



Nolturesh Loitoktok Water & Sanitation Company Limited v Gachuhi t/a Intersect Hardwares Services Ltd (Civil Appeal E094 of 2022) [2024] KEHC 5454 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E094 OF 2022
SN MUTUKU, J
APRIL 25, 2024**

BETWEEN

NOLTURESH LOITOKTOK WATER & SANITATION COMPANY LIMITED APPLICANT

AND

JOHN GACHUHI T/A INTERSECT HARDWARES SERVICES LTD RESPONDENT

RULING

The Application

1. By a Notice of Motion application dated 30th December 2022, the Appellant/Applicant has moved this court under Order 42 Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, seeking stay of execution of the orders and decree of the judgement of the Chief Magistrate’s Court delivered on the 29th November 2022 in Civil Suit No. E039 of 2022 pending the hearing and determination of this application.
2. The Applicant further seeks stay of execution of the orders and decree of the judgement of the Chief Magistrate’s Court delivered on the 29th November 2022 in Civil Suit No. E039 of 2022 pending the hearing and determination of this appeal and costs.
3. The grounds in support of the application are found on the face of it and in the Supporting Affidavit of Gedion Kentente, the managing director of the Appellant. He has stated that the Appellant is a government entity owned by the County Governments of Kajiado, Makueni and Machakos; that on 29th November 2022, the Court (Hon. B. Cheloti, SRM), delivered a judgment in CMCC No. E039 of 2021 in which she found the Applicant liable to pay the Respondent Kshs 9,559,271 and costs of the suit which has aggrieved the Applicant who has preferred an appeal and that the Applicant filed a Memorandum of Appeal dated 13th December 2022.



4. It is further stated that the Applicant has been served with a proclamation notice dated 21st December 2022; that the appeal has high chances of success and that if the orders of stay sought are not granted the appeal shall be rendered nugatory and the Applicant is likely to suffer irreparable loss and damage. It is stated that the Respondents is not likely to suffer any loss should the stay be granted.

Replying Affidavit

5. Through a Replying Affidavit sworn on the 13th of January 2023 by Mercy Nduta Gachuhi, who describes herself as the wife of the Respondent through a Power of Attorney dated 15th of August 2022 and registered as P/A 75459/1, states as follows in opposition to the Notice of Motion: that the Notice of Motion Application is bad in law, it is fatally defective, incurably incompetent and the same should be dismissed with costs; that the Applicant has not adduced sufficient grounds and evidence to demonstrate granting of the orders sought; that the Respondent was not a party to the proceedings in Kajiado Magistrates' Court Civil Case Number E039 of 2022 and neither is it executing any consequential orders in the same proceedings contrary to the averments at paragraph eight of the Applicant's affidavit.
6. It is stated that the Respondent is a stranger to the proceedings and judgment arising from Kajiado Chief Magistrate's Court Civil Case number E039 of 2022 and this Honourable Court cannot issue orders of stay against the Respondent arising from the said proceedings; that no order of stay of execution has been sought against the judgment and decree issued in Kajiado Chief Magistrate's Court Civil Case number E030 of 2021 and further that the Applicant has not satisfied the criteria set out under Order 42 Rule 6 of Civil Procedure Rules or demonstrated that it will suffer substantial loss if stay is not granted and that the Applicant has not offered to issue any security for the due performance of the decree as may eventually become binding on the Applicant upon the determination of the appeal.
7. It is further stated that the Applicant will not suffer any substantial loss if the orders of stay are not granted because the Respondent has a reputable business with financial capability of satisfying the decretal sum in the event the appeal succeeds and that this application is an abuse of the court process, is misconceived, frivolous and bad in law and ought to be dismissed with the costs.
8. This court directed that this application be canvassed through written submissions. I have noted that both parties have filed their written submissions.

Applicant's Submissions

9. The Applicant's submissions are dated 15th January 2024. The Applicant has raised issue with the pleadings of the Respondent to the effect that the Power of Attorney was specific to CMCC No. E030 of 2021 and therefore the Respondent has not opposed this Application. The Applicant has raised one issue: whether the application is merited.
10. The Applicant has cited Order 42 Rule 6 of the Civil Procedure Rules and submitted that the power of the court to grant stay of execution is discretionary which power should not be exercised capriciously or whimsically; that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of each case. The Applicant cited *RWW v. EKW* (2019) eKLR to support its submissions.
11. The Applicant further cited *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. 15 of 1990 [1990] KLR 365 where the Court of Appeal outlined the requirements for granting stay of



execution pending appeal as the establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

12. It was submitted that the appeal is arguable as can be discerned from the Memorandum of Appeal; that the appeal has been filed without undue delay and that not granting stay will occasion substantial loss to the Applicant. The Applicant cited *James Wangalwa & another v. Agnes Naliaka Cheseto* [2013] eKLR on what constitutes substantial loss as well as *Absalom Dova v Tarbo Transporters* [2013] eKLR where the court stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order does not introduce any disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focusses on their reconciliation.....”

