



REPUBLIC OF KENYA



**Equity Bank Limited & 2 others v Lumasia (Civil Appeal E176 of 2023)  
[2024] KEHC 11620 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E176 OF 2023  
SC CHIRCHIR, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> APPELLANT**

**NZIOKI LUIGI ..... 2<sup>ND</sup> APPELLANT**

**MUTHINI DOMINIC ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ANDREW OLIVER CHONELWA LUMASIA ..... RESPONDENT**

**RULING**

1. The Respondent filed suit against the Appellants at the chief Magistrate's court, seeking for damages for loss incurred to a building following a road accident which occurred on 23.1.2012 along Chavakali-Kapsabet Road.
2. In a judgment delivered on 13<sup>th</sup> June 2023, the trial court entered judgment against the Appellants jointly and severally, and awarded the respondent ksh. 1,250,000 in damages.
3. The appellants were aggrieved by the judgment and proffered this Appeal. They have also filed the present Application seeking for the following orders:
  - a) .. (Spent).
  - b). (spent )
  - c). This honourable be pleased to grant a stay of execution pending the hearing and determination of the appeal against the judgment and Decree of the Kakamega Chief Magistrate court delivered on 13<sup>th</sup> June 2023 in kakamega Civil Case No. 40 of 2014.
  - d). The costs of and incidental to this application do abide the result of the said appeal.



### **The Applicants' case**

5. The application is premised on Order 42, Rule 6 Order 51 Rule 1 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*, Cap 21.
6. It is based on the grounds set out on the face of it and the supporting affidavit of Beatrice Muraguri, the legal manager of the the 1<sup>st</sup> Appellant sworn on 1<sup>st</sup> February 2024.
7. The Applicants state that the respondent has obtained warrants of attachment against the Applicant and have instructed the Auctioneers to proceed with the proclamation pursuant to the decree obtained. They are therefore apprehensive that the appeal would be rendered nugatory if the attachment proceeds.
8. It is further stated that the decretal sum is huge and would cause the respondent real and substantial difficulties in refunding, if their appeal is successful and hence the appeal would consequently be rendered nugatory.
9. It is further stated that the Applicants have an arguable appeal with triable issues and with a high chance of success.
10. They have committed to provide the appropriate security for the due performance of the decree, which they would be bound by if the appeal is unsuccessful. It is also their case that the respondent would not be prejudiced, if stay is granted.

### **The Respondent's case.**

11. It is the Respondent's case that the application is fatally defective; that it is an abuse of the court's process and that applicants have not met the conditions for granting stay.
12. The Application was canvassed by way of written submissions.

### **Applicant's submissions**

11. The Applicant submits that it has an arguable appeal , which was not frivolous, and which raises substantial triable issues. It is argued that the trial court had failed to recognize that the 1<sup>st</sup> applicant was a mere financier of the subject motor vehicle. It is further argued that it could not be held a vicariously liable for the negligent use of the vehicle's driver since it did not have the physical control, management or possession of the vehicle.
12. It is the Applicant's further submission that unless stay is granted, the appeal would be rendered nugatory. It states that once its assets were proclaimed, they were in danger of being sold.
13. It is further submitted that the decretal amount was significantly large, so as to cause the respondent substantial difficulties in refunding them if the appeal is succeeds.
14. It is the Applicant's final submission that the respondent would not be prejudiced in any way if the stay is granted, and they are willing to deposit an appropriate security for the due satisfaction of the decree.

### **Respondent's submissions**

11. It is the respondent's submission that the appeal did not raise any triable issues; that in any event the insurer of the motor vehicle were liable to settle the claim on behalf the Appellants. It is further submitted that the Appeal do not raise any triable issue in respect to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.



12. The Respondent considers the Application as an attempt to delay them from enjoying the fruits of the Judgment.

### **Analysis and determination**

11. The parties have relied on a number of Authorities which I have perused. The only issue for determination is whether the applicants have met the conditions for granting of stay pending Appeal.
12. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules](#). It provides as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.
- (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

21. It must also be demonstrated that the Appeal is arguable. (see [Trust Bank Limited & Another v Investech Bank Limited & 3 Others](#) [2000] eKLR.

22. The Court of Appeal in [RWW v EKW](#) (2019) eKLR explained the purpose for stay as follows:-

“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.”



22. The power to grant stay is discretionary and the guiding principles are well settled. In *Butt v Rent Restriction Tribunal* (1982)KLR 417 the court of Appeal stated as follows:

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principal 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 that appeal court reverse the judge's discretion.
- iii. 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.
- iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

22. On whether the appeal is arguable, the memorandum of Appeal indicate that the question of ownership of the subject Motor vehicle and vicarious liability of the 1<sup>st</sup> Applicant are among the issues that the Applicant intend to present for consideration on appeal. In my view these are triable issues which the Applicant ought to be given a chance to ventilate on Appeal.

23. In determining whether an Appeal is arguable ,courts have often stated that an arguable appeal is not one which must necessarily succeed. In the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR for instance , it was held: “ On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...”

24. The second consideration is whether the Application has been brought without undue delay. The judgment that form the subject matter of the appeal was delivered on 13<sup>th</sup> June 2023. From the record , a letter was written on 7<sup>th</sup> august 2023 to request for the certified typed copy of proceedings at the lower court. The present application was 1<sup>st</sup> February 2024. It is clear that the appellants have made effort to file the appeal .Though there was delay , the same was not prolonged and can not be said to be inordinate.

25. Thirdly, this Court must determine whether not granting the order will occasion substantial loss to the Applicant.

26. Substantial loss was explained in the case of *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR 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.....”

22. In the instant case, the applicants aver that they stand to suffer substantial loss if the respondents were to attach their assets and that they would not be in a position to return them to their original position if the appeal was to succeed. Thus the Applicant has expressed apprehension that it is unlikely to recover the decretal sum in the event that the Appeal succeeds. The respondent has not said anything to allay this apprehension. In the case of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Ano* (2006) eKLR the Court of Appeal emphasized the role of the respondent once the Applicant has expressed doubts on the respondent’s ability to refund the decretal sum. The court held:-

“This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants 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 – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

22. Am satisfied that in the absence of any rebuttal to the Applicant’s apprehension, then the Applicant is likely to suffer a substantial loss if stay is not granted.
23. On security, the appellants have submitted that they are ready to comply with any orders of security. In *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, the purpose of security was explained as follows: “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 in civil process 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.”
24. Am satisfied that the Application is merited and the same is hereby allowed on the following terms:
- a). There shall be a stay of execution of the judgment and decree of Kakamega chief Magistrate’s court civil case No. 40 of 2014 and all consequential orders emanating therefrom.
  - b). The stay referred to in ( a) above is conditional upon the Appellant depositing the decretal sum and ascertained costs, if any, in an interest earning Account in the joint names of respective Advocates
  - c). costs of this Application in the cause.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024**

**S. CHIRCHIR**

**JUDGE**

In the presence of :

Godwin Luyundi- Court Assistant

