



REPUBLIC OF KENYA



Makau v Mwanzia (Civil Appeal 238 of 2023) [2024] KEHC 9267 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL 238 OF 2023

MW MUIGAI, J

JULY 29, 2024

BETWEEN

JOSEPHINE MUTETHYA MAKAU APPLICANT

AND

JOHN MASIKA MWANZIA RESPONDENT

RULING

Pleadings

1. Vide a Notice of Motion dated 27th September, 2023 brought under Sections 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22 and Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) wherein, the Applicants sought the following orders that:
 1. Spent
 2. This Court to grant stay of execution of the judgment in Machakos SCCC NO. E212 of 2023 delivered by the Honourable M. Thibaru, Adjudicator on 21st August, 2023 pending the hearing and determination of the application.
 3. This Court to grant stay of execution of the judgment in Machakos SCCC No. E212 of 2023 delivered by the Honourable M. Thibaru, Adjudicator on 21st August, 2023 pending the hearing and determination of the Appellant's appeal filed at the High Court of Kenya at Makueni.
 4. That the Appellant be allowed to furnish the Court with security in form of a bank guarantee as pending the full hearing and determination of the appeal.
 5. That the cost of this application abide the outcome of the appeal.



Supporting Affidavit

2. The application was Supported by Supporting Affidavit dated 27th September 2023 sworn by Josephine Mutethya Makau, she deposed that she was the beneficial and owner of registered of motor vehicle registration number KCY 732K and that judgement was delivered as against the applicant as liability 100%, General Damages Kshs 190,000, special damages kshs.15,985 plus cost and interest.
3. It was deposed that they have appealed against the said judgement and that the appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chances of success.
4. She deposed that he was reasonably apprehensive that the Respondent may proceed and levy execution against them which will then render the appeal nugatory and will suffer irreparable loss and damage.
5. It was deposed that the judgment was of a substantial amount and if the decretal sum was paid to the respondent, the respondent would be in no position to refund the same if the appeal is successful and that the respondent has not furnished the court with any documentary evidence to prove her financial standing.
6. It was further deposed that they were ready, willing and able to give a bank guarantee as security since their financial status was utterly compromised by the Corona virus pandemic.
7. She deposed that the respondents will not suffer any prejudice or damage not capable of being compensated by way of costs
8. It was finally deposed that there was an eminent threat of execution if stay is not granted and they stand to suffer great prejudice and irreparable substantial loss as there was a likelihood that they will not recover the decretal amount if paid over to the respondents before determination of the appeal.

Replying Affidavit

9. By a Replying Affidavit dated 24th October, 2023, sworn by John Masika Mwanzia wherein he deposed that the applicant's application was baseless and devoid of merit.
10. The Respondent averred that he objected to the use of a bank guarantee since the guarantee used by the applicant has a duration of only 12 months and there was no evidence that at the lapse of the said duration the guarantee will be renewed.
11. The Respondent averred that there was a possibility of the bank that had given the guarantee not honouring the same and that the bank not being a party to a suit would make it difficult for a successful party to enforce any orders he or she may get concerning the bank guarantee.
12. He stated that the application does not meet the threshold for grant of stay as no substantial loss has been demonstrated by the applicant and that the applicant had not furnished the court with any documentary evidence to prove her financial standing
13. He deposed that the Applicant's actions appear to be engaging in delaying tactics as they waited until the stay granted by the Trial Court lapsed to run to the Court to Appeal.
14. The matter was canvassed by way of written submissions.



