



Ali & 2 others v Transnational Bank Ltd & 3 others (Civil Suit 82 of 2006) [2024] KEHC 2705 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 82 OF 2006
HI ONG'UDI, J
MARCH 14, 2024**

BETWEEN

**TAHFA ALI 1ST PLAINTIFF
MUNAWAR ALI 2ND PLAINTIFF
MUNIR ALI 3RD PLAINTIFF**

AND

**TRANSNATIONAL BANK LTD 1ST DEFENDANT
BENJAMIN KISIO SILA T/A LEGACY AUCTIONEERING
SERVICES) 2ND DEFENDANT
HABIB-UR-REHMAN PARKAR (LEGAL REPRESENTATIVE OF THE ESTATE
OF ABDUL JALEEL PARKAR (DECEASED)) 3RD DEFENDANT
WONDER FEEDS LIMITED 4TH DEFENDANT**

RULING

1. In the Notice of Motion dated 16th October 2023 the two applicants herein pray for orders that there be stay of execution of the Judgment delivered on the 21st September, 2023 pending the hearing and determination of the intended appeals against the said judgement.
2. The application is based on the grounds thereof and the affidavit of the 1st applicant sworn on the same date. He deposes that the applicants being dissatisfied with the judgment of this honourable court had instructed their advocates on record to lodge appeals to the Court of Appeal against the entire judgment. Further, that pursuant to those instructions, respective notices of appeal had been lodged and the relevant proceedings sought by the said advocates.



3. It was deposed further that there was imminent danger that the applicants would suffer irreparable loss and the appeals rendered nugatory, if the respondents were allowed to execute the decree emanating from the Judgment delivered on the 21st September, 2023. Further, that the applicants intended appeals had high probability of success as evidenced by the draft Memorandum of Appeal. Additionally, that the applicants were ready to give security as this honourable court may deem fit for the due performance of the orders herein.
4. The respondents through their replying affidavit sworn on 15th November 2023 by the 2nd respondent herein, deposed that the application offended the express and mandatory provision of order 51 rule 13 of the Civil Procedure Rules. Further, that the application as drawn had not in any way met the minimum threshold requirement for granting the prayers sought and was thus an abuse of the due process of the law.
5. He deposed further that the applicants could not just allude that they would suffer substantial loss and not give evidence of the same. He added that the applicants had been utilizing the premises for close to 18 years but currently the same was vacant despite their being in possession to their detriment. He went on to depose that from the judgment and the fraud allegations this court made it's finding and he was sure that the draft memorandum of appeal raised no triable arguable issues.
6. The 2nd respondent averred that in the circumstances it was prudent that even with the security proposed by the applicants if any, they should continue paying rent. Further, that in the event that the appeal is unsuccessful without monetary security being deposited in an interest earning account and or a portion thereof released to them they would suffer further. He added that it was prudent that the lease be surrendered to avert any charging or adverse dealing on the title and sufficient security be provided for in the circumstances.
7. The application was canvassed by way of written submissions.

Applicants' Submissions

8. The applicants' submissions were filed by Kagucia Advocates and are dated 29th November, 2023. Counsel identified three issues for determination. On the first issue, as to whether the applicants would suffer substantial loss if the stay orders are not granted, counsel submitted that from the terms of the Judgment it was clear that the execution of the decree herein unless stayed would subject the applicants to substantial loss.
9. He added that the intended appeals had arguable issues with high probability of success. Reliance was placed on the case of Cleophas Wasike v Mucha Swala [1984] KLR 591, where the Court of Appeal held that an arguable appeal was not one that would necessarily succeed but one that merits consideration by the court.
10. Secondly, on whether the application had been filed without inordinate delay, counsel while placing reliance on the case of Anthony Kaburi Krio v Ragati Tea Factory Company Limited & 10 Others [2014] eKLR at paragraph 10, submitted that the present application had been filed without undue delay. Lastly and on whether the applicants had offered security for due performance of the decree, he submitted that the issue of security was discretionary and it was upon the court to determine the same.



11. He added that the applicants had by express averments in their supporting affidavit addressed the requirements to provide security. He placed reliance on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR at paragraph 14, where the court held as follows:

“Where the applicants’ purposes to provide security as the applicant has done it was a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this grant for stay.”

12. Counsel finally submitted that the applicants had paid the auction sum of kshs. 7,800,000/= to the 1st defendant on account of the respondents’ financial liability which payment should serve as a form of security. He urged the court to allow the application as prayed.

The Respondents’ Submissions

13. The respondents’ submissions were filed by Wambeyi Makomere Advocates and are dated 19th January, 2023. Counsel submitted that the power to grant stay of execution proceedings was discretionary. He placed reliance on Order 43 rule 6(2) of the *Civil Procedure Rules* and the locus classicus case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 in regard to the prerequisites to be established for grant of stay of execution orders, to be made.

14. On the first condition that substantial loss may result to the applicants, counsel submitted that no substantial loss would result to the applicants as they had been carrying out their business in other premises within Nakuru. In support of this position he relied on several cases among them *Jason Ngumba Kagu & 2 Others v. Intra Africa Assurance Co. Limited* [2014] eKLR where the court held as follows:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the *Civil Procedure Rules*. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of ‘the appeal will be rendered nugatory, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the — appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

15. Counsel went on to submit that the applicants were required to show and meet the condition of payment of security for due performance of the decree and that the reliance on kshs. 7,800,000/= as stated in their submissions was not proper. He urged the court to dismiss the application with costs.



Analysis and Determination

16. I have considered the application, affidavits together with the grounds of opposition and submissions by the parties. I find the issue arising for determination to be whether an order for stay of execution should issue against the Judgment delivered on the 21st September, 2023.
17. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
- 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 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.
18. In [RWW v. EKW](#) [2019] eKLR, the court addressed the purpose of a stay of execution order pending appeal, in the following words:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
19. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh both situations.
20. Further, in the case of [Regional Institute of Business Management v Lucas Ondong' Otieno](#) [2020] eKLR the court observed as follows;
- “20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the [Constitution](#) of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the [Constitution](#) of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.
21. On substantial loss, the applicants argued that they would suffer irreparable loss and the appeals would be rendered nugatory, if the respondents were allowed to execute the decree emanating from



- the Judgment delivered on the 21st September, 2023. The respondents on their part argued that the applicants could not just allude that they would suffer substantial loss and not give evidence the same.
22. In the case of *Silverstein v. Chesoni* [2002]1 KLR 867, the court observed that substantial loss was the cornerstone of both jurisdictions and the same had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
 23. The applicants in their affidavit stated that were ready to give security as this honourable court may deem fit for the due performance of the order herein. The respondents on their part contend that it was prudent that the lease be surrendered to avert any charging or adverse dealing on the title and sufficient security be provided for in the circumstances.
 24. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. It is my opinion that this court must balance these rights to ensure that justice is served.
 25. The above being the position, I allow the prayer for stay of execution on condition that the Applicants (3rd and 4th defendants) deposit the sum of Kshs 35,000,000/= (Thirty-five Million shillings) in a joint interest earning account of the advocates on record within 45 days. Failure to comply will lead to an automatic lapse of the order of stay of execution with no further reference to this court.
 26. Costs of the application to the 1st – 3rd Plaintiffs/ Respondents.
 27. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 14TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

