



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge & another v Malweyi & another (Civil Appeal E243 of 2024)  
[2024] KEHC 16207 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16207 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E243 OF 2024  
FN MUCHEMI, J  
DECEMBER 19, 2024**

**BETWEEN**

**ELIJAH NJORE NJOROGE ..... 1<sup>ST</sup> APPELLANT**

**AIRWAVE PROPERTIES LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HESBON ODANGA MALWEYI ..... 1<sup>ST</sup> RESPONDENT**

**RUTH KHAMALI ODANGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 17<sup>th</sup> September 2024 seeks for orders of stay of execution in respect of the ruling in Ruiru SPMCC No. E217 of 2022 delivered on 17<sup>th</sup> September 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondents filed a Replying Affidavit dated 24<sup>th</sup> September 2023.

**Appellants'/Applicants' Case**

3. The applicants state that the ruling in Ruiru SPMCC No. E217 of 2022 was delivered on 17<sup>th</sup> September 2024 whereby the trial court dismissed their application for enlargement of time by a single day to deposit thrown away costs of Kshs. 15,000/- awarded to the respondent following the setting aside of an ex parte judgment. The applicants further state that by dismissing their application, the trial magistrate invariably condemned them to shoulder an ex parte decree in excess of Kshs. 6 million merely on account of a technical and humanly excusable oversight.
4. The applicants aver that the 14 days in which they were meant to pay the thrown away costs were inadvertently overlooked and forgotten owing to the existing political tensions in which the 1<sup>st</sup> applicant was actively involved as the Member of Parliament for Gatundu North. The applicants aver



that they were late in payment by only one day and upon realizing the same, they immediately sent the money to counsel for the respondents.

5. The applicants argue that the learned magistrate erred in fact and in law by failing to appreciate that 6 hours' delay in depositing the thrown away costs of Kshs. 15,000/- was an excusable and understandable mistake that could be remedied by enlargement of time by a day. Additionally, the learned magistrate erred in failing to appreciate that notwithstanding the apparent half day delay in depositing the thrown away costs, the applicants rectified their error within hours of realizing the oversight by payment of thrown away costs.
6. The applicants aver that the failure to pay the Kshs. 15,000/- was neither deliberate nor reckless but was a result of excusable human error. The applicants further state that it is manifestly unfair, unconscionable and unjust to condemn them to settle an ex parte decree in excess of Kshs. 6 million on account of an oversight in settling Kshs. 15,000/-, a paltry and negligible amount in comparison.
7. The applicants argue that they have a strong and arguable appeal with high chances of success. Further, the applicants argue that should the respondents proceed to execute the decree, the appeal shall be rendered nugatory and an exercise in futility.
8. The applicants state that the respondents shall suffer no prejudice or harm as the 1<sup>st</sup> applicant is a well known personality whilst the 2<sup>nd</sup> applicant is a legal corporation with a fixed known address and is not in danger of folding up or closing down.
9. The applicants argue that they raised the issue of jurisdiction in their Statement of Defence however the trial court failed to make a determination on the issue and on the other substantive issues identified and raised in their defence, with the reasons thereof, upon each separate issue canvassed before the court, in contravention of the mandatory provisions of Order 21 Rules 4 & 5 of the Civil Procedure Rules. Thus, the applicants state that by proceeding on a matter upon which the court had no jurisdiction, the honourable court gravely misdirected itself and rendered the entire decision null and void ab initio.
10. The applicants aver that no justice will be served by shutting them out on a technicality and land being a fairly emotive issue, it is only fair and just that the court hears both sides of the dispute. The applicants further aver that no party ought to be condemned unheard and the denial of their right of audience is an infringement on their constitutional rights under Article 50 of *the Constitution*.
11. The applicants state that the application has been brought timeously, on the same date of the impugned ruling. Further, the applicants are willing to deposit acceptable fixed asset security in form of land as the decretal sum is a substantial amount.

