



**Mutuku v Wambua (Civil Appeal E317 of 2023)
[2024] KEHC 16187 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E317 OF 2023
MW MUIGAI, J
DECEMBER 18, 2024**

BETWEEN

FRANCIS MUASYA MUTUKU APPELLANT

AND

CYNHIA NDUKU WAMBUA RESPONDENT

RULING

Notice Of Motion Application

1. Vide application dated 26/02/2024 brought under Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 the Applicant sought the following orders, that;
 - a. Spent
 - b. That there be a stay of execution of the judgement delivered by the Honourable B.A Luova on 23rd November pending the hearing and determination of the appeal
 - c. The costs of the application be provided for
2. The Application is supported by an affidavit sworn by Francis Muasya Mutuku the Applicant herein sworn on 26th February, 2024 stating as follows; that the Applicant being dissatisfied with the judgment of the Trial Court delivered on 23/11/2023 and that the respondent had taken out a notice to show cause demanding payment of kshs 154, 993 and if stay is not granted he may be committed to civil Jail; that the appeal raises triable issues and has chances of success and the appeal will be rendered nugatory if stay is not granted, that he is not guaranteed of recovery of the decretal sum if paid to the respondent since it is clear is financially not able to meet the obligation.



Replying Affidavit

3. The Respondent opposed the Application through a Replying Affidavit sworn by Cynthia Nduku Mutua on 27th May 2024 in which she stated as follows; that the memorandum of appeal was never served upon her advocates and the applicant only acted when the notice to show cause was served upon him and a warrant of arrest was issued and that's when the applicant sought for stay of execution. That the appeal does not raise triable issues and chances of success are minimal and that the application had not satisfied the conditions for grant of stay of execution and that the applicant had not provided any security and had not demonstrated what loss he stands to suffer.
4. The Application was canvassed by way of written submissions.

Applicant's Submissions Dated 25.10.2024

5. On the issue of whether the court should grant stay of execution , reliance was made to order 42 of the Civil Procedure Rules and the case of Butt v Rent Restriction Tribunal [1982] which laid down the principles for grant of stay of execution
6. On the issue of whether the Applicants have demonstrated that substantial loss will occur unless stay is granted, it was submitted that the respondent has successfully prosecuted a notice to show cause where she obtained orders to have the appellant committed to civil jail and such the appellant stands to suffer substantial and irreparable loss . Reliance is made in the case of Antoine Ndiaye vs Africa Virtual University (2015)e KLR and the case of New Nairobi United Services Ltd & another v Simon Mburu Kiiru [2021]
7. On the issue of security it is submitted it was at the discretion of the court to determine the security
8. Reliance was made to the case of HE vs SM [2020]eKLR , Kenya Women Microfinance Limited v Martah Wangari Kamau[2020] and Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR
9. It was their final submission that the applicants had satisfied all the conditions set out in order 42 rule 6 and prayed that stay of execution be granted pending appeal.

Respondent's Submissions Dated 18.09.2024

10. On behalf of the Respondent, reliance was made on order 42 rule 6 of the Civil procedure Rules.
11. On substantial loss reliance was made to the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and submitted that the applicant had not sufficiently demonstrated what loss he will suffer if he was to pay the decretal amount and had not proved the respondent would not be able to refund the amount.
12. On security, reliance was made to the case of Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Service Ltd & 4 others[2015] eKLR, Ena investment Limited v Benard Ochau Mose & 2 others [2022] e KLR, Gianfranco Manenthi & another vs Africa Assurance Company Ltd [2019]
13. It was submitted that the applicant had not offered any security and has thus failed to satisfy the court on the two cardinal principles for grant of stay of execution
14. Finally, it is submitted that the application is devoid of merit and should be dismissed with cost to the respondent however if the court grants stay, it should order the applicant to deposit the entire decretal sum in a joint interest earning account in the name of both counsels on record



Determination

15. The Court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.
16. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”
17. The three conditions to be fulfilled can therefore be summarized as follows;

that substantial loss may result to the applicant unless the order is made application has been made without unreasonable delay security as the court orders for the due performance
18. These principles 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:-
 - a. 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.
 - b. 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.
 - c. 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.
 - d. 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. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon



application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial Loss

19. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 that:

“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.”

20. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“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.”

21. The Applicant contends that the appeal shall be rendered nugatory if the orders sought herein are not granted as he may be committed to civil Jail

Arguable Appeal

22. The Applicant has submitted that it has a strong arguable appeal which has high chances of success that will be rendered nugatory if the orders sought are not granted.

Undue Delay

23. As to whether the Application has been filed without undue delay, judgment was entered on 23.11.2023 and this application was filed on 26.02.2024, months later. The court finds that the Application has been filed without undue delay.

Security

24. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.



Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

25. The Applicant in this case has not offered any form of security for due performance.

Disposition

1. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
 - a. Stay of execution pending Appeal of Machakos SCC No. E502 of 2023 is granted on condition that the Applicant deposits half of the decretal amount in a joint interest earning account of both Advocates on record and other half in favour of the Respondent 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.

It so ordered.

RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 18/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).

MARGARET W. MUIGAI

JUDGE

