



Orego & Odhiambo t/a Orego & Odhiambo Advocates v China Road & Bridge Corporation (Environment & Land Miscellaneous Case E118 of 2023) [2024] KEELC 7234 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E118 OF 2023**

**MD MWANGI, J
OCTOBER 29, 2024**

BETWEEN

**FREDRICK OREGO & COLLINS ODHIAMBO T/A OREGO & ODHIAMBO
ADVOCATES ADVOCATE**

AND

CHINA ROAD & BRIDGE CORPORATION CLIENT

((In respect of the Client’s Application dated 7th June, 2024 seeking to stay the execution of the judgment dated and delivered herein on 9th May,2024))

RULING

(In respect of the Client’s Application dated 7th June, 2024 seeking to stay the execution of the judgment dated and delivered herein on 9th May,2024)

Background

1. This ruling is in respect to the Client/Applicant’s application dated 7th June, 2024 praying for orders that: -
 - a. The Honourable Court be pleased to stay the execution of the Judgement dated and delivered herein on 9th May, 2024 pending the hearing and determination of the Intended Appeal.
 - b. The Client be granted leave to appeal to the Court of Appeal against the whole of the Ruling of this Honourable Court dated and delivered on 9th May, 2024.
 - c. The costs of this Application be in the cause.
2. The application is premised on the grounds on the face of it and further supported by the Affidavit of William Ouko, the Client’s Public Relations Officer, deponed on 7th June, 2024. The Deponent



avers that the Client filed a Reference dated 11th December, 2023 seeking to set aside the Taxing Master's Ruling on the Advocate's Bill of Costs dated the 4th May, 2023. This Court however in its Ruling delivered on the 9th May, 2023 dismissed the Client's Reference and allowed the Advocate's application for entry of judgement in the taxed sums.

3. The Client being aggrieved by the Ruling of this Court intends to appeal against the same to the Court of Appeal thus seeks leave to lodge an appeal. It argues that it has an arguable appeal and intends to ventilate the same before the Court of Appeal.
4. The Client faults this Court for failing to take into account the sums of money already paid to the Advocate as well as the mutual agreement made between the parties on the fees payable. The Client is apprehensive that if the stay is not granted, the intended appeal shall be rendered nugatory.

Advocate's Replying Affidavit

5. The Advocate opposed the application through a Replying Affidavit sworn by one Olendo Cecilia on the 24th June, 2024. The Advocate contends that although the application has been made timeously in compliance with the provisions of Order 42 Rule 6 of the Civil Procedure Rules the Client has not established any substantial loss that it is likely to suffer as it is aware that it owes the Advocate his legal fees. Further, and in any event that should the appeal succeed, the Client shall be at liberty to recover the money paid from the Advocate.
6. The Advocate further avers that the Client has not offered any security which is a mandatory condition to be met before an order of stay of execution is granted. The application must therefore fail.
7. The deponent avers that the court has to strike a balance between the Client's right to appeal and that of the Advocate to enter his duly earned legal fees. The Advocate avers that should the Court be inclined to allow the application, the Advocate be paid half of the decretal sum and the remainder be deposited in a joint interest earning account to protect the interest of both parties. The Client has not denied that it indeed instructed the Advocate to represent it in the main suit.
8. On the prayer for leave to appeal, the Advocate avers that he is not opposed to the said prayer.

Court's Direction

9. The Court's directions were that the application be canvassed by way of written submissions. Both parties complied. The Client filed its submissions dated 19th September, 2024 whereas the Advocate's submissions are dated 5th July, 2024. The Court has read through the submissions which form part of its record.

Issues for Determination

10. Having considered the application, the replying affidavit and the submissions filed by the parties the sole issue for determination is whether the Client has satisfied the conditions for the grant of stay of execution pending the hearing and determination of the intended appeal in the Court of Appeal.

Determination

11. The application for leave to appeal against the decision of this court was unopposed. Accordingly, on the 1st July 2024, the same was granted. This ruling is therefore in respect to the application for stay of execution pending appeal only.



