the case of **African Cotton Industries Ltd Vs Patrick Wambua Ikusya (2021) eKLR** where the Court of Appeal relied on Memorandum of Appeal provided by the applicant to conclude that the grounds raised therein were arguable.

13. The defendant submitted that it is not disputed that the application has been brought without undue delay but the applicant has not demonstrated the substantial loss it will suffer if the prayers sought are not granted and execution of a decree is not a cause for substantial loss since a party has a right to enjoy the fruits of their judgment.

14. The respondent further submitted that the applicant has not proved that the respondents will not be able to refund the amount if paid and this being a money decree, cannot render an appeal nugatory. Further the applicant has not provided security for the performance of the decree and is therefore not deserving of the orders sought.

15. The defendant/respondent submitted that if this court exercises its discretion in favor of the applicants and grants the orders sought, the applicant be ordered to pay half the decretal amount to the respondent and the other half in a joint interest-earning account in the names of both advocates. Defendant urged this court to find the applicant has failed to demonstrate it has an arguable appeal, and the substantial loss to be suffered and dismiss the application.

ANALYSIS AND DETERMINATION

16. I have considered averments and submissions filed. What I consider in issue is whether the applicant has demonstration that the requirements for grant of stay of execution pending appeal have been met.

17. **Order 42 Rule 6 of the Civil Procedure Rules** sets conditions for grant of stay of execution pending appeal. It provides as follows: -

“(1)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 an application being made, to consider such application and to make such order thereon as may 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 sub rule (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.

18. The court in **Butt Vs Restriction Tribunal [1979] eKLR** stated conditions the court should consider before a stay of execution is granted as follows: -

i. “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.

ii. The general principle 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 that appeal court reverse the judge’s discretion.

iii. 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.

iv. 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 requirement.”

18. I note that in the instant case, Judgment was delivered on **26th November 2020** and the application dated **11th January 2021** was filed on **15th January 2021**. There was therefore no delay in filing the application.

19. The court has a duty to ensure that the intended appeal is arguable and not frivolous. The applicant herein intends to appeal against the award of damages from the judgment and/or the decree herein. However, he has not attached a memorandum of appeal, what has been attached is a notice of appeal. The court is therefore not able to consider whether the appeal is arguable.

20. On whether the applicant will suffer substantial loss if stay of execution is not granted, counsel for the applicant submitted that the decretal amount is in Euros and high and the respondent will proceed to execute as the respondents are men of straw and thus not in a position to refund the money if the appeal succeeds. The respondents on the other hand contend the decree is a money decree and are capable

of refunding the money. The respondents argue that they are capable of refunding the money though evidence to prove the contrary. There is no doubt that the respondent is expected to show they are capable of refunding the money once doubt of their ability is raised. The applicant's position in respect to deposit of security is that the company is experiencing some economic handoff, they propose grant of stay without an order for security.

21. **Order 42 Rule 6** of the Civil Procedure Rules, provide for deposit of security as a condition for grant of stay pending appeal. This court has a duty of balancing between the decree holder's enjoyment of the fruits of the judgment and the fears of the applicants; the respondent has asked half the decretal; be paid to them while the other half is deposited in the joint interest earning account of both advocates.

22. I have considered arguments by both parties and I am of the view that it is in the interest of justice to allow the application with conditions.

23. FINAL ORDERS

1) Stay of the execution of the judgment and/ or decree delivered on 26th November 2020 do issue on the following conditions: -

a) That the applicant does deposit half the decretal amount in a joint interest-earning account in the names of both advocates

b) A third of the decretal sum to be paid to the respondent.

c) Compliance of a) and b) within 45 days from the date of this ruling.

2. In default of the payment in b) and c), the stay of execution shall automatically lapse.

3. The costs to abide by the outcome of the appeal.

RULING dated, signed and delivered via zoom at **Nakuru**

THIS 18TH DAY OF NOVEMBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

JENIFFER - COURT ASSISTANT

MR. OPONDO FOR DEFENDANT

MR. BIKO FOR PLAINTIFF/APPLICANT