



**Twaha & another v Gumo (Civil Appeal E011 of 2023)
[2023] KEHC 18625 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E011 OF 2023
DKN MAGARE, J
APRIL 27, 2023**

BETWEEN

ABDULLA FOWZY TWAHA 1ST APPELLANT

COUNCIL OF IMAMS & PREACHERS OF KENYA 2ND APPELLANT

AND

MATHEWS OTIENO GUMO RESPONDENT

RULING

1. This is a normal application for stay pending Appeal. It is made under [Order 42 Rule 6 \(1\)](#). The same provides as doth: -

“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 applicant unless the order is made.
- b. and that the application has been made without unreasonable delay;
- c. And 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.”

2. The Appellant relies on the authority of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) (2012) which states: -

“.... 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 care 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.”

3. To be able to determine this matter the Court should be satisfied of 4 things:-
 - a. There is an Appeal filed.
 - b. The application was made without undue delay
 - c. The Appellant has an arguable appeal.
 - d. There is security provide for due performance of the decree.
4. The appeal was filed timeously and application was equally filed without undue delay.
5. The other aspect, is whether there is an arguable appeal. An arguable appeal is not the same as an appeal that will succeed. It is an appeal that is not frivolous and raises issues ex facie.
6. The memorandum of appeal raises issues of inordinately high quantum of damages and the finding of liability. These are no idle questions. The memorandum of Appeal discloses an arguable appeal.
7. Whether it will succeed it is a matter of another province. (See the authority of [*Nyandama Progressing Agencies Ltd =vs= Francis Wainaina Mugo & 9 Others*](#) (2021) eKLR.
8. I also confirm that the Appeal was duly filed on February 3, 2023 and duly paid for. It seeks to overturn the decree that is sought to be stayed. The only issues that remains is whether there is any loss that will require security for due performance.
9. The Respondent filed grounds of opposition. This means they are in essence conceding the factual postulations. The appellant is apprehensive that, in the event money is paid, they may not recover the same. On that the Respondent relies on the authority of [*Nicholas Stephen Okaka & Another v Alfred Waga Wesonga*](#) (2022) eKLR, where the Court stated:-

“However, this Court Is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal”
10. The only question is what should order as security. The Appellant have offered to deposit in court the original logbook for motor vehicle Registration No KBK 505X. They rely on the decision of [*Ena Investment Limited v Bernard Ochau Mose & 2 Others*](#) (2022) eKLR as follows: -

“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 That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for 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.”
11. However, the issue of stay is discretionary. I do not find deposit of a log book to be sufficient decree. The court had awarded a sum of Kshs 600,000/= as General damages and Kshs 12,000/= as special damages on January 13, 2023. Proclamation was done and the auctioneers indicate the motor vehicle registration KBK 505 X (Nissan Patrol is worth about 150,00/=). The Applicant did not find it useful to have the same valued. I don't think such a chattel offers sufficient security for due performance of



the decree. The appellant cannot litigate on their own time. I reject the motor vehicle as log book as security.

12. I note that costs were taxed at 121,020. The decree was for 612,000/=. The proper security is a money decree. I also note that deposit of an entire decretal sum is a moving target. I therefore allow the Application subject to provisions of Security as herein below stated.

Determination

13. The application dated March 8, 2023 is allowed in the following terms;
- a. There be stay of extension of the judgment and decree issued in Mombasa CMCC 1022 of 2022 pending the hearing and determination of this appeal.
 - b. The appellant to deposit a sum of Kshs 650,000/= as security pending appeal in a joint interest earning account within 45 days, failing which execution do issue.
 - c. The order of stay is valid till April 27, 2023 or till hearing of the Appeal.
 - d. The appellant shall ensure the appeal is heard before April 27, 2024 shall the Appeal be heard by that time stay continues till judgment is delivered.
 - e. The court gives further directions without affecting the stay application.
 - f. The Appellant to file the record of Appeal within 60 days, together with submissions.
 - g. The respondents to file submissions within 15 days of service.
 - h. The Court to give directions on hearing date immediately of this Ruling.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF APRIL, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Applicant

Mwabonje for the Respondent.

Court Assistant - Firdaus

