



**Nyoro Construction Limited v Musau (Civil Appeal E028 of 2024)
[2024] KEHC 13740 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E028 OF 2024
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

NYORO CONSTRUCTION LIMITED APPELLANT

AND

AGNES MWETHYA MUSAU RESPONDENT

RULING

Notice of Motion Application

1. Vide application dated 04/04/2024 brought under Order 42 rule 6 and 7 of the Civil Procedure Rules, the Applicant sought the following orders, that;
 - a. (Spent)
 - b. (Spent)
 - c. That there be a stay of execution of the judgement and decree of this court pending the hearing and determination of the appeal.
 - d. The costs of this Application abide the outcome of the Appeal.
2. The Application is supported by an affidavit sworn by Josiah N Njuguna the Appellant herein sworn on 4th April 2024 stating as follows; that on 21st December 2023, the court delivered judgement in CMCC No E278 of 2022 in favour of the respondent for a sum of kshs 965,530 plus cost and interest. The respondents then served their letter dated 21.02.2024 threatening to execute the decretal sum within 10 days and since the lapse of the 10 days, the assets of the applicant are exposed to sale and attachment that the respondents demonstrated their struggle to make ends meet and thus would not be in a position to pay the applicant if the appeal is successful. The applicant stated that it has employed over 100 workers who stand to suffer substantially should execution take place and that they undertake to comply with the terms of the court.



Replying Affidavit

3. The Respondent filed a Replying Affidavit sworn on 11/04/2024 by Jacob Kyula Musau in which he stated that the application was an abuse of the court process and made without basis and a mere afterthought. That the applicants had failed to satisfy the basic requirements of the orders which it is brought. The applicant had not provided any form of security which is a mandatory requirement and should the court be inclined to allow the application, the court should order security for money decree and order release of half of the decretal sums being kshs 468,704 and the balance in a joint interest earning account in the name of both advocates as they are capable of refunding the decretal sum.
4. The Application was canvassed by way of written submissions.

Appellant's Submissions Dated 08.10.2024

5. On behalf of the Appellant it is submitted that the appellant will suffer substantial loss and their property sold in execution of the decree and thus the appeal will be rendered nugatory.
6. On undue delay it was submitted that there has been no delay in filing the appeal of part of the appellant.
7. On security it was submitted that the appellant will comply with the terms given by the court
8. It was the appellant's final issue that he had satisfied all the conditions for granting orders of stay of execution pending appeal and urged the court to exercise its discretion in favour of the application.

Determination/analysis

9. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
10. 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.

11. 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 vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.



12. The Court, in *RWW vs. 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.”

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

Substantial Loss

14. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. 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...”

15. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. 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.”

16. In *National Industrial Credit Bank Ltd vs. 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...”

17. The Applicant’s contention is that there was an imminent threat of execution by the respondent unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.

18. 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 vs. Agnes Naliaka Cheseto and James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR.”

19. Gichuhi, Ag.JA (as he then was) in Kenya Shell Limited vs. 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 judgement.”

20. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
21. The Court notes that despite the Respondent not stating in his affidavit whether the company 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 it will suffer. The Applicant has simply stated that there was an imminent threat of execution which will render the appeal an academic exercise.
22. 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

23. On the second condition, the Applicant stated that the application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgment of the Trial Court was entered on 21.12.23 and the application was filed on 04. 04.23. some few months later which is unreasonable delay.
24. The Court finds that there is undue delay in filing the application herein.

Furnish Security

25. The Applicant stated that it was willing to abide with the terms of security that the court will order.
26. The Court in Focin Motorcycle Co. Limited vs. 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.”

27. It follows therefore that it is the discretion of the Court to determine the security.



Disposition

28. In the premises: -

- a. There will be a stay of execution pending the appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum be deposited in a joint interest earning account of both advocates 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.
- c. Memorandum of Appeal to be filed within 30 days in default appeal shall stand dismissed.

It so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 31/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the presence of

Ms Kabaula H/B Mr. Mutiso - For Defendant/Applicant

Ms Kavita - For the Respondent

Geoffrey - Court Assistant

