



REPUBLIC OF KENYA



**KENYA LAW**  
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**Eurofix Royal Industries Limited v El Dad Holdings Limited (Commercial Appeal 1 of 2023) [2024] KEHC 1892 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
COMMERCIAL APPEAL 1 OF 2023  
FN MUCHEMI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**EUROFIX ROYAL INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**EL DAD HOLDINGS LIMITED ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated 2<sup>nd</sup> August 2023 seeks for orders of stay of execution of the warrants of sale of property in execution of decree for money issued by the trial court in Ruiru SPMCC No. E464 of 2021 on 20<sup>th</sup> April 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 1<sup>st</sup> September 2023.

**Applicant's Case**

3. The applicant states that the ruling in Ruiru SPMCC No. E464 of 2021 delivered on 31<sup>st</sup> January 2023 whereby the trial court dismissed an application to set aside the interlocutory judgment and to allow filing of defence. The applicant further states that they filed another application in the same court but it was dismissed on 30<sup>h</sup> June 2023 for being res judicata.
4. The applicant contends that their appeal has high chances of success as their defence raises triable issues particularly that they owed the respondent a sum of Kshs. 1,050,000/- yet the respondent claimed for more than owed at Kshs. 1,312,070/-. Further, the applicant is apprehensive that if any of the execution orders of the trial court arising from the rulings dated 31<sup>st</sup> January and 30<sup>th</sup> June 2023 occur, the same will render the intended appeal nugatory.
5. The applicant states that the respondent already extracted warrants dated 20<sup>th</sup> April 2023 with an aim to instruct auctioneers to auction their factory items and materials. Moreover, the applicant contends



that the respondent was paid part of the decretal sum vide cheques dated 19<sup>th</sup> August 2022 yet the respondent still went ahead to conduct an auction at the applicant's factory on 7<sup>th</sup> September 2022 where the respondent carted away their materials and property worth more than 14 million yet the decretal sum was only 1.5 million.

6. The applicant contends that the respondent did not serve them with the notice of entry of judgment and they only came to now of the judgment when the respondent accompanied by auctioneers visited their factory on 7<sup>th</sup> September 2022. The applicant further contends that they were subjected to a very aggressive and exaggerated auction whereby the auctioneer under-declared their returns. The applicant is apprehensive that the respondent will extract further warrants and subject them to another round of
7. carting away the applicant's property in the guise of executing the warrants when in essence the same amounts to self-enrichment.
8. The applicant states that no prejudice shall be suffered by the respondent in the event the orders sought are granted.

### **The Respondent's Case**

9. The respondent argues that the appeal is incompetent for having been filed out of time without leave of court. The ruling being appealed against was delivered on 31<sup>st</sup> January 2023 and the applicant had thirty (30) days to appeal within which period no action was taken to that effect.
10. The respondent states that the trial court in its ruling noted that the applicant never rebutted the fact that they were served. Service of summons to enter appearance and the plaint were not in dispute. Furthermore, the applicant admits to owing the respondent the sum of Kshs. 1,050,000/-.
11. The respondent contends that the warrants of attachment dated 20<sup>th</sup> April 2023 necessitated the applicant to file an application dated 25<sup>th</sup> April 2023 in the Magistrate's court whose ruling was delivered on 30<sup>th</sup> June 2023. The respondent argues that the said warrants have since expired as they were valid for only 2 months. The respondent states that the applicant has not lodged an appeal against the ruling dated 30<sup>th</sup> June 2023.
12. The respondent states that out of the cheques the applicant issued to them, only two cheques of Kshs. 210,014/- went through and were paid by the bank. The respondent contends that the applicant ought to provide evidence in court to show that the other cheques were paid.
13. The respondent argues that the auctioneer only proclaimed the goods intended in the Notification of Sale which goods were sold by public auction on 20<sup>th</sup> September 2022. The respondent contends that the applicant does not want to fully settle the debt. Moreover, the applicant has not even offered to deposit security in form of the decretal sum pending the hearing and determination of the appeal.
14. The applicant further argues that the respondent ought to declare to the court the money paid by a judgment debtor when making a subsequent application for warrants of execution which was not the case with the respondent as per the warrants dated 30<sup>th</sup> April 2023.

### **The Applicant's Submissions**

15. The applicant reiterates what it has deposed in its affidavit and submits that the good and items that were illegally taken away in the name of execution were worth Kshs. 14million yet the respondent's auctioneers sold the goods and realized only Kshs. 200,000/-.



16. The applicant submits that it has paid the respondent Kshs. 630,042/- directly by way of cheques which had been collected by the director of the respondent. Despite the payment, the respondent went ahead to extract warrants of execution on 20<sup>th</sup> April 2023 without declaring to the lower court that they had indeed been partially paid and had also conducted an auction and been forwarded payment by their auctioneers.
17. The applicant relies on the cases of *Giella vs Cassman Brown Company Limited* [1973] EA and *Nguruman Limited vs Bonde Nielsen & 2 Others* [2014] eKLR and submits that it has met the conditions set out for granting of an interlocutory injunction pending appeal. Relying on the case of *Mrao Limited vs First American Bank of Kenya Limited* [2003] eKLR the applicant submits that its case has high chances of success as the facts of the matter are that the respondent has in its actions attempted to gain unjustly at the expense of the applicant contrary to Order 22 Rule 2 of the *Civil Procedure Rules*.
18. The applicant submits that it stands to suffer massive loss given that the first auction was conducted in an illegal manner and the value of the items taken was above the figure sorted. Further, the failure to amend the warrants to capture the correct figures demonstrates that the lack of good faith by the respondent whose intention is to frustrate and cripple the applicant's business.
19. The applicant contends that the balance of convenience tilts in its favour as the respondent did not follow due procedure and they have shown an affinity to twisting the law and procedures in their favour and to the detriment of the applicant. The applicant contends that the court is the only safe haven to protect it from the respondent's jaws and illegal ways which could easily cripple it.

