



Dolal & 2 others v Kenya Electricity Generating Company Limited & another (Environment & Land Case 10 of 2017) [2024] KEELC 7478 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE 10 OF 2017
JM MUTUNGI, J
NOVEMBER 13, 2024**

BETWEEN

**AHMED DOLAL 1ST PLAINTIFF
MUSA AHMED 2ND PLAINTIFF
FATUMA KADID 3RD PLAINTIFF**

AND

**KENYA ELECTRICITY GENERATING COMPANY LIMITED 1ST DEFENDANT
KENYA POWER & LIGHTING COMPANY LIMITED 2ND DEFENDANT**

RULING

1. This Ruling is in respect of the 1st Defendant/Applicant Notice of Motion application dated 23rd September 2024 brought inter alia under Order 42 Rule (6) of the Civil Procedure Rules.
2. The application seeks the following orders: -
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of the intended Appeal to the Court of Appeal, there be a stay of execution of the Judgment delivered on 25th July 2024, requiring the 1st Defendant to pay the plaintiffs Kshs. 10,000,000/-.
 4. Cost of this application be provided for.
3. The application is predicated on the grounds set out in the Notice of Motion and the Supporting Affidavit of George Drammeh Akelol, the Acting Legal Manager of the 1st Defendant/Applicant. He deponed that the Court delivered a Judgment on 25th July 2024, awarding the Plaintiff General



Damages of Kshs. 10,000,000/-, plus Interest at Court rates until full payment was made. The 1st Defendant was additionally directed, under the supervision of the County Director of Environment Garissa, to implement mitigation measures, including setting up of a waste fuel disposal system, within a period of six months to prevent oil spillage into neighbouring farms and the Tana River during the rainy seasons. The County Director of Environment, Garissa was further directed to file a status report on the implementation in Court; and the Judgment was directed to be served upon the Director General of NEMA. The Plaintiffs additionally were awarded the costs of the suit as against the 1st Defendant.

4. The 1st Defendant was aggrieved by the decision requiring it to pay Kshs. 10,000,000/- (Kenya Shillings Ten million) to the Plaintiffs and through its previous Advocates, filed and served a Notice of Appeal and requested for typed proceedings to prepare the Record of Appeal for the Court of Appeal. The 1st Defendant asserted that there were no existing orders to stay execution, raising concerns that the Plaintiffs/Defendant might begin the process of executing the Decree to recover the amount unless the 1st Defendant made the payment.
5. The 1st Defendant expressed uncertainty about the Plaintiffs' financial capacity and averred there was no guarantee that the Plaintiffs would be able to refund the Decretal Sum if the upcoming Appeal was to succeed. The Legal Manager maintained that if this situation were to occur, the intended appeal would effectively be rendered meaningless, causing the 1st Defendant to incur substantial loss.
6. The 1st Defendant averred that its financial performance was strong, suggesting that its capacity to pay the decretal sum in case the Appeal fails should not be in issue and therefore contended it was not necessary to require that it provides security for the due performance of the decree, whether through a bank guarantee or by depositing the decretal sum into a joint account.
7. The 1st Defendant further contended that granting a stay of execution against the Plaintiffs/ Respondents would serve the interests of Justice by allowing for the proper hearing and determination of the intended appeal in the Court of Appeal on merit.
8. Ahmed Dolal, the 1st Plaintiff, filed a Replying Affidavit dated 17th October 2024. He averred the 1st Defendant had sought and had been granted a 60-day stay of execution of the Judgment to enable it to arrange payment of the decretal sum and that the instant application was merely intended to keep the Plaintiffs away from enjoying the benefits of the Judgment to the prejudice of the Plaintiffs.
9. The Plaintiffs asserted that the 1st Defendant lacked any compelling reasons to warrant being granted a stay of execution of the Judgment. The Plaintiffs, however were not averse to the 1st Defendant being given a conditional stay where they would be required to deposit the decretal sum into an interest earning account.
10. The parties on 20th October, 2024 when the 1st Defendant's application was scheduled for hearing interparties made oral submissions. The 1st Defendant in support of the application relied on the Supporting Affidavit in respect of the application and placed reliance on the following authorities that they had furnished: Antoine Ndinye –vs- African Virtual University (2015) KEHC 6783 (KLR); Giafranco Manenthi & Another –vs- Africa Merchant Assurance Co. Ltd (2019) KEHC 7586 (KRL); and Joseph Simiyu Mukenya –vs- Agnes Naliaka Cheseto (2012) eKLR. I have perused and reviewed the cited authorities and all deal with the conditions that an Applicant for stay of execution need to satisfy to succeed in such an application. The conditions upon which stay maybe granted are settled; an Applicant must file the application without undue delay; the Applicant has to demonstrate that substantial loss may result unless stay is granted; and the Applicant is ready to give security for the due



performance of the decree or order as, may ultimately be binding on him upon the determination of the appeal.

