



**Nyang'era t/a Nyasae and Associates v Disciplinary Committee of the Institute of Certified Public Accountants of Kenya; Kenya Tea Development Agency Limited (Interested Party) (Petition E403 of 2017) [2024] KEHC 10388 (KLR) (Constitutional and Human Rights) (26 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10388 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E403 OF 2017  
LN MUGAMBI, J  
AUGUST 26, 2024**

**BETWEEN**

**AMOS NYASAE NYANG'ERA T/A NYASAE AND ASSOCIATES .. PETITIONER**

**AND**

**DISCIPLINARY COMMITTEE OF THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA ..... RESPONDENT**

**AND**

**KENYA TEA DEVELOPMENT AGENCY LIMITED ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. By a Notice of Motion application dated 8<sup>th</sup> May 2023, the petitioner applicant seeks Orders that:
  - i. Spent.
  - ii. This court be pleased to order stay of execution of the Ruling and/or Decree resulting from the decision of Justice M. Thande dated 3<sup>rd</sup> March 2023 pending the hearing and determination of this Application.
  - iii. This Court be pleased to order stay of execution of the Ruling and/or Decree resulting from the decision of Justice M. Thande dated 3<sup>rd</sup> March 2023 pending the hearing and determination of the intended Appeal.
  - iv. This Court be pleased to make such further orders to meet the ends of justice.



- v. Costs of this Application be in the intended appeal.

### **Petitioner's Case**

2. The petitioner was dissatisfied with the Ruling rendered by Hon. Justice M. Thande thus lodged its Notice of Appeal on 9<sup>th</sup> March 2023. At the time of filing this application, the Petitioner was in the process of filing the Record of Appeal.
3. The petitioner claims that if the order is not granted, it is likely to suffer irreparable harm and its appeal will be rendered nugatory. The petitioner on the other hand contends that the respondent is not likely to suffer any harm or prejudice if the orders are granted.

### **Respondent's Case**

4. The respondent in reply filed grounds of opposition dated 16<sup>th</sup> May 2023 on the basis that:
  - a. The Application is grossly incompetent and an abuse of court process in that it seeks to stay a court order and decision that dismissed the Applicant's application for review, with costs to the Respondents.
  - b. The dismissal order dated 3<sup>rd</sup> March, 2023 is by law a Negative Order incapable of execution or being stayed before this Court.
  - c. The Application in totality does not meet the conditions for grant of the Orders as set out in the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
  - d. The Applicant has not demonstrated substantial loss it stands to suffer if the Application is not granted by the court at all.

### **Petitioner's Submissions**

5. The petitioner through Osoro Omwoyo and Company Advocates filed submissions dated 5<sup>th</sup> June 2023. Counsel submitted that the power to grant or refuse an order of stay of execution is discretionary. Reliance was placed in *Butt vs Rent Restriction Tribunal* (1982) KLR 417 where it was held that:

“The power of the Court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principle in granting or refusing a stay is; if there is no other overwhelming hinderance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's decision.

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 proceedings.

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”

6. Moreover, for such an order to be granted, an applicant must prove that they have an arguable appeal with high chances of success, that substantial loss may result if the stay is not granted and that the application was made without unreasonable delay.



7. In this matter, Counsel affirmed that the petitioner’s case met all these conditions and as such the orders should be granted. In support reliance was placed in *Gitahi & Anor vs Warugongo*, Nairobi Civil Application No 13 of 1998 where the Court of Appeal held that:

“In an application for stay pending appeal the court is faced with a situation where the judgment has been given, it is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiff.”

8. Further reliance was placed on *Stanley Kang’ethe Kinyanjui versus Tony Keters & 5 Others* (2013) eKLR.

9. Counsel in light of this, argued that the respondent’s right to enjoy the fruits of the judgment rendered in its favour, should not be utilized to diminish the petitioner’s right to appeal. In this regard, Counsel relied in *Jamii Bora Bank Limited & another vs Samuel Wambugu Ndirangu Civil Appeal No. E030 of 2021* where it was held that:

“That the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment in his favour.”

