



**Tasty Choice Limited v Simon & Kennedy (Suing as the Administrator
of the Estate of Kevin Barasa Ndiwa - Deceased) & 3 others (Civil Appeal
E092 of 2022) [2023] KEHC 4028 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E092 OF 2022
MW MUIGAI, J
APRIL 28, 2023**

BETWEEN

TASTY CHOICE LIMITED APPELLANT

AND

**ROSEMARY NASAMBU SIMON & ELIUD WANJALA WATOYA KENNEDY
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF KEVIN BARASA
NDIWA - DECEASED) 1ST RESPONDENT**

FUJIKING MOTORS LIMITED 2ND RESPONDENT

MURIIITHI NYAGA 3RD RESPONDENT

JULIUS KINYANJUI NDURUHU 4TH RESPONDENT

RULING

NOTICE OF MOTION

1. Vide an application dated 27.09.2022, the Appellant/ Applicant sought the following orders;
 - a. Spent.
 - b. Spent.
 - c. There be stay of execution of the judgment of the Trial Court delivered 15.06.2022 pending the hearing and determination of the instant appeal being Machakos High Court Civil Appeal No. 92 of 2022.
 - d. Any other relief that this Hon. Court deems fit and appropriate to grant.
 - e. Costs be in the cause.



2. The Application was supported by the affidavit of John Mwedadu Liana, a representative of the Applicant's company contended that they have filed an appeal that has high chances of success and that the 1st Respondent has made known their intention to extract the decree and warrants of attachment in preparation to levy execution against them. He contends that this would subject the Applicant to irreparable loss and damage and would render the Appeal nugatory.
3. The Applicant would suffer irreparable damage and loss that they will unlikely be able to recover the decretal sum. He deposed that the Application had been filed on time and is not meant to deny the 1st Respondent from enjoying the fruits of the Judgment. It was opined that the insurers of the motor vehicle registration KCJ 646M/ZF 7004 undertake to issue security for costs in the form of a bank guarantee or insurance bond.

Responses

4. The 1st Respondent in opposition filed a ground of opposition dated 14.10.2022 and raised the following grounds;
 - a. The Appellant's/Applicant's Application lacks merit, as an afterthought, vexatious, frivolous and an abuse of court process and in total contravention of the Civil Procedure Rules, 2010
 - b. The Appellant's/Applicant's Application is unmeritorious and is a ploy to defeat the Plaintiffs from benefiting from the fruits of their lawful judgment.
 - c. The Appellant/Applicant is guilty of inordinate delay and laches that the Appellant does not deserved discretion of the court since it has been indolent.
 - d. The Appellant's/Applicant's application is only aimed at buying more time and delaying the already concluded matter
 - e. The Appellant's/Applicant's has not provided proof that it will suffer substantial loss hence the application should not be granted.
5. The 1st Respondent also filed a Replying Affidavit on 19.10.2022 deposed by Rosemary Nasambu Simon who contended that the Application is frivolous, vexatious, bad in law, lacks merit and is an afterthought, filed after inordinate delay and is only meant to delay the execution of the decretal sum. In addition, the memorandum of Appeal was lodged on 29.06.2022 but her advocates were not served with it in total contravention of rule 90 (1) of the Court of Appeal Rules, 2010. The present application was filed 3 months since judgment was entered.
6. It was deposed that the Appellant's application was defective as the Deponent of the supporting affidavit lacks capacity and is a mere deponent representative. The 1st Respondent stated that the deceased herein left a school going child who requires education and other obligations which the two representatives of the estate are unable to meet due to lack of funds. The 1st Respondent proposed deposit of half of the decretal amount to them and the other half be deposited in an interest earning account in the joint names of their advocates. She also said that the Appellant had not provided proof that it will suffer substantial loss.
7. The Application was disposed of by written submissions. At the time of writing this judgment, only the Applicant's submissions were on record.



