



**Regency Slots Limited v Omwoyo (Appeal E172 of 2021)
[2022] KEELRC 3977 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3977 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E172 OF 2021
K OCHARO, J
SEPTEMBER 20, 2022**

BETWEEN

REGENCY SLOTS LIMITED APPELLANT

AND

PETER OSUGO OMWOYO RESPONDENT

RULING

1. Before me for determination is an application dated January 18, 2022, which seeks the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this application there be and is hereby issued an order of stay of execution of the judgment delivered by Hon AN Makau (Ms) Principal Magistrate on the December 10, 2021 and all consequential orders therefrom.
 - iii. That pending the hearing and determination of this Appeal there be stay of execution of the Judgment Delivered by Hon AN Makau (Ms) Principal Magistrate on December 10, 2021 and all consequential orders
 - iv. That costs of this application be provided for.
2. The application is supported by the affidavit of John Hinga , the general manager of the appellant/ applicant with the authority of the board of directors of the appellant/ applicant, sworn on April 18, 2022 in which he reiterated the grounds set out on the face of the application.
3. It is that the respondent instituted a claim against the appellant before the Chief Magistrates Court being CMEL Cause No 1992 of 2019 and a judgment was entered against the appellant December 10, 2021 for KShs 536,000
4. The appellant being dissatisfied with the judgment, preferred an appeal against the decision.



5. The appellant asserts that it is apprehensive that the respondent might proceed to obtain the decree and take out execution proceedings if the orders sought are not granted.
6. The applicant contends the respondent may not be able to refund the decretal amount should the appeal succeed. It has an appeal which is arguable, with high chances of success.
7. The applicant is willing to comply with any condition[s] that the court will attach to the orders of stay, including depositing the decretal amount in court or in joint interest-earning account held by both parties.
8. The applicant states that they have applied for certified copies of the proceedings and the judgment and is keen to have the appeal heard expeditiously.
9. In response to the application the respondent filed replying affidavit sworn on the March 17, 2022 in which the respondent avers that the application is pre-mature as no decree as been extracted nor costs assessed.
10. The respondent argues that the applicant has not discharged the burden placed on it to demonstrate that he lacks the capacity to refund the proceeds of the judgment should the appeal succeed.
11. He asserts that that he is a man of means and will be able to pay the decretal sum. He owns five acres of land known as LR 990 Kisii where he grows tea and sugar cane, he further states that he keeps dairy cattle and supply milk to the sub-county, he also states that he owns a motorcycle that earns him Kshs 50,000 a month.
12. The application is only meant to delay him from enjoying the fruits of his judgment. It should be declined. It has been made in bad faith as it is made after a long period from the date of lapse of the stay of execution that was granted by the trial court.
13. It was argued that first the application is bad in law as the applicant ought to have approached the lower court first before filling this application in this court. The move is contrary to order 42 rule 6 of the [Civil Procedure Rules](#) and urges the court to dismiss it with costs.

Submissions

14. On the March 28, 2022, parties took directions to dispose of the application by way of written submissions

Applicant's Submissions

15. The applicant in its submissions rely on the provisions of order 42 rule 6 of the [Civil Procedure Rules, 2010](#), which provides the grounds on which a court of law can allow an application for stay of execution which are:
 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made
 - b. The court is satisfied that the application has been made without unreasonable delay; and
 - c. 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.
16. The applicant relies on the holding in [HE v SM](#) (2020) eKLR, thus, “an applicant for a stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2)”



17. The applicant submits that it stands to suffer substantial loss if the application is not allowed as its accounts and assets of are at risk of being attached by the respondent following the lapse of the stay execution period, granted by the trial magistrate.
18. The applicant submits that its apprehensive the respondent may not be in a position to refund the decretal amount nor will they be able to recover the same as he has not provided any proof that he has the means to refund the same upon the success of the appeal.
19. The applicant relies in the holding in *National Industrial Credit Bank Limited vs Aquinas Francis Wasike & another* (2006) eKLR wherein the court held;

“the court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum. It is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that the respondent would be unable to pay back the decretal sum the evidential burden must shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”
20. The applicant submits that the adduced photographs of the tea and sugarcane plantation, cattle and motorcycle are not sufficient proof that respondent owns them and further submits that he would have attached copies of the title documents.
21. The applicant submits that there has been no delay in filling the instant application as alleged by the respondent. The stay of execution period granted by the trial court lapsed on January 10, 2022 and the instant application was filed on January 20, 2022. To buttress this submission, it relies on the holding in the case of *Mwangi S Kimenyi V Attorney General & another* (2014) eKLR where the court held:

“There is no measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case.....”
22. The applicants pray that costs follow event and placed their reliance on section 27(1) of the *Civil Procedure Act* which states that awarding of costs shall be at the discretion of the judge.

