



**Roy Estates Limited v M’Anampiu (Environment and Land Appeal
E071 of 2024) [2024] KEELC 7251 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E071 OF 2024**

CK NZILI, J

OCTOBER 30, 2024

BETWEEN

ROY ESTATES LIMITED APPELLANT

AND

JAPHET MWORIA M’ANAMPIU RESPONDENT

RULING

1. In an application dated 24.9.2024, the applicant is seeking orders of stay of execution of the court orders of 18.9.2024 and an extension of time to comply with the consent made on 7.8.2024 by 5 months. The application is premised on Sections 1 A, 1B, and 1C of the *Civil Procedure Act*, Order 42 Rule 6, Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules. The grounds on the face of the motion and the supporting affidavit of the director of the applicant, Shemir Omar, are that the trial court allowed the motion dated 16.8.2024 with costs and for the contemnor, a director of the applicant, to appear in court for sentencing on 25.9.2024.
2. The deponent avers there is a pending appeal since the trial court did not consider the entire evidence on record to find him in contempt of the orders of 7.8.2024. The applicant avers that he failed to honor the consent due to a medical emergency of one of the directors of the applicant, Omar Yakub and that the conduct was not deliberate.
3. Further, the deponent avers that unless the orders are granted, the applicant will suffer substantial loss, and is in the interest of justice to balance the rights of parties, the respondent will not suffer any prejudice; is willing to furnish security; the appeal is arguable with a high probability of success; the application is made timeously and without undue delay. He annexed a copy of the court order and medical reports as SOY “1 & 2”.
4. In a replying affidavit dated 25.9.2024, the respondent avers that the application is frivolous, vexatious, and an abuse of the court process. It is averred that the applicant defied the court order for 25.9.2024;



- he has come with unclean hands; he was not unwell; he failed to annex the court order, draft memorandum of appeal, and the alleged request for proceedings.
5. Similarly, the respondent avers that the suit subject is a building in Meru town on the verge of collapsing and many lives are or are likely to be endangered; the applicant was to comply with the consent order within a week; he later prayed for a month and is now seeking five months within which to comply. Again, the respondent avers that a consent judgment can only be varied on account of fraud, collusion, illegality, mistake, contrary to public policy, absence of sufficient facts, or ignorance of material facts which the applicant has not demonstrated. The respondent has attached a copy of the summons and photos of the building as JMM “1-2” and he prays for the application to be dismissed.
 6. On 26.9.2024, this court granted leave to the applicant to file a supplementary affidavit, ordered parties to canvass the application through written submissions, and suspended the warrant of arrest against Shemir Omar pending this ruling.
 7. It appears that it is only the respondent who complied by filing submissions dated 11.10.2024. He submits that the applicant has not met the threshold for the grant of the orders sought. He failed to deposit Kshs.1,535,631/= for the purposes of reconstructing a retention wall and is thus in contempt of the consent orders. On whether the trial court accorded the applicant a fair hearing, the respondent submits that it did as it had directed parties to file responses and submissions.
 8. Further, the respondent submits that the applicant has not explained why he has been unable to comply and is therefore not genuine and is taking the court for granted. That extension of time to comply will be in vain, as time is of the essence. Reliance was placed on *Lazarus Kirech vs Kisorio Arap Barno (2008)*, *Board of Trustee National Social Security Fund vs. Micheal Mwalo (2015)*, *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd (1982) KLR* and *Koilel & 2 others vs Koilel & Another (2022) KEHC 10288 (KLR)*.
 9. The applicant, on its part, opted to file a letter explaining that it has not been able to access the lower court file for it to extract the consent order and the proceedings. The court takes great exception to the manner in which the applicant is taking this matter casually.
 10. The applicant is seeking to have the orders of 18.9.2024 stayed, where the trial court found the director in contempt and was due for sentencing on 25.9.2024, the day he opted to file this application and the appeal. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The prerequisites that must be met sequentially for grant of stay orders are substantial loss, unreasonable delay, security for costs and show that it is in the interest of justice to grant the orders sought.
 11. In *James Wangalwa vs Agnes Naliaka Cheseto (2012) eKLR*, it was held that it is not enough for a party to state that execution was imminent, given that execution is a legal process. A party has to offer tangible and cogent evidence to demonstrate immense suffering if the execution ensues and or offer any security for the due realization of the decree should the appeal fail, as held in *Butt vs Rent Restriction Tribunal (1982) KLR 417. I*.
 12. The order appealed against was issued on 18.9.2024, while this appeal and the application were filed on 25.9.2024. An application for a stay has to be brought without unreasonable delay. The law has not specified what is minimum or maximum delay is. The respondent has, in his affidavit admitted that the conviction for contempt has been issued against one of the directors of the appellant, who now awaits a sentencing. In paragraph 10 of the supporting affidavit of Shemir Omar Yakub, he expresses apprehension that he risks being put in civil jail, hence losing his right to liberty, yet there is a pending appeal by the appellant.



13. What is before the court is a stay of execution of an order made on 18.9.2024, which found the appellant in breach of a consent judgment and found it and its directors guilty of contempt of court. The trial court proceeded to issue a warrant of arrest on 25.9.2024 against Shemir Omar Yakub, after failing to appear before the trial court for sentencing.
14. Substantial loss is what should be prevented from happening; otherwise, the substratum of the appeal dissipates, rendering the appeal nugatory. In *RWW vs EKW*(2019) eKLR, the court held that in doing so, it must weigh rights of appellant against the success of a litigant who should not be denied the right to enjoy the fruits of his judgment, so that no party suffers prejudice that cannot be compensated by way of costs.
15. Deprivation of the personal liberty of the appellant's director is imminent. The warrant of arrest disclosed has been brought to this court. In *Republic vs Director of Lands and Urban Planning Makueni County Government ex parte; Edward Mutinda and others* (2015) eKLR, the court held that where the liberty of an applicant was at risk or jeopardy, the court would usually grant stay, for to decline to do so would lead to an imprisonment, that cannot be undone if the appeal succeeds. In *United Insurance Co. Ltd vs Stephen Ngare Nyamboki Civil Appeal No Nai 295 of 2001*, the Court of Appeal said that if the order for imprisonment were to be enforced, even if for a few days and the intended were to succeed, that success would obviously be rendered nugatory.
16. In *Nation Media Group vs Child Welfare Society of Kenya* (2021) eKLR, the court was about to render its sentence, having found the appellant and the alleged contemnors guilty of contempt of court. The court found the apprehension that there was a likelihood of denial of personal liberty through a custodial sentence quite true, for there was also no guarantee that the trial court would simply condemn the contemnors to pay a fine and, in default, serve an alternative prison sentence.
17. Guided by the cited case law, the applicant has an undoubted right of appeal on whether or not the decision finding it guilty of contempt of court should stand. That right would obviously be rendered nugatory if the sentencing occurs. Deprivation of personal liberty is not a mere apprehension in this case, for there is already a warrant of arrest. I note that the applicant has not appealed against the consent judgment. It came up as a compromise to an application dated 8.7.2024, entering judgment for Kshs.3,071,262.40/=, for purposes of putting up a retention wall on plot L.R Meru Municipality Block/11/79. Kshs.1,535,631.20/= was to be paid on or before 12.8.2024, and the 1st monthly installments for the balance were to start on 19.8.2024. None of the conditions were met on time or at all save for Kshs.100,000/=.
18. The circumstances leading to the default are related to the alleged sickness of one of the applicant's directors, which the respondent has not denied. In the circumstances, I find this a proper case to grant a stay of execution. The applicant is ordered to deposit Kshs.1,000,000/= as security for the due performance of the decree should the appeal not succeed, within 3 days. The lower court file be availed. Mention on 14.11.2024.
19. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 30TH DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE

In presence of



C.A Kananu

Mukobi for Wachira for appellant

Kaba for Maranya for respondent