Applicant Submissions Dated 7.12.2022

8. The Applicant submitted while relying on order 42 rule 6 of the [Civil Procedure Rules](#), that the 1st and Respondents admitted their intentions to proceed with execution vide their letter dated 21.07.2022 and this confirms that their application is well founded. It was submitted that the Applicant was already in dire strait even without the burden of execution. Reliance was placed on the case of [James Wangalwa & Another vs Agnes Naliaka Chesto](#) [2012] e KLR and [Butt vs Rent Restriction Tribunal](#) [1979]
9. On security of costs, it was submitted that the Applicant were ready to deposit insurance bond or bank guarantee and was ready and willing to abide by any other conditions for stay of execution. Further, that the earnings of the 1st and 2nd Respondent was quite speculative as they did not produce documentation as proof during the trial, they were apprehensive of their inability to refund the deposited amounts once the appeal is successful. Reliance was placed on the cases of [RWW vs EKW](#) [2019] e KLR, [Absalom Dova vs Tarbo Transporters](#) [2013] e KLR, [Mwaura Karuga T/a Limit Enterprises vs Kenya Bus Services Limited & 4 others](#) [2015] e KLR, [Arin C. Sharms vs Ashana Raikundalia t/a Rairundalia & co Avodcates & 2 Otehs](#) [2014] eKLR; [Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another](#) [2018] eKLR.
10. As regards delay, the Applicant conceded that there was delay for 90 days however the delay was not so unreasonable that it would occasion significant prejudice on the Respondents that the court feels compelled not to grant the orders in question. The Applicant relied on the case of [Mohsen Ali & Another vs Priscillah Boit & Another](#) E & L No 200 of 2012 [2014] e KLR and [Charles Nyamwega vs Asba Njeri Kimata & Another](#) [2017] e KLR.

Determination

11. I have considered the Application, the grounds of opposition, the affidavits in support and against the Application as well as the submissions on record and I find that the issue for determination is whether the Applicant should be granted orders of stay of execution pending appeal.
12. First and foremost, as regards the affidavit in support of the Application, the 1st Respondent contends that the deponent John Mwedadi Liana lacks capacity to swear the same. This contention is not denied. The Applicant is indicated as Tasty Choice Limited. There is no authority on record. It is therefore not clear who the deponent is as the copy of the judgment exhibited does not indicate that the said deponent is a party to these proceedings. To that extent, the said affidavit is incompetent and being incompetent it cannot be the basis upon which the application may be granted.
13. Stay of Execution is guided by the proviso under order 42 rule 6 of the [Civil Procedure Rules](#) 2010 that provides 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.”

14. 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.
15. The Court of Appeal in the case *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is set over to him.
16. In *RWW v EKW* [2019] eKLR, considered 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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



Delay

17. In this case judgment was delivered on 15.06.2022 and the Memorandum of Appeal was filed on 20.06.2022. The present application was filed on 29.09.2022, about 3 and a half months later. There is inordinate in the absence of any plausible explanation provided for the delay.

Substantial Loss

18. The next issue is substantial loss which was defined in the case of Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another vs. Agnes Naliaka Cheseto* where the court stated that:

“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. This is what substantial loss would entail.”

19. The Applicant contends that the appeal will be rendered nugatory and he will suffer substantial loss however he has not explained how exactly he will suffer if the orders sought are not granted since by granting stay would mean that the status quo would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement. This ground has therefore not been satisfied.
20. The Respondent has stated that they need school fees for the son of the deceased.

Security

21. On the 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.”



22. The Applicant is willing to give a bank guarantee or insurance bond through his insurer however no evidence of the same has been produced. In the absence of any evidence from the insurer or the bank guarantee or Insurance bond, this court is unable to exercise its discretion on this issue. To that extent, this ground has not been fulfilled.
23. This Court notes that there is also a cross appeal by 1st respondent filed on 19/10/2022. Whereas the Appellant's authority to lodge the appeal on behalf of the Appellant Company is not forthcoming at this stage and the inordinate delay unexplained, the right to appeal in light of cross appeal shall be maintained but on conditions. The court shall maintain the legal rights of parties to pursue appeals but at the same time safeguard the right to the judgment holder non -prejudice from not enjoying and/or delaying the enjoyment of fruits of the judgment.

Disposition

1. Consequently, The Appellant is granted right to appeal, the appeal is through the memorandum of appeal which is admitted on condition that ½ decretal amount shall be paid to the Plaintiff/ Respondent through the advocate on record within 90 days from date of Ruling.
2. The balance of the decretal amount to be deposited in an interest earning joint account of parties' advocates on record within 90 days of the Ruling.
3. Thereafter, the appeal and cross appeal shall be processed in the normal legal way, filing and service of Record of appeal (s) and taking directions on disposal of the appeal.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH APRIL 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Wanza H/B Ms Mwangangi for the Appellant

No Appearance - for the Respondents

Geoffrey - Court Assistant