13. It was submitted that if this Court were to deny the Applicant the order for stay of execution, it would place them at a more prejudicial position than the Respondents as the Applicant has demonstrated that they are likely to suffer loss should the properties be attached and sold off.
14. It was submitted that costs follow the event and that the successful party should be awarded costs.

Respondent’s Submissions

15. The Respondent referred to Paragraphs 4, 5 and 6 of the Applicant’s Further Affidavit and submitted that the Replying Affidavit is sound in law and that the deponent of the Replying Affidavit swore that affidavit pursuant to the powers donated to her vide the Power of Attorney dated 15th August 2022.
16. It was submitted that stay may only be granted for sufficient cause and that the Court is enjoined to give effect to the overriding objective in the exercise of its powers under Section 1A and 1B of the *Civil Procedure Act*. The Respondent cited *Machira t/a Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63, among other authorities to support their submissions.
17. It was submitted that the application was filed 30 days after the delivery of judgment on 29th November 2022 and therefore there was unreasonable delay and that the Applicant has not demonstrated why there was delay; that the Applicant has not demonstrated how it will suffer substantial loss.
18. The Applicant cited *James Wangalwa & another v. Agnes Naliaka Cheseto* [2012] eKLR where it was held that:

“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 an execution has been levied and completed, that is to say, the attached properties have been sold, as it the case here, does not in itself amount to substantial loss under Order 42 Rule 6 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.”



19. It was submitted that, in the absence of factors that show that execution will create a state of affairs that will irreparably affect the Appellant, the Court ought to find that the Appellant is not deserving of the orders sought for there is nothing to preserve.
20. On the factor of deposit of security, it was submitted that a deposit of security is mandatory for the court to exercise its discretion in considering whether or not to grant stay of execution. The Respondent relied on *Gianfranco Manenthi & Another v. Africa Merchant Assurance Company Ltd* [2019] eKLR on this issue of deposit of security and submitted that the Applicant has not stated that it is willing to deposit any security in favour of obtaining a stay of execution order. The Respondent urged that the application be dismissed with costs.

Analysis and Determination

21. I will determine a singular issue: whether the Applicant has met the threshold for granting of a stay of execution order. Before considering that issue, I wish to state that I have considered the mention by the Respondent of a Further Affidavit by the Gedion Kentente said to have been sworn on 6th March 2023. I have not found that Further Affidavit in the court file. Secondly, there is the issue raised by the Respondent that there was no CMCC No. E039 of 2022. I have read the Memorandum of Appeal dated 13th December 2022 and filed on 14th December 2022. It refers to CMCC No. E)30 of 2021. I have seen a copy of the Proclamation dated 21st December 2022. It refers to CMCC E030 of 2021. Besides, the parties to that case are the parties appearing before me in this application. It is clear to me that this was a typographical error.
22. Further there is the issue raised by the Applicant that Mercy Nduta Gachuhi lacked capacity to swear the Replying Affidavit because the Power of Attorney was specific to CMCC No. E030 of 2021 and not this application and therefore this Application has not been respondent to. I have read the Power of Attorney, and I am satisfied that it gave the deponent of the Replying Affidavit power to do all matters concerning CMCC No. E030 of 2021. This appeal and application are filed out of that suit. My view is that Mercy has the capacity to swear the Replying Affidavit.
23. Turning on the issue for determination, I have considered the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the authorities cited by parties on the principles applicable for grant of stay of execution pending appeal. Order 42 Rule 6(2) provides that:
 - (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 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.
24. It is upon the applicant to demonstrate that substantial loss may result unless the order is made; that the application was made without unreasonable delay and that it has provided security for the due performance of the decree.
25. My reading of the application and the supporting grounds shows that the Applicant only emphasis is that the Applicant stands to suffer substantial loss if their property is sold in execution of the decree. There is nothing in the grounds in support explaining the delay of 30 days in bringing the application. There is nothing said about providing security for the due performance of the decree.



26. I have considered this application. In the name of substantive justice, I am amenable to giving the Applicant its day in court to be heard on appeal, but it must abide by strict conditions. I take the Applicant on their word that they are willing to comply with such terms as the court may impose as a condition for grant of the prayers sought.

27. I will allow the application subject to the following conditions:

- a. That stay of execution pending the hearing and determination of the appeal is hereby granted.
- b. The Applicant shall provide security by payment of the entire decretal sum by depositing the same in a joint interest earning account held by both counsel for the applicant and the respondent within 45 days from the date of this ruling.
- c. Failure to comply with order (b) above will automatically lead to laps of the order for stay of execution.
- d. The Applicant shall within 60 days file and serve the Record of Appeal.
- e. Parties shall attend court on the 17th September 2024 to confirm compliance with these orders and further directions.

28. Orders shall issue accordingly.

DATED, SIGNED AND DATED THIS 25TH APRIL 2024.

S. N. MUTUKU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

