



**Absa Bank Kenya PLC & another v Oshe (Civil Appeal
E006 of 2023) [2023] KEHC 21697 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E006 OF 2023
JN ONYIEGO, J
JULY 28, 2023**

BETWEEN

ABSA BANK KENYA PLC 1ST APPLICANT

ABSA LIFE ASSURANCE KENYA LTD 2ND APPLICANT

AND

MANJUU MBARAK OSHE RESPONDENT

RULING

1. The Firm of Wamae & Allen Advocates filed before this court a notice of motion dated 19.05.2023 in which the applicant sought the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. Pending the hearing and determination of the substantive appeal, a stay of execution of the judgment Garissa CMCC No. E035 of 2022 Manjuu Mbarak Oshe v Absa Bank Kenya PLC & Another and subsequent decree do issue.
 - iv. The Court be pleased to order favourable conditions of stay pending appeal.
 - v. The Court be at liberty to make any further orders in the interests of justice.
 - vi. The costs of and/or incidental to this application do abide the outcome of the appeal.
2. The application was supported by the grounds set on its face as well as on the supporting affidavit of Michael Massawa, the applicant herein sworn on 19th May,2023 It was deponed that on 26.04.2023, Hon. Omwange SRM entered a judgment in favour of the respondent in Garissa CMCC No. E035 of 2022 Manjuu Mbarak Oshe v Absa Bank Kenya PLC & Another and having been dissatisfied with the said judgment, the applicant expeditiously filed the application herein pending the hearing and



determination of his appeal. That unless this application is heard urgently and the prayers sought granted, the applicant/appellant will suffer irreparable and substantial loss for the reasons inter alia that the respondent will not be in a position to refund the decretal sum in the event the appeal succeeds. That the applicant/appellant is willing to have the decretal amount held in an interest earning account in the name of both advocates pending the hearing and determination of the substantive appeal. This court was therefore urged to allow the prayers as sought.

3. The firm of Nyipolo advocates representing the respondent opposed the application by filing a replying affidavit sworn 08.06.2023 to the effect that the applicants/appellants did not satisfy the conditions necessary to grant the orders sought. That they have not satisfactorily demonstrated the risk of substantial loss as required under order 42 rule 6(2)(a) of the *Civil Procedure Rules*. Further, that no security had been given for due performance of the decree as demanded by the law. That the respondent is an employee of the ODPP, hence endowed with the ability to refund the decretal sum in the event the appeal succeeds. That in the event this Honourable court is inclined to grant stay of execution orders, then the same ought to be subject to the applicants/appellants depositing the decretal sum in an interesting earning account in the joint names of the advocates on record for the parties within 14 days.
4. Parties took directions to have the application disposed off by way of written submissions. The applicants through the firm of Wamae and Allen advocates filed their submissions dated 15th June 2023 submitting on two issues;
 - i. Whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
 - ii. Whom should costs be awarded to.
5. On the first issue, it was their plea that the orders sought herein are deserved as guided by the provisions of order 42 rule 6 of the *Civil Procedure Rules* in that they had complied with the said requirements. Reliance to support the same was placed on the case of *Turbo Highway Eldoret Ltd v Munuu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling). Regarding the imposition of the terms before granting stay of execution, the applicants/appellants submitted that there was no proof tendered that the respondent is employed as alleged. It was thus proposed that the decretal sum be deposited and held in an interest earning account or the applicants be granted leave to deposit into this Honourable Court a bank guarantee of similar value. In that regard, reliance was placed in the case of *Mwaura Karuga T/a Limit Enterprises v Kenya Bus Service Ltd & 4 Others* [2015] eKLR.
6. In reference to costs, the applicants/appellants submitted that this court awards costs as set out under section 27 of the *Civil Procedure Act* as ordinarily, costs follow the event.
7. The respondent on the other hand through the firm of Nyipolo advocates filed their submissions dated 15th June 2023 contending that order 42 rule 6 provides for the pre-requisites that a party should meet when seeking for stay in case of an appeal to wit that a court ought to be satisfied that substantial loss may result to the applicant unless the order is made; the application be made without unreasonable delay and; that such security as the court orders for the due performance of such decree or order.
8. It was submitted that there was no proof that the respondent who works with the ODPP will not be in a position to refund the decretal sum. The applicant in support of his averment relied on the case of *Jessikay Enterprises Ltd v George Kaboto Muiruri* [2022] eKLR wherein the court found and held that the ingredient of risk of substantial loss must be demonstrated with particularity.



