



REPUBLIC OF KENYA



**Omari v Gichana (Civil Appeal E001 of 2023) [2023] KEHC 17871 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA**

**CIVIL APPEAL E001 OF 2023**

**WA OKWANY, J**

**MAY 25, 2023**

**BETWEEN**

**CHRISTOPHER OMARI ..... APPLICANT**

**AND**

**SAMUEL OMARI GICHANA ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Application dated March 10, 2023 wherein the applicant seeks, inter alia, orders to stay the execution of the Judgement/Decree dated December 13, 2022 in Keroka PMCC No 15 of 2018.
2. The Application is premised on the following grounds: -
  1. Judgment was delivered on December 13, 2012 for a sum of Kshs. 803, 364/= and a period of 30 days stay granted.
  2. The Applicants dissatisfied with the judgment and decree of the trial court on liability and quantum lodged an appeal vide Nyamira HCCA No. E001 of 2023.
  3. The stay period granted has since lapsed thus exposing the applicant to an imminent risk of execution proceedings.
  4. It is trite law that an appeal does not operate as stay and the applicant's movable properties are thus exposed to execution and sale.
  5. It is apparent that there is an impending threat of execution by the respondent against the applicant as the stay granted has lapsed anytime from now.
  6. That the applicant's appeal has a high chance of success.



7. That the appellant/applicant is apprehensive that the respondent may levy execution against the appellant/applicant.
  8. That the judgment is of substantial amount and the appellant/applicant is apprehensive that if the respondent proceeds to execute against the appellant/applicant and thereafter the appeal is successful, the appellant will not be able to recover the same from the plaintiff/ respondent.
  9. Unless stay of execution is granted and the respondent levies and/or executes the said judgment delivered on December 13, 2022, the appellant/applicant's appeal will be rendered nugatory and the appellant/applicant will suffer irreparable loss and damage.
  10. That the applicant is ready and willing to offer security in the form of a bank guarantee for the full decretal sum of Kshs. 803,364/= pending the hearing and determination of this Appeal.
  11. The appellant/applicant has an arguable appeal with numerous chances of succeeding.
  12. The appellant/applicant has come to court within a reasonable period of time and without undue delay.
  13. The Application will not occasion any prejudice to the respondent.
  14. That this application is made in good faith, timeously and it will be in the interests of justice that the same be allowed.
3. The Respondent opposed the application through the Grounds of Opposition dated 24<sup>th</sup> March 2023 wherein he states that the application lacks merit and is calculated to delay the realization of the fruits of his decree. He further states that the Application is a replica of another application the Applicant filed before the trial court in Keroka SPMCC No. 15 of 2018 which is pending determination. The Respondent maintained that the present Application is therefore not properly instituted.
  4. The Respondent further averred that, whereas he stood to suffer substantial loss in the event of the Application succeeding, the Applicant on the other hand would suffer no prejudice as he had already enjoyed 30 days stay granted by the trial court. He urged this court to dismiss the application so as to allow the legal process of execution to take place.
  5. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution pending appeal.
  6. The law governing stay of execution pending Appeal is contained in Order 42 Rule 6 of the [\*Civil Procedure Rules 2010\*](#), which states as follows:-
    - (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit, a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

7. In the case of *Halai & another v Thornton & Turpin (1963) Ltd* [1990] KLR 365 the Court of Appeal held thus:-

“The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd* (2013) eKLR and *Hassan Guyo Wakalo v Straman FA Ltd* [2013/eKLR in which it was held thus;

‘In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.’”

8. An applicant seeking to stay execution pending appeal must satisfy the following conditions:-
- a. That substantial loss may result to them unless the order sought for is granted by the court;
  - b. That the Application had been brought without unreasonable delay; and



- c. That the Applicant has given such security as the court orders for the due performance of such a decree or order which may be binding on them.
9. The court is at the same time enjoined to consider the rights of an Appellant to appeal if he is dissatisfied with the judgment and the rights and interest of a decree-holder who ought not to be precluded from enjoying the fruits of his judgment. This principle was aptly explained in the case of *RWW v EKW* [2019] eKLR, as follows:-
- “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.
10. It did not escape the attention of this court that the Order against which the stay is sought emanated from a court of competent jurisdiction and that the Respondent herein, being the successful party, is well within his legal rights to execute the said judgment decree. A decree from a judgment debt becomes payable once judgment has been delivered by a trial court. In the case of *Macharia t/a Macharia & Co Advocates v East African Standard, No 2* (2002) KLR 63, the court observed that:-
- “To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”
11. As a principle, therefore, stay of execution will only be granted upon satisfaction of the parameters set under Order 42 of the *Civil Procedure Rules*, the circumstances of a case and the court’s discretion. This court must make a decision that avoids injustice or hardship. (See the case of *Shah v Mbogo and another* (1967) EA 116).
12. Applying the above principles to this case, I note that the Applicant is apprehensive that the Respondent will not be able to refund the decretal amount should the appeal succeed. In *Kenya Shell Limited v Kibiru & another* [1986] KLR 410 it was held that once the question as to the financial capability of a party has been raised, as was the case in this Application, it is incumbent upon the Respondent to prove to the court that he or she is not a person of straw and could therefore refund the decretal amount should the appeal not go his or her way. This evidential burden shifts to such a party and can only be discharged by them.