Respondent’s Submissions

23. The respondent submits that the conditions for granting stay are;
 - i. Satisfaction of substantial loss
 - ii. Furnishing security
 - iii. The application must be made without unreasonable delay
24. The respondents rely in the holding in *Victory Construction vs BM) a minor suing through the next of friend PMM)* 2019 eKLR where it was stated that when a court is confronted with such circumstances it should 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. The court in exercising its discretion should always opt for the lower than the higher risk of injustice.
25. The respondents submit that the applicant has not provided any documentary evidence to demonstrate that it is likely to suffer substantial loss, and its extent. An allegation by the applicant that its goods are likely to be attached is not sufficient demonstration of substantial loss.



26. The respondent submits that he was the successful party in the original suit and denying him the fruits of his judgment merely because he may not be a man of the level means as expected by the applicant is unjust.
27. The respondent submits that in the case of *Victory Construction* the court observed that unsuccessful litigants re quick to file applications for stay pending appeal and urges the court to have its sight firmly fixed in upholding the overriding objective which is to do justice in accordance with the law and to prevent the abuse of court.
28. The respondent submits that this application was filed 40 days after judgment was entered, indicative that it was an afterthought and only meant to frustrate him.
29. The respondent urges the court to uphold justice by striking out the appellant's application as the same is a waste of the judicial time and non-compliant with the threshold provided under order 42 rule 6 of the *Civil Procedure Rules*.

Analysis and Determination

30. I have considered the application filed by the applicants herein, the response by the respondent and the submissions. There is only one broad issue for determination, thus: -
 - a. Whether the applicant has met the threshold for stay of execution, pending the hearing of the appeal herein. Whether the applicants are entitled to the orders sought.
31. The requirements for the grant of stay of execution pending appeal were set out in *Butt v Restriction Tribunal* (1982) KLR, namely;
 - 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 the appeal if successful from being nugatory.
 - II. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal may not be rendered nugatory should the appeal court reverse the trial court's decision.
 - III. 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.
32. In the instant case, judgment was delivered on December 10, 2021 and the respondents were granted 30 days stay of execution. On the 22nd December the appellants filed an being the appeal herein assailing the judgement.
33. The appellants vide a letter dated December 10, 2021 requested for a copy of the judgment, decree and certified copies of the court proceedings.
34. The respondents on the other hand have procured warrants of attachment dated April 14, 2022 and instructed Mbusera Auctioneers to execute the decree flowing from the judgement.
35. The instant application was filed 10 days after the lapse of the stay duration issued by the trial court.
36. Order 42 rule 6 of the *Civil Procedure Rules* stipulates the conditions necessary that an applicant for orders of stay of execution pending the hearing and determination of an appeal must satisfy in order to attract a favourable exercise of the court's discretion under the provision, they are:
 - a. That the application is brought without undue delay



- b. That substantial loss may result to him or her unless stay of execution is ordered; and
 - c. Such security as the court orders for the due performance of such decree or order as many ultimately be binding on him or her has been given by the applicant.
37. The application having been brought 10 days after the lapse of the period for stay of execution I find that there was no undue delay on the part of the applicant.
38. The applicant contended that the respondent is not a man of means that can enable him refund the decretal sum should its appeal succeed, with a consequence that the respondent is required to refund the same. The respondent in my view has not addressed this issue in a manner that can be termed sufficient. He alleges that he is an owner of a five-acre parcel of land, yet he exhibits no evidence of ownership. Reasonably, one would expect him to place forth a title deed in regard thereto or an extract of title. The title number cited seems to court, just a number given for the sake of this application. He has too not shown any ownership document for the alleged motorcycle. He was under a duty to demonstrate *prima facie* that he is not, a man of straw, and one that cannot be able to refund the sum of the decree should he be called upon to following a successful prosecution of the appeal herein by the applicant.
39. The applicant has indicated its willingness to comply with this court's condition[s] regarding security as contemplated under the provisions of order 42 rule 6, that it might attach to a grant of the orders sought.
40. This court is satisfied that the applicant has met the conditions necessary for a grant of the orders sought in its application, and in the interest of justice, the application is allowed on condition that the applicant do deposit the entire decretal sum in a joint interest earning account in the names of both counsel for the parties within 30 days from the date of this ruling, in the defaulting the orders stand vacated.

READ SIGNED AND DELIVERED THIS 20TH DAY OF SEPTEMBER, 2022.

OCHARO KEBIRA

JUDGE