11. The Power of the Court to grant stay of execution under Order 42 Rule 6 of the Civil Procedure Rules is discretionally and has to be exercised having regard to the conditions stipulated under Sub rule (2) of Rule 6. Order 42 Rule 6 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 Applicants 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 Applicants”.

12. The first matter to deal with is whether the Applicant has demonstrated a likelihood of experiencing substantial loss if the stay is denied. One of the most enduring legal precedents regarding substantial loss is the case of Kenya Shell Ltd v Kibiru & Another [1986] e KLR 410. The principles established in this case have been applied in numerous decisions by superior courts, including the authorities cited by the 1st Defendant. Holdings 2, 3, and 4 of the Shell case are particularly relevant.

- “ 1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

13. The Judgment of Platt Ag JA in the Shell case above outlines two distinct circumstances in which substantial loss could occur. The Ag JA, (as he then was) stated, among other things, as follows:-

“The appeal is to be taken against a Judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because



the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two Courts... (emphasis added)”

14. The Learned Judge continued to observe 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 Applicants, 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 cornerstone of both jurisdictions for granting 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.” (Emphasis added)

15. In the instant matter the Applicant’s Legal Manager deponed that the 1st Defendant/Applicant had the financial capability to pay the decretal sum in the event the 1st Defendant was unsuccessful in the Appeal. He stated the Plaintiffs financial ability to refund the money if it was paid out to them, and the 1st Defendant was successful in the Appeal, was unknown to the 1st Defendant. It was the 1st Defendant’s position that given their undoubted capacity and ability to pay the decretal sum in the event their appeal was unsuccessful it was unnecessary to require the 1st Defendant to provide security for the due satisfaction of the decree.

16. An application made under Order 42 Rule 6 of the Civil Procedure Rules is primarily based on two important factors: substantial loss and security. As highlighted in the Shell case, substantial loss is fundamental to the jurisdiction granted under Order 42 Rule 6. It is emphasized that a decree holder should not be deprived of the benefits of their judgment without just cause. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR, the Court of Appeal stated as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an 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 Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

17. While it may be true that the 1st Defendant may have the capability to satisfy the decree even if they were to lose the appeal, it is also true that the Plaintiffs have obtained a regular Judgment and unless the same is set aside on appeal it remains valid. If the Judgment is confirmed on Appeal, as it could, the Plaintiffs ought not to be taken back to the drawing board where they would have to re initiate an execution process that could take various forms. It is sufficient that the 1st Defendant should offer security for the performance of the decree such that when the appeal is determined the security is available to the 1st Defendant, if successful in the Appeal, and would equally be available to the Plaintiffs should the appeal be unsuccessful.



18. Warsame, J (as he then was) in the case of Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 (2007) eKLR expressed himself succinctly as regards the exercise of discretion by the Court in an application for stay of execution. He stated thus:-

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the Court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an Appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a Judgment is that it has defined the rights of a party with definitive conclusion. The Respondent is asserting that matured right against the Applicant/Defendant...For the Applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the Court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the Court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the Court to give an order of stay with certain conditions.”

19. In the Case of Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into Court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the Court is faced with a situation where Judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. The Court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the Court to hold the ring even-handedly without prejudicing the issue pending the appeal.

20. In the circumstances of the present matter it is my view that the Court has to strike a balance as regards the interests and concerns of the parties. I am satisfied that granting a conditional stay of execution would serve the interests of both sides. For the 1st Defendant, they will take comfort that should they be



successful in the Appeal, they will not have to pursue the Plaintiffs for a refund that could be difficult to get, and for the Plaintiffs should the Judgment be upheld on appeal, they will realise the fruits of their Judgment without engaging in what could be protracted execution process.

21. I therefore grant a conditional stay of execution of the Judgment on the following terms:-
1. That stay of execution of the Judgment is granted on the condition that the 1st Defendant/Applicant deposits the total decretal sum of Kshs 10,000,000/- in a joint interest earning account, at Kenya Commercial Bank Ltd, Milimani High Court Branch, in the joint names of the 1st Defendant's Advocates and the Plaintiffs Advocates within 60 days from today. The deposit shall be held as security for performance of the decree that may be ultimately be binding on the 1st Defendant/Applicant.
 2. That in default of the deposit being made as under (1) above the stay will lapse and the 1st Defendant/Applicant's application dated 23rd September, 2024 will stand dismissed.
 3. The Costs of the application shall abide the outcome of the Appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF NOVEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

