



**Kenol Kobil PLC v Canarian Holdings Limited (Environment & Land  
Case 111 of 2019) [2024] KEELC 4722 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4722 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 111 OF 2019**

**SM KIBUNJA, J  
JUNE 19, 2024**

**BETWEEN**

**KENOL KOBIL PLC ..... PLAINTIFF**

**AND**

**CANARIAN HOLDINGS LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff moved the court vide a notice of motion dated 23rd November 2023 seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination and of the Plaintiff's (Defendant in the Counterclaim's) intended appeal, this Honourable Court be pleased to grant an order of stay of execution of the Judgment and Decree delivered on 25th October 2023 herein.
  - d. That an appropriate order be made for costs of this application.

The application is premised on the four (4) grounds on its face, and supported by the supporting and further affidavits sworn by Kebao Mike, legal counsel for the plaintiff, on 23rd November 2023 and 11<sup>th</sup> January 2024 respectively, inter alia deposing that the plaintiffs intend to appeal against the entire judgment of 25<sup>th</sup> October 2023 and decree thereof; that the plaintiff has good grounds of appeal and the court should grant the stay order sought; that if it is made to pay the decretal sum to the respondent, it would have difficulties in recovering it if it eventually succeeds on appeal; that the intended appeal is arguable and was filed without undue delay; that the application is not premature as the respondent has taken steps to execute by filing the Bill of Costs dated the 28<sup>th</sup> November 2023, and that the plaintiff is willing to secure the decretal sum by complying with the conditions the court may direct.



2. The application is opposed by the defendant through the replying affidavit of Alex Trachtenberg, director with the defendant, sworn on 5th December 2023, inter alia deposing that the plaintiff has failed to meet the legal threshold prescribed under Order 42 rule 6 (2) of the [Civil Procedure Rules](#), and the application is only intended to obstruct the defendant’s right to enjoy the fruits of its judgement; that the plaintiff has not tendered any proof to show that the defendant will be unable to pay back the decretal sum if judgment is executed; that the plaintiff is a private company dealing with real estate, for example, the suit properties herein, and it is thus able to repay the decretal amount should the appeal succeed; that the application is premature; that should the court consider allowing the application, then it should be on condition that the plaintiff deposits as security the full monetary decree standing at Kshs.57,462,617.53 and USD 1,152,570.88 as at 30<sup>th</sup> November 2023, in a joint interest earning account in the names of the parties’ advocates, in a reputable bank and continue depositing the monthly mesne profits in respect of the suit properties, as they fall due.
3. The learned counsel for the plaintiff and defendant filed their submissions dated the 25<sup>th</sup> January 2024 and 5<sup>th</sup> February 2024 respectively, which the court has considered.
4. The following are the relevant issues for determinations by the court in the instant application:
  - a. Whether the plaintiff has met the threshold for an order of stay of execution pending appeal to issue.
  - b. What orders would serve the circumstances of this case.
  - c. Who bears the costs?
5. The court has meticulously considered the grounds on the notice of motion dated 23<sup>rd</sup> November 2023, the affidavit evidence, and the submissions by the learned counsel, the superior courts decisions cited thereon and has come to the following determinations:
  - a. This court delivered a judgment in favour of the defendant and counterclaimant on 25th October 2023. The plaintiff filed a notice of appeal dated 3rd November 2023, which constitutes an appeal, whose merits or otherwise should be canvassed before the Court of Appeal, and not this court.
  - b. The question of stay of execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules](#), which provides as follows:

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“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 to 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 for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

It is clear as submitted by Counsel for the defendant that the conditions in subrule 2 (a) and (b) above must be met simultaneously as they are not disjunctive. See the decision in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR. The main function of a stay of execution pending appeal is to preserve the suit property pending the logical conclusion of an appeal. The order is at the discretion of the court, which must be exercised judiciously, as opposed to whimsically as was held in *Butt versus. Rent Restriction Tribunal* [1982] KLR. The Court of Appeal in *RWW versus. EKW* (2019) eKLR addressed itself on this as hereunder:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

A similar position was also held by the Court of Appeal of Uganda in *Mugenyi & Co. Advocates vs. National Insurance Corporation* [Civil Appeal No. 13 of 1984]).

