



REPUBLIC OF KENYA



**Safaricom PLC v Muriuki (Civil Appeal E162 of 2024)
[2024] KEHC 16206 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E162 OF 2024
FN MUCHEMI, J
DECEMBER 19, 2024**

BETWEEN

SAFARICOM PLC APPELLANT

AND

ALBERT MWANIKI MURIUKI RESPONDENT

RULING

1. The application dated 15th July 2024 seeks for orders of stay of execution in respect of the judgment in Thika Small Claims Court SCC COMM No. E146 of 2024 delivered on 24th June 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 29th August 2024.

Appellant's Applicant's Case

3. The applicant states that judgment in Thika SCC COMM No. E146 of 2024 was delivered on 24th June 2024 whereby the trial court entered judgment in favour of the respondent and awarded him Kshs. 190,727-. The applicant further states that it was not awarded stay of execution.
4. Being aggrieved with the decision of the trial court, the applicant lodged an appeal by filing its Memorandum of Appeal dated 10th July 2024 on 11th July 2024.
5. The applicant argues that its appeal has high chances of success and if stay is not granted, the appeal would be rendered nugatory and it shall suffer substantial loss. The applicant further states that it is apprehensive that the respondent is likely to execute the judgment which execution will occasion it substantial loss and damage.



6. The applicant states that the respondent's financial ability is unknown and he is unlikely to refund the decretal amount after execution in the event the appeal succeeds. The applicant further states that the decretal sum awarded to the respondent is a colossal amount.
7. The applicant states that it is willing and able to furnish security for due performance of the decree. The applicant further states that the application is made timeously without any reasonable delay.

The Respondent's Case

8. The respondent states that the trial court delivered judgment in his favour on 24th June 2024 for a sum of Kshs. 190,727-. The respondent thus urges this court to adopt the trial court's judgment in its entirety and dismiss the applicant's appeal.
9. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

10. The applicant relies on the case of RWW vs EKW (2019) eKLR and submits that the purpose of an application for stay of execution is to preserve the subject matter in the dispute while balancing the interests of the parties. The applicant further relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of Butt vs Rent Restriction Tribunal [1979] and Jamii Bora Bank Limited & Another vs Samuel Wambugu Ndirangu (Civil Appeal No. E030 of 2021) and submits that the respondent's financial means and status is unknown to it and further the respondent has not filed any affidavit of means to confirm his financial status. The respondent has not provided any material as to his ability to repay the decretal sum in the event the appeal succeeds. The applicant thus submits that it stands to suffer substantial loss if stay of execution is not granted as there is a risk of failure to compensate it should the appeal succeed. The applicant argues that if execution of the judgment proceeds, its appeal shall be rendered nugatory and expose it to irreparable loss and damage as the respondent's financial ability may be incapable of effecting a refund thereof.
11. The applicant submits that the application has been brought timeously as judgment was delivered on 24th June 2024 and the instant application was filed on 18th July 2024.
12. On the issue of security, the applicant cites the case of Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd [2019] eKLR and submits that it complied with the court's orders issued on 18th July 2024 by depositing the sum of Kshs. 190,727- on 15th August 2024.
13. The applicant argues that the respondent has not addressed the issue of stay of execution but has instead delved into the merits of the appeal.

The Respondent's Submissions

14. The respondent submits that the application lacks merit and is an abuse of the court process. The respondent further submits that the sum of Kshs. 190,727- deposited in court be released to him as he was awarded the same by the trial court.
15. The main issue for determination is whether the applicant has 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 applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.



16. 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 1st 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.
17. 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.
18. 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.
19. The applicant provides that should the respondent proceed with execution and the appeal is successful, he may not recover the same from the respondent as his financial ability is not known to it.
20. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has shown that it does not know the respondent’s financial capabilities and that it may not recover the said amount from the respondent in the event the appeal succeeds. The evidentiary burden at that point shifted to the respondent to show that he is a person of means and would be able to settle the decretal sum should



the appeal succeed. The respondent in this case failed to do so. Thus, it is my considered view that the applicant has demonstrated the substantial loss it stands to suffer.

Has the application has been made without unreasonable delay

21. Judgment was delivered on 24th June 2024 and the applicant filed the instant application on 18th July 2024. It has taken the applicant about 3 weeks between the date of judgment delivered in the trial court and the time when it filed the instant application, thus the application has been filed timeously.

Security of costs

22. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia ta 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.

23. Evidently, the issue of security is discretionary and it is upon the court to determine the same. On 18th July 2024, the court directed that the applicant deposits the decretal sum in court within 30 days of the ruling being made. The applicant stated that it complied with the said orders and deposited the sum of Kshs. 190,727- on 15th August 2024.

24. 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.”

25. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law but raise questions of fact.

26. From the foregoing, it is my considered view that the applicant has met the threshold of granting stay of execution pending appeal. It is noted that the security being the full decretal amount has already been deposited in court and as such no order are required in this regard.

27. Accordingly, it is my considered view that the application dated 15th July 2024 has merit and is hereby allowed.

28. It is hereby so ordered.



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

F. MUCHEMI

JUDGE