#### **The Respondent's Submissions**

20. The respondent relies on the case of *Albert Osooro Orwaru & Another vs Hellen Beverline Mubadi* [2022] eKLR and submits that the applicant has failed to demonstrate any substantial loss it is likely to suffer. Further, the applicant has not demonstrated whether in the event that the appeal succeeds, the respondent would be unable to refund the decretal sum. The respondent further contends that the applicant has on its own admission admitted owing it money. Thus, the application is a delaying tactic aimed at frustrating the respondent and delaying the fruits of its judgment.
21. The respondent contends that the ruling and order being appealed against was delivered on 31<sup>st</sup> January 2023 whereas the instant application and the memorandum of appeal are both dated 3<sup>rd</sup> August 2023, which is about 5 months after the ruling was delivered. Thus, the respondent submits that the application has been made with inordinate delay.
22. The respondent further relies on Section 79G of the *Civil Procedure Act* and the case of *Gilbert Mwangi Njuguna vs Judicial Service Commission & Another* [2020] eKLR and submits that the current application and the intended appeal have been filed out of time without the leave of the court.
23. Relying on the case of *Michael Ntouthi Mitheu vs Abraham Kivondo Musau* [2021] eKLR the respondent submits that the applicant has not offered to provide any security for the due performance of the decree. Thus, the respondent argues that the applicant has failed to meet the conditions for granting of stay of execution.



## The Law

### Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

24. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
1. “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 orders 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 1<sup>st</sup> 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 Applicant.
25. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
26. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-
- “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.
27. In his supporting affidavit, the applicant only states that it is apprehensive that the respondent will extract further warrants and subject it to another round of carting away its property in the guise of executing the warrants when in essence the same amounts to self-enrichment. Furthermore, the applicant has not demonstrated that the respondent will be unable to repay the decretal sum in the



event that the appeal succeeds. The respondent argues that the applicant has not demonstrated the substantial loss it stands to suffer.

28. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect it or will alter the status quo to its detriment and thus render the appeal nugatory. It is therefore, my considered view that the applicant has not demonstrated that he will suffer substantial loss in the event that the orders sought are not granted.
29. I have further perused the court record and noted that the ruling delivered on 31<sup>st</sup> January 2023 dismissed the application dated 8<sup>th</sup> November 2022 which sought to set aside the ex parte judgment on 11<sup>th</sup> January 2022 to allow the applicant file its defence and counter claim. Furthermore, the application dated 25<sup>th</sup> April 2023 which sought for orders that the warrants of execution dated 20<sup>th</sup> April 2023 be set aside and vacated was dismissed by the lower court on 30<sup>th</sup> June 2023 for being res judicata. Notably the applicant has not lodged an appeal against the said ruling. Upon perusal of the application it is evident that the applicant has lodged an appeal against the decision of 31<sup>st</sup> January 2023 and has sought for stay of execution of the warrants issued on 20<sup>th</sup> April 2023. That notwithstanding, the court cannot grant stay as the impugned ruling dated 31<sup>st</sup> January 2023 and 30<sup>th</sup> June 2023 both dismissed the respective applications which in essence are negative orders and are incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

30. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before



coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

31. In light of the above, the order being a negative one which does not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

**Has the application has been made without unreasonable delay.**

32. The impugned ruling was delivered on 31<sup>st</sup> January 2023 and the applicant filed the instant application on 4<sup>th</sup> August 2023. It has taken the applicant six months between the date the ruling was delivered in the lower court and the time when it filed the instant application. Furthermore, the applicant has not offered any explanation on why it took them six months to file the instant application. It is therefore my considered view that a delay six months is inordinate and inexcusable.

**Security of costs.**

33. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“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 the 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.

34. Evidently, the issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and noted that the applicant has not offered any terms of security to warrant the application for stay.

35. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“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 judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

36. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue is whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law. It is my considered view that the applicant has not demonstrated that the balance of convenience tilts in his favour. Neither has he shown that he has an appeal which is arguable



37. I have further perused the court record and noted that the applicant filed its Memorandum of Appeal on 4<sup>th</sup> August 2023 without the leave of the court. Section 79G of the Civil Procedure Act provides:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

38. Whilst relying on the said case, the court in Gilbert Mwangi Njuguna vs Judicial Service Commission & Another [2020] eKLR stated:-

By filing an appeal out of time before seeking extension of time and subsequently seeking the Court to extend time and recognize such an appeal is tantamount to moving the court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's registry. This is irregular as the document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time the much he can do is to annex the draft intended petition for appeal for the court's perusal when making his application for extension of time and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this court extending time), is expunged from the Court's record.

39. Accordingly, the applicant filed its memorandum of appeal on 4<sup>th</sup> August 2023 out of the statutory timelines for lodging an appeal without first seeking leave to file the appeal out of time. As such, the memorandum of appeal is a nullity and is hereby struck out.

### **Conclusion**

40. Consequently, I find no merit in this application dated 2<sup>nd</sup> August 2023 and it is hereby dismissed with costs to the respondent.

41. This appeal having been declared a nullity is hereby struck out with no orders as to costs.

42. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUCHEMI**

**JUDGE**