- c. The Counsel for the plaintiff argued that a stay of execution order pending appeal should issue where a party has an arguable appeal and relied on several superior courts decisions, which position counsel for the defendant did not agree with. The Court of Appeal in the case of *Vishram Ravji Halai versus. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, 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 (as it then was) 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. It is this court’s



finding that the requirement for an arguable appeal is no longer one of the conditions to be considered in applications for stay pending appeal since the advent of the Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The requirements in Order 42 rule 6 (2) are daily fare when it comes to matters of stay pending execution pending appeal. It is important to in passing as an obiter dicta to point out that responsibility of considering whether an appeal has arguable grounds should be the preserve of the appellate court, and not the court of first instance.

- d. This court agrees that the requirements for stay of execution are; substantial loss may result if stay is not granted; application must be made without undue delay, and security as the court orders for the due performance of such decree. Starting with question on whether or not there was undue delay in filing the application, there is no doubt that it was filed before the lapse of the previous orders of status quo of 25th October 2023, and it was therefore timeously filed.
- e. Substantial loss was described in *Kenya Shell Limited v Kibiru* [1986] KLR 410, it was held that:

“It is usually a good rule to see if Order XLI Rule 4 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.”

In the case of *James Wangalwa & Another case supra*, the court held:

“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.”

Counsel for the plaintiff has argued that there will be great difficulty in recovering the decretal amount from the respondent if the appeal is successful, and relied on the case of *Antoine Ndiaye versus African Virtual University* [2015] eKLR, where the court stated that a party appeal will be reduced to a mere explorer if he/she does what the decree commands without any prospects of recovering his/her money should the appeal succeed.

- f. The counsel for the defendant argued that the burden of proving that the defendant does not have the financial capability of refunding the decretal amount is on the plaintiff, who has failed to tender prove. Further, counsel stated that the defendant is not a ‘man of straw’.
- g. In balancing the two competing interests of the plaintiff recovering back the decretal amount should the appeal succeed, and the defendant enjoying the fruits of its judgment, I am guided



by the Court of Appeal decision in the case of *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, where it stated as follows:

“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...”

Both counsel and the parties have in principle one common position that the court may consider granting the stay order on condition that security is provided. The value of the security has however not been agreed upon. This position tallies with the third condition for granting stay of execution. I therefore find the application has merit and stay of execution order should be granted on condition security is provided in the terms to be determined by the court.

- h. Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events, unless where for good cause the court directs otherwise. As this application is tied to the pending appeal before the Court of Appeal, I am of the view that justice in the case would be better served by an order that costs abide the outcome of the appeal.
6. Flowing from the foregoing determinations, the court finds merit in the plaintiff’s application dated the 23<sup>rd</sup> November 2023 and orders as follows:
- a. That stay of execution order of the judgement and decree of 25<sup>th</sup> October 2023 is granted as prayed in prayer (3) to be in force pending the hearing and determination of the appeal before the Court of Appeal, on the following two conditions;
    - i. That the plaintiff to deposit the whole decretal amount, as of the date of the judgement, in an interest earning account in the names of advocates both parties, in a financial institution, within sixty (60) days from today.
    - ii. That the plaintiff to also deposit all the accrued mesne profits to date, in the said account in sixty (60) days from today, and continue depositing the monthly mesne profits in the said account before the last day of every month.
  - b. That should the Plaintiff fail to comply with any of the above conditions, the stay order to automatically lapse.
  - c. That the costs in the application to abide the outcome of the appeal pending before the Court of Appeal.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : M/s Onyango

Defendant : Mr. Okoth, Ochieng and Obegi.



Leakey – Court Assistant.

S. M. Kibunja, J.