9. That the broad and vague averment that the respondent was not in a position to refund the decretal sum without giving a specific and justifiable explanation as to what factors may hinder him from refunding the decretal sum did not amount to a satisfactory demonstration of risk of substantial loss as demanded in order 42 rule 6 of the Civil Procedure Rules. Concerning costs, it was submitted that the same follows the event and therefore, the respondent deserved the costs of the application. In the end, the respondent urged this court to disallow the application and let him execute the judgment since the application is devoid of merit and deserves to be dismissed with costs.
10. I have considered the applicant's application herein, response thereto and viral submissions by both parties.
11. The law concerning stay of execution pending appeal is found in order 42 rule 6 of the Civil Procedure Rules which stipulates as follows:
 - 6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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.
12. There are three conditions which must be established before granting stay order pending appeal under Order 42 Rule (6)(2) of the Civil Procedure Rules which provides that:
 - i. The court must be satisfied that substantial loss may result to the applicant unless stay of execution is ordered;
 - ii. That the application is brought without undue delay; and
 - iii. That 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 applicants.
13. The requirements for grant of stay pending appeal were set out in Butt -vs- Rent Restriction Tribunal [1982] eKLR 417 wherein the Court of Appeal held: the power of the court to grant or refuse an application for a stay must be exercised in such a way as not to prevent an appeal.
14. On the first condition of proving that substantial loss may result unless stay order is made, the Court of Appeal in the case of Mukuma v Abuoga (1998) KLR 645 held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
15. There is no contestation that the judgment was entered for the respondents on 26.04.2023 in which it had been declared that the respondent was entitled to an amount of Kes. 1,200,000.00.



16. In an application of this nature, the applicants ought to show the loss they would suffer if the stay order is not granted since by granting stay, it would mean that the status quo remained as it were before the judgment. The applicants argued that they were apprehensive that if the respondent is paid, he may deal with the same in a manner prejudicial to the applicants and if the appeal is successful, they might not be able to recover the same from the respondent. It is equally important that the respondent herein should rebut the allegation that if paid the money, he will be in a position to refund the same should the applicant's appeal be successful. Be that as it may, the respondent submitted that he was an employee of the ODPP but nothing was produced or annexed in his pleadings to support the same.
17. In the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike* Misc Application 238 of 2005, the Court of Appeal was of the view that the evidential burden lies with the decree holder to prove that he has the resources to pay back the decretal sum should the appeal succeed.
18. In the same breadth, it should be noted that the right to be heard is provided for in our constitution. The applicants having expressed their intention to be heard, it is paramount that they be granted the opportunity. This is buttressed by article 50 of *the constitution* which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In my view the applicant has not demonstrated that the respondent is a person of straw hence not likely to suffer substantial loss should the stay order not be granted.
19. On the second condition, there is no contestation that the judgment of the trial court was delivered on 26.04. 2023. The application herein was filed on 19.05.2023 which was almost one month from the date of the said judgment. In my view, the application ought not be shut out since the orders sought depend on the discretion of this court. In the case of *Jaber Mohsen ali & Another v Priscillah Boit & Another* E & L No. 200 of 2012[2014] eKLR, the court stated that what is unreasonable delay is dependent on the surrounding circumstances of each case. In my view, the application was filed within reasonable time.
20. Regarding deposition of security, this is an issue of discretion. The court has a duty not to deny the judgment debtor the fruits of his judgment and equally the applicant his right to a fair hearing and appeal as enunciated in article 50(2)(q) of *the Constitution*. It is all about balancing justice.
21. In the same breadth, the court in *Century Oil Trading Company Limited vs Kenya Shell Limited Nairobi* [2008] eKLR held the view that: -

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful to the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”
22. The applicants deposed that they were ready to abide by any order that the court might give and which in my view can only be taken to include the order that they deposit security for the due performance of the decree. The security must be one which could serve the purpose of guaranteeing due performance of such decree or order as may ultimately be binding on the applicant. This was the court's holding in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR.



23. From the depositions on record, it is more probable that the issue at hand calls for status quo pending the hearing of the appeal. Indeed, if the respondent is left to execute the decree, it will complicate the situation further if the applicant becomes successful. That being the case, and in balancing the rights of the parties, justice will demand that the application be allowed. The respondent would not suffer prejudice which in my view would not be compensated monetarily. Equally, the application might be rendered nugatory if the appeal succeeds after execution has taken place.
24. In the foregoing, I allow the application in the following terms;
- a. That an order of stay be and is hereby issued staying the execution of the judgment and consequential orders in the judgment Garissa CMCC No. E035 of 2022 Manjuu Mbarak Oshe v Absa Bank Kenya PLC & Another delivered on 26.04.2023 pending the hearing and determination of the intended appeal.
 - b. That the applicants deposit the decretal sum in an interest earning account in the joint names of counsel for the parties within 30 days.
 - c. That failure to comply with order (ii) above, the respondent shall be at liberty to execute the said judgment delivered on 26.04.2023.
 - d. That the respondent shall have the cost of the application

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.

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J.N. ONYIEGO

JUDGE