12. In making the decision in this matter, I will consider two decisions on the issue of stay of execution pending appeal. The 1st one is in the case of Edward Kamau & Another -vs- Hannah Mukui Gichuki & Another [2015] eKLR where the Court held that:

“The right of appeal, it has been held time and again, is a Constitutional right which is the Cornerstone of the rule of Law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of *the Constitution* and also a denial of a right to a fair hearing guaranteed under Article 50 of *the Constitution* which latter right cannot be limited under Article 25 of the said Constitution.”

13. The 2nd decision is the case of Tanui Robert & Another -vs- Jessica Adikinyi Afwande [2021] eKLR, where the High Court held that it was obligated to balance the Applicant’s undoubted right of appeal against the Respondent’s right to enjoy the fruits of her judgment.

14. The Court of Appeal in the case of Vishram Ravjiltalai -vs- Thornton & Turnip (Civil Application No. Nai 15 of 1990 [1990] KLR 365 observed that whereas the Court of Appeal’s power to grant stay pending appeal is unfettered, the High Court’s (and now Courts of equal status’) jurisdiction to do so under Order 41 Rule 6 (now Order 42 Rule 6) is fettered by 3 conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.

15. The law concerning the grant of stay of execution pending Appeal is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a 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 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 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 1st Applicant.

16. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay; and



- iii. 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.
17. Undoubtedly, the Court has the discretion to issue an order of stay of execution. However, the said discretion being judicial discretion must be exercised judicially and in accordance with the laid down principles.
18. The Applicant contends that it will suffer substantial loss if stay is not granted, because the decretal amount of Kshs. 28,352,112.66/= is substantial. Further that the amount awarded to the Advocate does not take into account the amounts already paid to the Advocates by the Client.
19. On the issue of substantial loss, the court in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, expressed itself as hereunder:
- “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.”
20. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007*, where he stated that:
- “The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to or different from that...Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement.”
21. I have considered the submissions by both the Client and the Advocate. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal as well as those of the Respondent who holds a judgment in his hands.
22. All that the Client has stated is that the decretal amount is substantial. As clearly stated in the Wangalwa case (supra), 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. The court therefore finds that finds that the Client/Applicant has not established substantial loss.



23. On the second condition, I agree with the parties' submissions that the application was filed timeously without undue delay. The Ruling the subject of these proceedings was delivered on 9th May, 2024 and the instant application was filed on the 7th June, 2024.

24. On the last condition as to provision of security, I agree with the court in the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 4 Others (2014) eKLR, when it held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

25. The Applicant herein has sought stay of execution of the taxed Bills of Costs pending the determination by the Court of Appeal. It is evident that the Bills of Costs have been taxed and Judgement duly entered. Evidently, the quantum of costs payable by Client to the Advocates is ascertainable. Therefore, the Advocate can proceed with execution proceedings.

26. The Applicant has not stated its willingness to provide any security. The Advocate contends that in the event the court is inclined to grant the stay, the Applicant be directed to pay the Advocate half of the decretal sum and the remainder be deposited in a joint interest earning account to protect the interest of both parties.

27. I note that the Client has not raised any issue as to the Advocate's ability to refund the money claimed in the event the appeal succeeds.

28. In Mwaura Karuga t/a Limit Enterprises Vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, it was observed:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the Appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

29. In Gianfranco Manenthi & Another -vs- Africa Merchant Assurance Company Ltd [2019] eKLR, the Court. observed:

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of Appeal from money decree of the lower court for an order of stay must satisfy this condition on security.”



Conclusion

30. Taking all factors into consideration, the particular circumstances of this case, and in order not to render the intended appeal illusory; further in order to balance the interest of the Applicant and the interest of the Respondent who is seeking to enjoy the fruits of his judgement, the court will grant a conditional order of stay of execution of the decree herein. The condition is that the Client pays the Advocate 50% of the taxed costs in the next forty-five (45) days from the date of this ruling, that is to say Kshs. 14,176,056/=, failing which the order of stay of execution will stand discharged without any further reference to this court. I Make no order as to the costs of this application.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF OCTOBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Ngigi h/b for Ms. Olendo for the Advocate/Respondent

N/A for the Client/Applicant

Court Assistant: Yvette

M.D. MWANGI

JUDGE

