



**Benjamin v Scarsdale Investments Ltd & another (Commercial Case 324 of 2014)  
[2024] KEHC 4519 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4519 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 324 OF 2014  
DO CHEPKWONY, J  
MARCH 18, 2024**

**BETWEEN**

**MUKOMA MWINZI BENJAMIN ..... PLAINTIFF**

**AND**

**SCARSDALE INVESTMENTS LTD ..... RESPONDENT**

**AND**

**RUTH OTIENO ..... DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 29<sup>th</sup> September, 2022 brought pursuant to Article 40, 40 and 51 all of the Constitution of Kenya, Sections 1A, 1B and 3A, 44 and 46, all of the Civil Procedure Act and Order 22 Rule 18, Order 42 Rules 6, Order 51 Rule 1, all of the Civil Procedure Rules, Rules 6 and 11, both of the Auctioneers Act, 1997. The application seeks the following orders:-
  - a. Spent
  - b. This Honourable Court be pleased to issue a temporary stay of execution of the warrants of attachment herein pending the hearing and determination of the present application.
  - c. This Honourable Court be pleased to set aside the warrants attachment dated 15<sup>th</sup> September, 2022 and the proclamation by Moran Auctioneers dated 20<sup>th</sup> September, 2022.
  - d. Pending the hearing and determination of the Defendant's appeal there be stay of execution of the decree.
  - e. Costs of this application be granted to the applicant in any event.



2. The application is premised on the grounds on its face and further supported by the affidavit of Ruth Otieno sworn on 29<sup>th</sup> September, 2022. According to her, sometimes in 2019 after the judgment she filed a Notice of Appeal and made an application for certified copies for purposes of filing an appeal. On 20<sup>th</sup> September, 2022, agents of Moran Auctioneers served her with a copy of the proclamation in this matter. She has averred that even though she was aware of the pending suit and as she was pursuing her appeal, the judgment and decree having been obtained more than 30 months ago it was imperative for the Decree-Holder to obtain and serve upon her a notice to show cause to enable her respond in good time.
3. It was deposed that the Applicant stands to suffer irremediable loss as the Plaintiff is a foreigner residing in the Democratic Republic of Congo and in the event her appeal succeeds she may not recover decretal amount from him. That, in his own admission, the Plaintiff is not in possession of sufficient funds to make any refunds in the event the appeal succeeds.
4. In response to the application, the Plaintiff swore a replying affidavit dated 1<sup>st</sup> November, 2022 by Juliah Mwangi in which she has averred that she is an Advocate on record for the Plaintiff/Respondent, who is duly conversant with the case hence authorized to swear this affidavit. She states that on 22<sup>nd</sup> February, 2022, she served the 2<sup>nd</sup> Defendant via WhatsApp and filed a return of service sworn on the 24<sup>th</sup> February, 2022. The same was received and read by the 2<sup>nd</sup> Defendant as evidenced by the blue ticks on the messages. She also deposed that in cases of appeals, it is the appellant who ought to pay for security for costs. It is thus the applicant who ought to deposit such security and not the Respondent, Decree holder herein.
5. According to the deponent, judgment was entered on or about the 29<sup>th</sup> November, 2019, which is nearly three (3) years ago and the Applicant has neither filed any Notice of Appeal nor attached any or given any details of the alleged appeal as the same is a mere excuse and untrue. The Applicant refused to attend the Hearing and the Honourable Court noted in its Judgment noted that the Plaintiff's evidence was not contradicted by the Defendants who failed to attend Court for trial. The Plaintiff/Respondent asked this court to dismiss the application with costs.
6. Parties agreed to dispose of this application by way of written submissions and while the Plaintiff/Respondent filed his submissions, there are no submissions filed on behalf of the Defendant/applicant.

### **Determination**

7. I have considered the orders sought in the application, the affidavits in support of and in opposition thereof alongside the submissions filed as well as the authorities cited. I find the sole issue arising for determination being whether or not a stay of execution should be granted pending the hearing and determination of the intended appeal.
8. The principles which guide the courts on whether or not to grant stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) which states as follows:-
  - “(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 Applicant”.

9. In the case of *Halai and Another v Thornton & Turpin (1963) Ltd* [1990] eKLR, the Court of Appeal held that the Superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.
10. From the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and the cited authority, it is important to note that stay may only be granted for sufficient cause in light of the overriding objective as provided for under Sections 1A and 1B of the *Civil Procedure Act*. Thus, a party seeking stay of execution must meet the following conditions;
- a. That substantial loss may result to the applicant unless the order is made.
  - b. That the application has been made without unreasonable delay.
  - c. That security for costs has been furnished for the performance of the decree.
11. On the first principle regarding substantial loss, it was observed in the case of *Kenya Shell v Kibiru and Another* (1986) KLR 410, where Platt Ag. JA (as he then was) had this to say:-
- “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 applicant, 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.”
12. In the instant matter, the Applicant has stated that he was served with a Warrant of Attachment dated 15<sup>th</sup> September, 2022 and a Proclamation of Attachment dated 20<sup>th</sup> September, 2022 from Moran Auctioneers. The position of the law requires that while an appeal is pending and there are serious threats of execution before the hearing of the appeal, the court intervenes to serve the purpose of substantive justice. In this case, there indeed exists a threat of execution as presented by the Applicant and therefore the applicant has satisfied this limb for stay of execution to issue.
13. Secondly, the application must have been made without unreasonable delay. A cursory perusal of the pleadings shows that Judgment in this matter was delivered on 29<sup>th</sup> November, 2019 and the present application is dated 29<sup>th</sup> September 2022. Clearly, the application was brought almost three years after



the delivery of the Judgment and there has been no sufficient explanation regarding the said delay. In the case of *Jaber Mohsen Ali and Another v Priscilla B Boit & another* [2014] eKLR, the court held that:-

“...The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter...”

14. It is evident that the application before court has been brought late in the day and no explanation has been proffered for such delay. In the absence of such explanation the Applicant has failed to satisfy this requirement for granting orders of stay.
15. Additionally, there is no evidence on record that a Notice of Appeal and Memorandum of Appeal were ever filed in relation to this matter. In the absence of either a Notice of Appeal or Memorandum of Appeal having been filed, the application for stay has no legs to stand on.
16. Finally, it is a requirement that the applicant furnishes security for costs for due performance of the decree. In the present case, Judgment was delivered way back in 2019 and nothing has been proposed by the Applicant to confirm any payment that has been made in fulfilment of the decree.
17. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates and 2 Others* [2014] eKLR, the court stated 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.”

18. Clearly, the Applicant is required to furnish security as per the law. In the instant case, no security has been proposed and neither has willingness to provide such security been demonstrated by the Applicant. Accordingly, based on the above, this court is of the considered view that the Applicant has not satisfied the ground on security for due performance of the decree.
19. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417, set out the principles to be considered in granting orders of stay. The Court stated thus;
  - a. 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.
  - b. 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.
  - c. 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 applicant at the end of the proceedings.
  - d. 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.

- e. The court in exercising its powers under Order XLI rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

20. In the circumstances of this case, this court finds that the Applicant has not made out a case to warrant the grant of the orders being sought. Therefore, the Applicant’s/2<sup>nd</sup> Defendant’s application dated 29<sup>th</sup> September, 2022 is without merit and is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF MARCH , 2024.**

**D. O. CHEPKWONY**

**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH , 2024.**

**ALFRED MABEYA**

**JUDGE**

