



Ponders Limited v Kihumba (Employment and Labour Relations Appeal E049 of 2024) [2024] KEELRC 13450 (KLR) (13 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E049 OF 2024
AN MWAURE, J
DECEMBER 13, 2024**

BETWEEN

PONDERS LIMITED APPELLANT

AND

GLADYS WAITHERA KIHUMBA RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion dated 13th September 2024 under a Certificate of Urgency seeking orders that:
 1. Spend
 2. There be a stay of execution of the decree herein pending hearing and determination of this application and appeal
 3. Costs of the application

Appellant/Applicant's case

2. The application is supported by the affidavit of Alpeshkumar Patel, the Appellant/Applicant's Managing Director.
3. He avers that the Respondent obtained a decree in Nakuru MCELRC No. E077 of 2023 and proclaimed the Appellant/Applicant's goods.
4. He avers that the Applicant has already appealed against the decree issued by filing a memorandum of appeal and requested for typed proceedings.
5. He avers that the Applicant is willing and ready to deposit the decretal sum in court or in an interest-earning account as a condition of stay of execution pending appeal.



6. He avers that if the stay of execution is not granted, the Applicant will have difficulty recovering the decretal sum from the Respondent rendering the appeal nugatory.
7. He also avers if the stay is not granted, the Applicant will be prejudiced and suffer a substantial loss that may not be recovered.
8. He avers that it is fair that the application is granted as prayed.

Respondent's case

9. In opposition, the Respondent filed a replying affidavit dated 23rd September 2024.
10. The Respondent avers that the Appellant/Applicant has not fulfilled the legal requirements set out in Order 42 Rule 6 of the Civil Procedure Rules.
11. The Respondent avers that she is entitled to enjoy the fruits of her judgment and the application before is just a delaying tactic by the Appellant/Applicant.
12. The Respondent avers that the Appellant/Applicant had already been issued with a thirty-day stay of execution from the trial court from 29th May 2024 which lapsed on 29th June 2024 but chose not to take action until its motor vehicles were proclaimed.
13. The Respondent avers that the auctioneers have already proclaimed the Appellant/Applicant's motor vehicles and the certificate of urgency filed on 18th September 2024 and stay order interim declined has been overtaken by events.
14. The Respondent avers that the court has the power to grant a stay of execution pending appeal. This decision is discretionary and should be made judiciously, as it is important to balance the Appellant/Applicant's rights with those of the decree-holder, who is entitled to the benefits of the decree.
15. The Respondent prays that the application be dismissed with costs. However, if the application is allowed, there should be a condition that the Appellant/Applicant deposits the full decretal sum in a joint interest-earning account in both parties' advocates' names and covers the auctioneer's costs pending the appeal's outcome.

Appellant/Applicant's submissions

16. The Appellant/Applicant submitted Order 42 Rule 6 of the Civil Procedure Rules set out the conditions of stay of execution which are summarized as follows:
 - a. Substantial loss may result to the applicant unless an order is made
 - b. Application is made without unreasonable delay
 - c. Security as the court orders for the due performance
17. In *Butt V Rent Restriction Tribunal* [1979] eKLR the Court of Appeal considered the following conditions granting or refusing a stay of execution pending appeal as follows:
 - 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 principle in granting or refusing a stay is; that if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that 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 unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - e. Finally, the court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
18. The Appellant/Applicant submitted that paying the large decretal sum would cause irreparable and substantial loss, crippling its operations. This diversion of essential funds would negatively impact the business and those who depend on it.
 19. The Appellant/Applicant relied on the case of *Tropical Commodities Suppliers Ltd V International Credit Bank Ltd (in liquidation)* [2004] EA 331 Ogalla J stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
 20. The Appellant/Applicant submitted that the application was made in good faith and not meant to deny justice to either party involved therefore the application was timely. The Appellant/Applicant relied on the case of *Antoine Ndiaye V African Virtual University* [2015] eKLR the court held that the application for stay of execution was made timeously.
 21. The Appellant/Applicant submitted that the court has the discretion to set security terms which should be just and reasonable as provided under Order 42 Rule 6(2)(b) of the Civil Procedure Rules. In *Gianfranco Manenthi and another V African Merchant Assurance Co. Ltd* [2016] eKLR it was held that the applicant must meet the condition of paying security for the due performance of the decree. This is required for a party seeking to appeal a money decree from a lower court and obtain an order of stay. Under Order 42 Rule 6(1) of the Civil Procedure Rules, the security ensures that the winner of the litigation can execute the decree and enjoy the fruits of the judgment if the appeal fails.

