



REPUBLIC OF KENYA



**Shah & 4 others v Rabadiya & 5 others (Civil Suit 347 of 2018)
[2024] KEHC 4832 (KLR) (Commercial and Tax) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 347 OF 2018
PM MULWA, J
APRIL 25, 2024**

BETWEEN

**MAHENDRAKUMAR MANEK SHAH 1ST PLAINTIFF
AVNISHKUMAR MANEK SHAH 2ND PLAINTIFF
MAHESHKUMAR CHAGANLAL SHAH 3RD PLAINTIFF
YATIN CHAGANLAL SHAH 4TH PLAINTIFF
ROOSHAB AVNISH SHAH 5TH PLAINTIFF**

AND

**SHIVIJ MEGHJI RABADIYA 1ST DEFENDANT
KARSAM MEGHJI RABADIYA 2ND DEFENDANT
KESHRA MEGHJI RABADIYA 3RD DEFENDANT
NARAN MEGHJI RABADIYA 4TH DEFENDANT
HANSABEN KESHRA 5TH DEFENDANT
RAJESH BHIMJI RABADIYA 6TH DEFENDANT**

RULING

1. On 28th July 2023, Hon. Justice E.C. Mwita entered judgment for the Plaintiffs against the Defendants in the sum Kshs 28,335,000.00 plus interest of 15% compound interest per annum from 5th September 2017.



2. The applicants have now filed the Notice of Motion dated 27th September 2023 seeking orders of stay of execution of the judgment and decree delivered on 28th July 2023 pending the hearing and determination of the intended appeal to the Court of Appeal, Nairobi.
3. The application was supported by the grounds on the face of it and by the sworn affidavit of Shivji Meghji Rabadiya who stated that the applicants have filed a Notice of Appeal and offered security in form of a title deed, that they have an arguable appeal and that unless the orders sought are granted, they shall be staring at satisfying a huge money decree which judgment they are dissatisfied.
4. The respondents (1st, 3rd – 5th Plaintiffs) filed a Replying Affidavit dated 15th December 2023 and contended that the applicants did not attach a draft Memorandum of Appeal to justify that the appeal is arguable and in addition, the applicants have not shown that they will suffer any substantial loss should the order not be granted.
5. The respondents added that the stay of execution of the judgment will grossly prejudice their rights as they are rightfully entitled to enjoy the fruits of their judgment.
6. The parties filed written submissions which the court has considered alongside the application and the responses. The issue for determination is whether the application for stay of execution pending appeal is merited?
7. A stay of execution of judgment/decree is a discretion of the Court and should only be granted where sufficient cause is shown. In *Antoine Ndiaye V African Virtual University* (2015) eKLR Gikonyo, J opined that:

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules...”
8. The legal basis for grant of stay pending appeal is Order 42 Rule 6 of the *Civil Procedure Rules*. Basically, the defendants/applicants are required to demonstrate that substantial loss may result unless the order is made; that the application has been made without unreasonable delay and such security as the court orders for the due performance of the decree has been given.
9. Will the applicants herein suffer loss unless the order is granted? It was contended by the applicants that they are currently incapacitated and that the company they are operating business - Hexagon Agencies Limited - had only Kshs. 667,911/-. This coupled with the current hard economic situation obtaining in the country, they will not be in position to make good the decretal sum.
10. The respondents, on the other hand, argued that this being a money decree, the appeal is not capable of being rendered nugatory as any loss that may arise if judgment is overturned in the Court of Appeal can be remedied by reimbursement of the decretal sum.
11. In *Kenya Shell Limited V Kibiru* [1986] KLR 410, it was held that: -

“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain



as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

12. It is the court’s view that the applicants have not adequately demonstrated the substantial loss that they would suffer.
13. Was the application made without unreasonable delay? The judgment was issued on the 28th July 2023 and the applicants filed the instant application seeking stay of execution on 27th September 2023. As such the application was filed timeously.
14. The other consideration is security. In the case of *Arun C. Sharma V Ashana Raikundalia T/A Raikundalia & Co. Advocates* (2014) eKLR the Court held 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 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.”
15. What security has the Applicant given? It was the respondents’ argument that the security offered by the applicants is grossly insufficient and this will only frustrate the execution process.
16. As security, the applicants have furnished a title for Land Reference Number Kajiado/Olchoro Onyore/3903 in the name of Pravinkumar Jethalal Chowhan and valued at Kshs.10,000,000/- as per the valuation report of Prime Land (m) Valuers dated 25th September 2023. The applicants have also tendered as further security Apartment Number B2 on the 1st Floor - L.R Number 209/118/100 (IR.NO. 22870) valued at Kshs.16, 500, 000 and Apartment No. B1 on 1st Floor, erected on L.R No. 209/118/100 valued at Kshs.16,500,000. The total security thus offered by applicants is a sum total of Kshs. 43,000,000/-.
17. In *Mohammed Salim T/A Choice Butchery V Nasserpuria Memon Jamat* (2013) eKLR, the court upheld the decision of *M/S Portreitz Maternity V James Karanga Kabia* Civil Appeal No. 63 OF 1997 and stated as follows:

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right...”
18. This court notes that the securities are in the name of a non-party to the appeal. Even though the applicants averred that the said parties have agreed to offer their property as security, it would have been prudent for the said parties to swear affidavits confirming the said position. That omission however is not material in the instant case.
19. It is my finding that the applicants herein brought this application without undue delay and even though they have not adequately demonstrated the substantial loss that they would suffer, they have furnished security as stipulated by *Rule 6 (2)(b) of Order 42*.
20. In dispensing justice, the Court is of the considered view that the applicants stand at a disadvantage should the stay orders be declined before hearing and determination of the appeal.



21. The upshot is that the application dated 27th September 2023, for stay of execution pending appeal is merited and the same is allowed.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL 2024.

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P. MULWA

JUDGE

In the presence of:

Ms Nkatha for Plaintiff

Mr. Kibet for Defendant/Applicant

Court Assistant: Carlos

