



**Cherutich v Theuri (Civil Appeal E457 of 2022)
[2023] KEHC 1317 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E457 OF 2022

CW MEOLI, J

FEBRUARY 23, 2023

BETWEEN

RICHARD KIOSOK CHERUTICH APPLICANT

AND

BENSON THEURI RESPONDENT

RULING

1. The motion dated June 29, 2022 by Richard Kiosok Cherutich (hereafter the Applicant) seeks to stay execution of the judgment and decree in favour of Benson Theuri (hereafter the Respondent) in Nairobi Milimani CMCC No. 1984 of 2009 (hereafter the lower court suit) pending the determination of his appeal. The motion is expressed to be brought under Section 3A of the *Civil Procedure Rules*, Order 42 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*, *inter alia*, on grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.
2. To the effect that being aggrieved with the judgment in Nairobi Milimani CMCC No. 1984 of 2009 delivered on June 3, 2022 he has preferred an appeal with high chances of success as evidenced by the various grounds in the memorandum of appeal. He swears to be a nurse employed at Kenyatta National Hospital and faced by the predicament that Blue Shield Insurance Co. Ltd, the insurer of his motor vehicle, went under leaving him exposed to the threat of execution and substantial loss which would render the appeal nugatory ; and that if execution is levied, it would create a state of affairs that will irreparably affect or negate the very core of a successful appeal. In conclusion he deposes that the motion has been brought without delay and that it is in the interest of justice that the court grants it pending hearing and determination of the appeal.
3. The Respondent opposes the motion by way of grounds of opposition dated July 22, 2022 and a replying affidavit of even date sworn by Roselyn Kihara who describes herself as a legal officer at ICEA Lion Insurance Company Limited, therefore well versed with the pertinent facts and duly authorized.



The deponent asserts that the Applicant has not demonstrated any evidence of substantial loss or offered any security for due performance of the his obligation as required by law and that the motion lacks merit.

4. The deponent views the motion as an afterthought meant to deprive the Respondent's insurer from enjoying the fruits of judgment; that the Applicant will not suffer substantial loss in the event the appeal succeeds as the Respondent's insurer is a reputable insurance company capable of refunding the decretal sum; and that the appeal herein lacks merit. She concludes by urging that the motion be dismissed but in the alternative, should the court be inclined to allow the motion to impose a condition for provision of security.
5. In a rejoinder by way of a supplementary affidavit the Applicant deposes that the deposit of security ought not to be an impediment to his right of appeal before this court. That in the event the instant appeal fails, the Respondent will not be deprived of the fruits of the judgment, and it has recourse by way of attaching a 1/3 of his salary pursuant to Section 44 of the *Civil Procedure Act* until the decree is satisfied. Therefore no prejudice will be suffered if stay of execution is granted on terms without an order for deposit for security. In conclusion he asserts that the court ought to exercise its discretion to enable him to pursue the instant appeal.
6. The motion was canvassed by way of oral submissions. Mr. Arusei who was appearing for the Applicant, as part of his submissions before this court reiterated the Applicant's affidavit material in support of the motion. He further submitted that the Applicant is exposed to substantial loss and the appeal being rendered nugatory if stay is not granted as he has no mean of making a deposit as condition for stay as he is a nurse relying on his salary. Counsel asserted that no prejudice will be occasioned to the Respondent if stay is granted without an order as security.
7. Ms. Jan Mohamed SC appearing on behalf of the Respondent, opposed the motion asserting that it ought not to be allowed without provision of security and reiterated that the Respondent's insurer is a reputable company. She further contended that the Applicant has failed to offer any security for the decree and no unique circumstances have been demonstrated. That no substantial loss will be visited on the Applicant as the Respondent has means to repay the decretal sum if the appeal succeeds. Counsel urged the court to order provision of security as condition for the order of stay.
8. In a brief rejoinder Mr. Arusei contended that the court has discretion on the question of security and stay of execution and the Respondent has failed to demonstrate ability to refund the decretal sum.
9. The court has considered the material canvassed in respect of the motion. However, it is pertinent to state at this stage, that the court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Applicant's prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* which provides that:

- “(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”.

10. The cornerstone consideration in the exercise of the discretion is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of the superior courts. Holdings 2, 3 and 4 of the Kenya Shell Ltd Case are especially pertinent. These are that:

- “ 1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

11. The decision of Platt Ag JA, in the Kenya Shell Ltd Case, in my humble view sets out two (2) different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”

12. The learned Judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in



its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added)

13. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton LJ in *Wilson v Church* (No 2) [1879] 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

14. The Applicant has reiterated in his affidavit material his present predicament arising from the fact that Blue Shield Insurance Co. Ltd, the insurer of his motor vehicle, went under thus exposing him to execution and substantial loss which would render the appeal nugatory. The Respondent countered the position by arguing that the instant motion is an afterthought meant to deprive the Respondent’s insurer from enjoying the fruits of judgment when the Applicant has not demonstrated substantial loss.

15. Execution in satisfaction of a decree is a lawful process, and the Applicant is duty bound to demonstrate specifically how substantial loss would arise, by showing, either that if the appeal were to succeed, the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of his money. While not elegantly or precisely expressed, the Applicant’s plea appears to be that as a nurse employed at a national hospital, he will be exposed to financial difficulty, thereby suffer substantial loss if he must shoulder the responsibility of satisfying the decree because his insurer Blue Shield Insurance Co. Ltd has financially collapsed.

16. The judgment sum in question is Kshs. 454,608/- plus costs and interest of which is substantial sum. And although the Applicant has not demonstrated his earnings, it appears that his apprehension of financial difficulty may be well grounded. Substantial loss in its various forms, is the cornerstone of the court’s jurisdiction for granting stay, and what has to be prevented.

17. As regards security, it is trite that the court is obligated to balance the rights of both parties. The Applicant has correctly argued that the deposit of security ought not to be an impediment to his right of appeal before this court. The Respondent on the other hand equally correctly contended that the motion ought not to be allowed without provision of security. The words of the court in *Ndubiu Gitabi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal.



It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

18. The provision of some form of security, and perhaps not necessarily cash or the actual sum in the decree, is necessary in an application of this nature. However, the court has to carefully balance the interests of both parties so as not to prejudice the appeal or put the decree holder at a disadvantage. The Applicant is salaried and not demonstrated to be destitute. Considering all the foregoing, the court will grant the motion dated June 29, 2022 on condition that the Applicant deposits into court a sum of Kes.200,000/- (Two Hundred Thousand) by close of business on 23.03.2023 as security for the performance of the decree. Costs will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 23RD DAY OF FEBRUARY 2023

C.MEOLI

JUDGE

In the presence of:

Ms.Ochola h/b for Mr.Arusei for the Applicant

Ms. Olung'a for the Respondent

C/A: Carol