### **The Respondents' Case**

12. The respondents state that the lower court entered judgment on 7<sup>th</sup> December 2023 against the applicants following the hearing of the respondents' evidence and further failure by the applicants to attend court on 18<sup>th</sup> October 2023 notwithstanding proper service. The applicants thereafter filed an application dated 22<sup>nd</sup> April 2024 seeking to set aside the said judgment whereby the trial court allowed the application on condition the applicants pay throw away costs of Kshs. 15,000/- within 14 days of the ruling failure to which the judgment would automatically be reinstated.
13. The respondent state that the applicants failed to pay the throw away costs as directed and thus the judgment of the court was automatically reinstated.
14. The respondents aver that on 18<sup>th</sup> July 2024, the applicants learnt of the auctioneers attempt to extract warrants of attachment and the 1<sup>st</sup> applicant then purported to pay throw away costs. The applicant



thereafter filed an application dated 15<sup>th</sup> July 2024 seeking stay of execution and an extension of time within which to pay throw away costs which was declined by the trial court. The respondents argue that the learned magistrate made the right order in light of the conditions given during the quest by the applicants to set aside judgment on 7<sup>th</sup> December 2023. Thus the trial court could not grant further stay orders following the failure by the applicants to meet the terms of the orders issued on 2<sup>nd</sup> July 2024.

15. The respondents argue that the appeal filed is hopeless, an abuse of the court process and stands no chance of success since the court had dealt with the issue of stay of execution granted orders and could not revisit the same.
16. The respondents further argue that the 1<sup>st</sup> applicant seeks this honourable court to revisit the issue of stay of execution and to be granted favorable treatment notwithstanding the fact that he has failed to comply with the earlier court orders. The respondents state that it would be a travesty of justice if the court entertains the current application as the applicants have not taken the court proceedings seriously and they feel that they can disregard court orders and get away with it.
17. Parties disposed of the application by way of written submissions.

### **The Applicants Submissions**

18. The applicants submit that the failure to comply with the requirement for the payment of the thrown away costs was neither deliberate nor reckless, but was the result of excusable human error. To support their contentions, the applicants rely on the case of *Bank of Africa Kenya Limited vs Put Sarajevo General Engineering Co. Ltd & 2 Others* [2018] eKLR.
19. Relying on the case of *Nicholas Mutuku Mwasuna vs Patricia Mueni Kilonzo* [2022] eKLR, the applicants submit that the proceedings and appeal shall be rendered nugatory and an exercise in futility should the respondents proceed to execute the decree. Additionally, the applicants rely on the case of *CA No. 6 of 2015 James Kanyita Nderitu vs Maries Philotas Ghika & Another* [2016] eKLR and submit that no party ought to be condemned unheard and denying them audience is an infringement of their constitutional rights under Article 50 of *the Constitution* of Kenya.
20. The applicants submit that they have a valid defence to the claim by the respondents including but not limited to the court's lack of jurisdiction to hear and determine the dispute, misjoinder of the 1<sup>st</sup> applicant, a director of the 2<sup>nd</sup> applicant company in a suit ideally against the latter, notwithstanding its being a limited liability company (Salomon & Salomon), disregard of Section 3(3) of the *Law of Contract Act* and Section 54 of the Indian Transfer of Property Act. The applicants further submit that the trial court by proceeding on a matter upon which it had no jurisdiction, it gravely misdirected itself and rendered the entire decision null and void ab initio. To support their contentions, the applicants rely on the cases of *Owners of Motor Vessel (Lilian) vs Caltex Oil (Kenya) Ltd* [1989] 1 KLR and *Adero & Another vs Ulinzi Sacco Society Limited* [2002] 1 KLR 577 and submit that the honourable court unilaterally and without justification clothed itself with nonexistent jurisdiction thus acting ultra vires rendering its decision an illegality.

### **The Respondents' Submissions**

21. The respondents submit that they obtained judgment against the applicants on 7<sup>th</sup> December 2023 which was entered following the testimony of the 1<sup>st</sup> respondent and deliberate failure by the applicants to attend court despite being served with the notice both physically and through their counsel on record's email address. The applicants then filed an application dated 22<sup>nd</sup> April 2024 seeking for orders of setting aside of the said judgment to which the trial court allowed on condition the applicants pay