13. In *ABN Amro Bank v Lemond Foods Limited* Civil Application No.15 of 2002, the Court Appeal held that:-

“The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”

14. I note, from the Grounds of Opposition, that the respondent merely denied being a person of straw and only stated that he had engaged the services of an advocate to defend the suit. This, in my view, is not sufficient to prove that he has the capacity to refund the decretal amount. I am therefore not persuaded that he discharged the burden of proof.

15. In the same vein, this court must also address itself to the intended appeal and consider whether the same is arguable and will be rendered nugatory should the said order not be granted. It is my view that if the respondent is allowed to execute the decree from the judgment of the trial court, the applicant will be highly prejudiced in the event that the decretal sum cannot be refunded or in the event that his property is attached and sold. The applicant stands to suffer more prejudice than the respondent herein.

16. In the case of *Chris Mungai N. Bichage v Richard Nyagaka Tongi & 2 others* (2013) eKLR, the Court of Appeal pronounced itself as follows:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

17. In *Trust Bank Limited and another v Investech Bank Limited and 3 others* [2000] eKLR where it was held thus: -

“The jurisdiction of the court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed, an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

18. From the above cited cases it is clear that an arguable appeal must not necessarily be one that will succeed but must raise substantive points of law worthy of consideration by a court on appeal. This means that a court is not to engage in an exercise of determining the merits of the Appeal at this as that is a reserve of the hearing of the Appeal, but must consider whether such grounds are substantial enough to warrant the attention of the court.



19. The above principle was explained by the Court of Appeal at Nairobi in the case of Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo (Deceased) v Mutunkei (Civil Appeal (Application) Number E041 of 2020) [2021] KECA 235 (KLR) where it held thus:-

“ 12. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the appeal is arguable inter alia whether the Court erred in admitting the oral agreement allegedly entered into between the deceased and the respondent as evidence of the sale of the suit property by the deceased to the respondent. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.”

20. I note that the grounds of appeal listed in the Memorandum of Appeal are centered on issues of liability and quantum. Without going into the merits of the Appeal, it is my view that the Applicant raises arguable points of law in his Memorandum of Appeal and that the same ought to be given adequate consideration on appeal, which then means that the same will be rendered nugatory if this Application is disallowed.

21. On the issue of time, I note that the judgment in the trial court was delivered on December 13, 2022, the Memorandum of Appeal was filed on January 10, 2023 while the present Application was filed on March 10, 2023. It is my view that there was no inordinate delay in filing of the said Application and that the same was brought in a timely manner.

22. Order 42 Rule 6 provides that a party seeking stay of execution pending appeal must furnish security. The question for determination here is two-fold: whether the party seeking stay has furnished security and whether the same is adequate. It was the respondent’s contention at paragraph 7 of the Grounds of Opposition that the security furnished by the Applicant was insufficient given that the bank was a stranger to the proceedings.

23. The main consideration for a court in assessing the adequacy of security is that the said security must be capable of ensuring the eventual performance of the judgment decree. In Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR, it was held that:-

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

24. In this case, the Applicant filed a Bank Guarantee dated 18<sup>th</sup> February 2022 from Family Bank. The said guarantee is valid for a duration of 12 months with an option for renewal. I note that this is not a renewed bank guarantee as the validity period has since lapsed. From my assessment of the said guarantee, I find it insufficient to cater for the decretal amount unless it is renewed, or an alternative



security provided. I find guidance in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417, where the Court of Appeal held that:-

“..... (5) 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 for costs as ordered will cause the order for stay of execution to lapse.”

25. Considering the law and the circumstances of this case, I hold that the interests of justice will be best served by allowing the Application and granting an Order for stay of execution pending appeal, on condition that the Applicant fulfils the requirements of order 42 Rule 6 sub-rule (2b).
26. In the end, I find that the Application has merit and I therefore allow it but on the following conditions:
- i. That the applicant/appellant shall release 50% of the decretal sum to the respondent within 30 days from the date of this ruling.
  - ii. That the applicant/appellant shall provide a suitable bank guarantee for the balance of the decretal sum within 30 days from the date of this ruling.
  - iii. That in the event of failure to comply with the conditions in orders i) and ii) hereinabove, the respondent shall be at liberty to proceed with the execution of the decree.
  - iv. That the costs of this application shall abide the outcome of the appeal.
27. It is so ordered.

**RULING SIGNED, DATED AND DELIVERED IN CHAMBERS AT NYAMIRA THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**W.A. OKWANY**

**JUDGE**