Submissions

The Appellant/Applicant's Submissions

15. The Appellant/Applicant filed his written submissions dated 9th December ,2023 and submitted that stay of execution, the applicant only needs to show he has an arguable appeal. Reliance was made to the case of *Bake N Bite (Nrb) Limited v Daniel Mutisya Mwalonzi* [2015] eKLR.
16. On discretion reliance was made to the case of *Esther Wamaitba Njibia & 2 Others v Safaricom Limited* [2014] eKLR.
17. On stay of execution, reliance was made to order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Tabro Transporters Ltd vs Absalom Dova Lumbasi* [2012] eKLR on the conditions for grant of stay of execution.
18. On substantial loss it is submitted that the respondent has not disclosed his financial status and his means are unknown and is highly unlikely that the respondent will be capable of refunding the decretal sum in the event that the appeal is successful. She relied on the case of *Edward Kamau & Another vs Hannab Mukui Gichuki & Another* [2015] eKLR and the case of *Tabro Transporters Ltd vs Absalom Dova Lumbasi*[2012].
19. It is submitted that there is no inordinate delay by the appellant in filing the application.
20. On issue of security, it is submitted that the applicant's insurer is ready and willing to provide a bank guarantee. Reliance was placed in the case of *Empower Installations Limited vs Eswari Electricals Limited* [2016] eKLR.
21. It is submitted that the applicants having satisfied all the conditions set out in order 42 Rule 6 pray that the stay be granted pending the hearing and determination of the appeal

Respondent's Submissions

22. It is submitted the suitability of a bank guarantee as security in this case requires a comprehensive evaluation of the circumstances. The bank guarantee cannot provide the respondent with necessary certainty and guarantee of receiving the decretal sum as it does not guarantee availability of funds at the time of payment
23. Reliance was made to the case of *Nyang'au v Choi & 2 Others* (Civil Appeal E088 of 2021 and *New Nairobi United Services Ltd & Another vs Simon Mburu Kiiru* [2021] on the suitability of a bank guarantee as security.
24. It is submitted that to ensure a just and equitable outcome, it was imperative that the court rejects the use of a bank guarantee and instead order the appellant to promptly pay the decretal sum.
25. Reliance was made to the case of *Re Estate of Richard Churko Stephen alias Richard Churko Guyo(deceased)*[2021]eKLR.
26. On whether the application had met the threshold for grant of stay of execution pending appeal, reliance was made to the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR on the principles guiding the grant of stay of execution pending appeal and also the case of *Visbram Ravji Halai vs Thornton & Turpin* {1990}.
27. It is submitted that the application fails to spell out how the appellant would suffer loss, the nature or extend of the claimed loss.



28. Lastly that the bank guarantee was not sufficient security for performance thus the application does not meet the threshold for grant of stay and should be dismissed.

Determination

29. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.

30. The application is premised on Order 42 rule 6(2) of the [Civil Procedure Rules](#),2010 provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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.

31. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See [Vishram Ravji Halai v Thornton & Turpin](#) Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

32. The Court, in [RWW v EKW](#) [2019] eKLR, addressed its mind to 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.”

33. The only issue necessary for determination would be whether the application seeking stay of execution is merited.



Substantial Loss

34. On the first condition, the Court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

35. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent - that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the Appellant.”

36. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st Respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd Respondents, the two might not be able to repay it back and in that case, if the Applicant's intended appeal were to succeed, that success would be rendered nugatory.

37. The Applicant's contention is that the Respondent has indicated to commence the process of execution and will proceed to execute unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.

38. Odunga J. in *George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business.” See in Bungoma High Court Misc. Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto* and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.



39. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at 417 held:

“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 judgement. 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.”

40. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.

41. The Court notes that despite the Respondent not stating in his affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss she will suffer. The Applicant has simply stated that the respondent is a person of unknown means and was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.

42. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground thus fails.

Unreasonable Delay

43. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 21.08.23 and the application was filed on 28.09.2023. A month and some few days later is not unreasonable delay.

44. The Court finds that there is no undue delay in filing the application herein.

Furnish Security

45. The Applicant stated that her insurer was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal, the Respondent in his replying affidavit that she was opposed to issuance of a bank guarantee as security as it was insufficient security to the decretal sum meant to prejudice the respondent's award.

46. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is 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 ground for stay.”

47. It follows therefore that it is the discretion of the court to determine the security.

Disposition



1. In the premises: -
 - a. There will be a stay of execution pending the said appeal on condition that the Applicant remits to the Respondent half of the decretal sum and the other half of the decretal in form of a bank guarantee from a reputable bank within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
 - b. The costs of this application abide the outcome of the appeal.

It so ordered.

**JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT ON 29/7/2024. (VIRTUAL/
PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Mutua for Respondent

Geoffrey/Patrick – Court Assistant(s)