- thrown away costs of Kshs. 15,000/- within 14 days failure to which the orders stand vacated and the judgment reinstated.
22. The respondents submit that Mr. Chris Mutuku, the applicants' counsel was present when the ruling was delivered and therefore the applicants were aware of the conditions set upon which the judgment would be set aside.
  23. The respondents argue that parties to court proceedings are entitled to equal treatment before the law however the applicants are seeking preferential treatment since the 1<sup>st</sup> applicant is a member of parliament. The applicants failed to meet the conditions set for the setting aside with the consequence that the said judgment was automatically reinstated.
  24. The respondents submit that thereafter the applicants moved the court again seeking to stay orders and enlargement of time to pay thrown away costs after the lapse of time and the reinstatement of judgment. The respondents argue that it was clearly an abuse of the court process as no good reason was advanced for the failure to obey a clear court order that was delivered in the presence of counsel for the applicants.
  25. The respondents submit that from the tenor of the applicants' application for stay of execution, the 1<sup>st</sup> applicant argues that he is a member of parliament and that he is a busy person who should be treated differently from other litigants.
  26. The respondents argue that the suit in the trial court is for money had and received for no valuable consideration. The applicants in their defence did not deny receiving the sum of Kshs. 4,700,000/- from the respondents and failing to sell the land to them. The respondents thus argue that the setting aside of the judgment would serve no useful purpose where the applicants were not denying receipt of money from them and the applicants failing to give valuable consideration. Furthermore, the arbitration clause that the applicants sought to rely on would be of no use where they entered appearance and filed a statement of defence. Pursuant to Section 6 of the *Arbitration Act*, the court would be fully seized of jurisdiction to hear and determine matters between the parties.
  27. The respondents submit that the appeal lacks merit. Furthermore, the respondents submit that it is the third time the applicants are seeking stay of execution which was initially awarded by the lower court. The respondents further submit that the applicants are seeking preferential treatment following the deliberate failure to attend court at the hearing of the suit before the lower court and further when the applicants failed to comply with the clear terms of a court order that set aside the judgment and decree which was conditional.
  28. The respondents state that in the event the court allows for the orders of stay, the applicants should deposit the decretal sum and costs in court.
  29. The main issue for determination is whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

## **The Law**

### **Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

30. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-



1. “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 orders 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 1<sup>st</sup> 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. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
32. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [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...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.
33. The applicants state that he stands to suffer substantial loss as the respondents shall proceed to execute the decree which shall render the appeal nugatory.
34. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show how execution shall irreparably affect them or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has not shown how they stand to suffer substantial loss. The applicants only mentioned that should the respondents proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory and an exercise in futility. Thus, it is my considered view that the applicants have not demonstrated the substantial loss.



### **Has the application has been made without unreasonable delay.**

35. The ruling was delivered on 17<sup>th</sup> September 2024 and the applicants filed the instant application on 18<sup>th</sup> September 2024. Thus, the application has been filed timeously.

### **Security of costs.**

36. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“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 the 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.

37. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has offered security in the form of land.

38. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

39. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondents their right of enjoying their judgment. Judgment in *Ruiru SPMCC No. E217 of 2022* was entered on 7<sup>th</sup> December 2023. The applicant then filed an application dated 22<sup>nd</sup> April 2024 seeking to set aside the default judgment and set down the matter for hearing. The trial court exercised its discretion in favour of the applicants and set aside the default judgment on condition the applicants pay throw away costs of Kshs. 15,000/- within 14 days failure to which the orders stood vacated and the judgment reinstated. The applicants did not pay the said amount and filed an application dated 18<sup>th</sup> July 2024, two days after the lapse of the orders setting aside the judgment, seeking for enlargement of time to pay the thrown away costs. On 17<sup>th</sup> September 2024, the trial court rendered its ruling and dismissed the application. The trial court found that the applicants’ advocates were present when the court delivered its ruling and therefore the applicants ought to have complied with the orders. Furthermore, the terms were couched in mandatory terms and thus with the 14 days having lapsed there was nothing for the court to extend or to expand since time had lapsed. Thus, it would be unjust and unfair to grant the orders herein for the applicants were given a chance to be heard by setting aside the judgment and ordering them to pay throw away costs. However, the applicants did not ensure compliance of the order of the court.



40. I have further perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law. Therefore, it is my considered view that the applicants have not met the threshold of granting stay of execution pending appeal.
41. Accordingly, it is my considered view that the application dated 17<sup>th</sup> September 2024 lacks merit and is hereby dismissed with costs.
42. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**F. MUCHEMI**

**JUDGE**