10. Similar reliance was also placed in *Dova vs Tarbo Transporters* (2013) eKLR.

### **Respondent’s Submissions**

11. Ogembo and Associate Advocates for the respondent filed written submissions and a list of authorities dated 20<sup>th</sup> June 2023. Counsel submitted that the impugned Ruling did not order the parties to do anything or refrain from doing something as alleged only that costs were awarded to the respondents. For this reason, Counsel argued that the challenged orders are not capable of being stayed as sought by the petitioner. Reliance was placed in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* (2015) eKLR where it was held that:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay - called a “positive order” - either an order that has not been complied with or has partly been complied with.”

12. Analogous reliance was placed in *Kanwal Sarjit Singh Dhimazl vs Keshavji Juvraj Shah* (2008) eKLR, *Jennifer Akinyi Osodo vs Boniface Okumu Osodo & 3 others* (2021) eKLR, and *Western College of Arts and Applied Sciences v EP Oranga & 3 others* (1976) eKLR.

13. Counsel further submitted that for such orders to be granted an applicant must establish that substantial loss will be occasioned if the stay is not granted. Counsel argued thus that the onus to prove this was on the petitioner. In this matter, Counsel was certain that the petitioner had not proved the loss it would suffer if not granted the orders. In support reliance was placed in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 others* (2016)eKLR where it was held that:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can



be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise.”

14. Counsel for this reason asserted that the petition is a non-starter and an abuse of court process. As such urged the Court to dismiss it.

### **Analysis and Determination**

#### **Whether this Court should grant the order of stay of execution.**

15. The legal foundation for an application for stay pending appeal is provided for in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 under Rule 32 which provides as follows:

Stay pending appeal.

32.

- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
- (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
- (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

16. The principles for grant of an order of stay of execution pending appeal are also well settled by the Courts. In *RWW vs EKW* (2019) eKLR the Court observed as follows:

- “ 8. 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...”

17. The Court went on to observe as follows:

- “ 10. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in *James Wangalwa & another v Agnes Naliaka Cheseto* Misc Application No 42 of 2011 [2012] eKLR.



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 execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein Vs Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma Vs. Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

11. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”
18. Equally, citing the principles outlined by the Court of Appeal for an application for stay of execution in *Jamii Bora Bank Limited* (supra) the Court observed as follows:

“The principles upon which the court may stay the execution of orders... were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

Secondly, 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 the appeal court reverse the judge’s discretion.

Thirdly, 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.

Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements...”



19. Further still, the discretionary nature of this order was expounded on by the Court of Appeal in *Absalom Dova* (supra) as cited in *Al-Riaz International Ltd & another vs Munini (Civil Appeal E058 of 2023)* (2023) KEHC 22221 (KLR) (27 April 2023) (Ruling):

“...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory... This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -“...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 focuses on their reconciliation...”

20. What becomes clear from the guiding principles is that an appeal or intended appeal does not operate as an automatic stay of execution. The overriding objective is for the Court to facilitate justice to all parties as required under Article 48 of *the Constitution*. This means thus that this court while making its determination in this matter must consider both parties positions while deciding which side its discretion ought to lean towards.

21. In the present application, the Applicant laments that he would suffer loss. This is on account of being required to pay costs. He filed an application seeking to review that order which the Court declined. In my view, payment of costs is done at the Court’s discretion. The Court refused to set aside the order on review for payment of costs by dismissing the review application. Going by judicial precedents on what amounts to substantial loss necessitating a stay, I do not think payment of those costs as ordered by the Court constitutes substantial loss that irreparably negates the essential core of the appeal as no adverse consequences that the applicant demonstrated from settling the said costs. This application is devoid of any merit and is hereby dismissed with costs. The file is ordered closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF AUGUST, 2024.**

.....

**L MUGAMBI**  
**JUDGE**