Respondent's case

22. The Respondent reiterated Order 42 Rule 6 of the Civil Procedure Rules which set out the conditions for stay of execution.
23. The Respondent submitted that the Appellant/Applicant delayed in making the application for a stay of execution. Moreover, the Appellant/Applicant failed to demonstrate the substantial loss it would suffer without the stay and did not provide security for the due performance of the decree. As a result, it did not meet the conditions for granting a stay of execution pending appeal.
24. The Respondent submitted that it was the Appellant/Applicant's responsibility to prove that the Respondent would be unable to refund any sums paid in satisfaction of the decree if the appeal was



successful. In *Indus Trading Limited & another v Charles Aricha* [2021] eKLR Justice Odunga stated that:

“It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer

loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the status quo would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay.”

25. The Respondent submitted that the Appellant/Applicant failed to demonstrate the substantial loss it would suffer if the stay of execution was not granted. Also, it did not prove that the Respondent is a person of no means or unable to refund the decretal sum of Kshs.389,879.40 if paid. Therefore, it has not met the necessary conditions for granting the stay.
26. The Respondent relied on the case of *Kenya Shell Limited V Kibiru* [1986] KLR 410 as quoted in *Indus Trading case (Supra)* where the court expressed itself stating that to substantiate Order XLI Rule 4 of the Civil Procedure Rules, there must be evidence of substantial loss to the applicant, as this is crucial for granting a stay. Simply stating that a sum of money is significant is insufficient; the applicant must demonstrate the specific damages they would suffer if a stay is not granted. Granting a stay means maintaining the status quo before judgment, but it must be balanced against denying a successful litigant the fruits of their judgment.
27. It is in the Respondent’s submissions that the Appellant/Applicant is willing to provide security for the due performance of the decree, as stated in its replying affidavit. The court has the discretion to determine the form and nature of this security, and it must exercise this discretion judiciously. It should balance the rights of an unsuccessful party to appeal with the rights of the successful party to enjoy the fruits of their judgment.
28. The Respondent relied on the case of *Machira T/A Machira & Co Advocates V East African Standard* [2002] eKLR the court held that focusing solely on protecting an Appellant while ignoring the successful party is contrary to judicial discretion. A successful party should enjoy the fruits of their judgment. Courts must balance this principle with ensuring justice and preventing abuse of court processes when handling applications for stay of proceedings or execution pending appeal.
29. The Respondent submitted that in the event this Honourable Court allows the application for stay pending appeal, then there should be a condition that the Appellant/Applicant deposit the entire decretal sum of Kshs.389,879.40 /= in a joint interest-earning account in the names of the advocates of the parties citing the case of *Njuca Consolidated Co. Ltd & another V Lineth Chemutai Moritim* [2017] eKLR the court ordered the Appellants, in their application for a stay pending appeal, to deposit the full decretal sum into a joint interest-earning account held in the names of the advocates for both parties. This measure is intended to assist the court in determining appropriate security for the due performance of the decree.

Analysis and determination

30. I have considered the application, replying affidavit as well as the submissions by both counsels and the precedents. The issue of determination is whether the application is merited.



31. The conditions for granting or denying a stay of execution pending appeal have been reaffirmed under Order 42 Rule 6 of the Civil Procedure Rules and *Butt V Rent Restriction Tribunal (Supra)*.
32. In this instant case, the Appellant/Applicant has demonstrated before this Honourable Court that it filed the memorandum of appeal on time and without unreasonable delay. Judgment was delivered on 22nd May 2024 and the Memorandum of Appeal was filed on 26th June 2024 and hence there was no delay. After decree was issued on 22nd July 2024 this application was filed on 13th September 2024.
33. The Appellant/Applicant also demonstrated that the Respondent's auctioneers have proclaimed its motor vehicles which is a tool of trade.
34. The Appellant/Applicant is willing to deposit the security in court or in a joint interest earning account of the respective counsels.
35. In view of the foregoing, this Honourable Court holds the application dated 13th September 2024 is merited and is granted as follows: -
 - a. An order for stay of execution be and is hereby issued pending the hearing and determination of the appeal.
 - b. The entire decretal sum of Kshs. 389,879.40 /= shall be deposited in a joint interest earning account opened in joint names of the Appellant/Applicant and Respondents' advocates by 28th January 2025.
 - c. The Appellant/Applicant shall prepare, file, and serve a record of appeal and set the same for directions before 28th January 2025.
 - d. In default of (b) and (c) above, the stay orders shall automatically lapse and execution will proceed automatically.
 - e. The Appellant/Applicant is responsible for paying the auctioneer's fees as will be agreed.
 - f. The costs of the application shall abide in the appeal.
 - g. Case will be mentioned on 28th January 2025 to confirm compliance and to give further directions.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 13TH DAY OF DECEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of



the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

