



REPUBLIC OF KENYA



KENYA LAW

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**Stellar Builders Limited v Light Pack Services Limited (Commercial Appeal E092 of 2023)
[2024] KEHC 3467 (KLR) (Commercial and Tax) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E092 OF 2023**

A MABEYA, J

MARCH 26, 2024

BETWEEN

STELLAR BUILDERS LIMITED APPELLANT

AND

LIGHT PACK SERVICES LIMITED RESPONDENT

RULING

1. This ruling determines the application dated 22/5/2023. The same was brought under sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 22 rule 22, Order 42 rule 6(1) and (2) and Order 51 rules 1&4 of the *Civil Procedure Rules*. It sought the stay of execution of the judgment and decree of the Chief Magistrates Court at Milimani in CMCC No. E391 of 2020 delivered on 3/5/2023.
2. The application was supported by the grounds set out on the face thereof and the affidavit of Elijah Mathenge sworn on 22/5/2023. The appellant contended that it had lodged the appeal against the impugned judgment and was apprehensive that execution proceedings would commence.
3. That it had an arguable appeal with a high chance of success and would be greatly prejudiced if stay is not granted. That the application was brought without unreasonable delay.
4. The respondent opposed the application vide a replying affidavit sworn by James Okoth on 30/5/2023. It contended that the appellant had failed to demonstrate the substantial loss it would suffer and how the appeal would be rendered nugatory since the impugned judgment was a money decree. That it was open to a conditional stay of execution provided that Kshs 2,186,611.72 was paid within 30 days and the balance of the decretal sum amounting to Kshs. 4,907,842/- is deposited in a joint interest earning account in the names of the advocates on record for the parties. That the sum of Kshs 2,186.611.72 had been admitted by the applicant.



5. The application was canvassed by way of written submissions which I have considered. The appellant submitted that the appeal was arguable and had merit for it raised pertinent issues and would be rendered nugatory if the stay is not granted. That it ran the risk of substantial loss since the respondent intends to execute and its financial means and standing was unknown. That the respondent did not give any evidence of its ability to refund the decretal sum if the appeal was successful.
6. For the respondent, it was submitted that the appellant had not demonstrated how it would suffer substantial loss and had not provided any security for the performance of the decree. That the appellant ought to release the undisputed sum as it would cure any substantial loss. That in any event, the appellant had not demonstrated that the appeal was arguable.
7. I have considered the opposing affidavits, the submissions and the authorities cited. The application before court is for stay of execution pending appeal. The jurisdiction to grant stay of execution is grounded in Order 42 rule 6 of the [*Civil Procedure Rules 2010*](#) which provides that: -

“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.”
8. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal provided direction on how a court should exercise its discretion in matters stay of execution as follow: -
 1. 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 an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the plaintiffs at the end of the proceedings.
 4. 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’
9. In this regard, an applicant ought to demonstrate that substantial loss may result unless a stay is ordered, that the application has been made without unreasonable delay and provide security for the due performance of the decree that might ultimately be binding upon him.
10. On substantial loss, the appellant contended that it stood the risk of execution and the respondent had not proved that it was in a financial position to refund the decretal amount. On its part, the respondent



was of the view that the appellant had not proved the grounds set out under Order 42 rule 6 of the *Civil Procedure Rules*. It sought payment of Kshs 2,186,611.72 and that the balance of Kshs 4,907,842 be deposited in a joint interest earning account in the names of the advocates.

11. In exercising its discretion to grant or refuse a stay of execution, a court has to balance between an appellant's undoubted right of appeal against a respondent's right to enjoy the fruits of its judgment.
12. In the present case, I find that the application was made timeously. As to substantial loss, I find that the respondent did not disclose its means of refunding the decretal sum were the appeal to succeed and a refund ordered. However, the appellant did not offer any security.
13. The respondent contended that a certain amount, Kshs 2,186,611.72 had been admitted by the appellant. That it would be fair that the same be released to it to reduce on the accrual of interest on the same. Further, that the balance should be secured by way of deposit. I find that to be plausible.
14. Accordingly, I find the application to be merited and I allow the same on the following conditions: -
 - a. A sum of Kshs. 2,186,611.72 be released to the respondent within 30 days of this ruling.
 - b. The balance of Kshs. 4,907,842/- be deposited in an interest earning account in the joint names of the advocates for the parties herein within the same period of 30 days of this ruling.
 - c. That in default of any of the above, the stay of execution shall stand vacated and execution shall issue on the entire decretal amount.
 - d. The costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE

