



**Nyange'ndo v Munene (Miscellaneous Civil Appeal 1 of 2023)
[2023] KEHC 22649 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPEAL 1 OF 2023
CM KARIUKI, J
SEPTEMBER 28, 2023**

BETWEEN

SIMON NGUYO NYANGE'NDO APPLICANT

AND

ROSE WANJIKU MUNENE RESPONDENT

RULING

1. The Applicant herein vide the application dated January 1, 2023 sought for the following orders: -
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That leave be granted to the Applicant herein to appeal against the orders of Hon V Kiplagat (SRM) given on 15th December 2022 in CMCC No E129 of 2022 Rose Wanjiku Munene vs Zachary Njuguna Muriithi & Others and the memorandum of appeal annexed to the supporting affidavit be deemed as duly filed.
 - v. That this honourable court be pleased to grant an order staying the trial court orders of December 15, 2022 in CMCC E129 of 2022 Rose Wanjiku Munene vs Zachary Njuguna Muriithi & Others pending hearing and determination of the intended appeal.
 - vi. That costs of the application be provided for.
2. The application is supported by the affidavit deponed by Simon Nguyo Nyang'endo dated January 13, 2023.
3. On the other hand, the Respondent filed the replying affidavit dated April 3, 2023. She deponed that the Applicant jointly with other Defendants and Interested Parties have the habit of using every trick



in the book to defeat the orders of the court. That examples are orders of the court dated October 27, 2022, November 8, 2022, December 22, 2022 and January 26, 2023.

4. The Respondent averred that the Applicant is guilty of laches as he had not disclosed to this court the orders of the trial court dated January 26, 2023 that shall put an end to this application. That the Applicant has not told the court that the trial court gave him an opportunity to appear before it and tell the court the reason why he could not obey the orders of the court.
5. It was deponed that it is shocking and in bad faith that contrary to the spirit of the orders of the court, the Applicant has elected to appeal on an order that the Respondent views to be favouring him. That the Applicant has not demonstrated to this court the reason why he elected not to appear before the trial court and explain the difficulties he was going through so that he could not obey the orders.
6. The Respondent asserted that had the Applicant chose to appear before the trial court, this application could no basis and the same could have been spent. That to this end the Applicant wants to use unconventional means to disobey the orders of the court and it is therefore the Respondent's plea that this application has no merit and the same should be dismissed with costs.

Applicant's Submissions

Whether the application meets the legal threshold for grant of orders sought?

7. The Applicant submitted that he is aggrieved by the orders of court issued on December 15, 2022 without giving him an opportunity to be heard and without the court considering his replying affidavit that was already on record.
8. It was argued that the subject matter motor vehicle is and was not within the Applicant's control or ownership as at the time the court was issuing the orders and his response had demonstrated as much. He averred that has the court considered the response, it would not have issued orders that he did nit have capacity to comply with.
9. The Applicant stated that he was now at risk of being cited for contempt of court orders that he has no capacity and/or ability to ensure compliance. In fact, the Applicant had already been summoned by the court pursuant to the said orders before an order of stay of proceedings was granted by this court.
10. It was asserted that under Section 75 of the *Civil Procedure Act* cap 21, the Applicant did not have an automatic right of appeal against the order issued by the subordinate court and thus requires leave of the court to do so.
11. The Applicant pointed out that looking at the memorandum of appeal, the intended appeal is arguable and the Applicant should be grated leave to file the same. Further, the intended appeal will be rendered nugatory if an order of stay of proceedings is not granted pending the hearing and determination of the appeal. That from the proceedings of the trial court, it is clear that the court had taken steps to enforce the impugned orders against the Applicant who has clearly demonstrated that he is not the owner of the motor vehicle in question and that the same is not in his control. He had annexed a search to his replying affidavit that the court failed to consider.
12. It wd also stated that the application was filed without unreasonable delay and therefore prayed that the orders sought be grated. As for costs, they prayed that the Applicant be allowed the costs of the application as per Section 27 of the *Civil Procedure Act*.
13. Respondent's Submissions was not available at the time of drafting this ruling.



Analysis and Determination

14. I have considered the application, the supporting affidavit, the replying affidavit and the submissions filed as well as the authorities relied upon. the issue for determination is whether the Applicants have met the prerequisites for leave to appeal against the orders of the trial court in CMCC no. E129 of 2022 Rose Wanjiku Munene vs. Zachary Njuguna Muriithi & Others dated 15th December 2022 and grant of stay of execution of orders of the trial court in CMCC No E129 of 2022 Rose Wanjiku Munene vs. Zachary Njuguna Muriithi & Others pending appeal.
15. Firstly, as stated by the Applicant; leave to appeal is a requirement of the law and the Appellant having sought the same, I am inclined to allow the application for leave to appeal as per Section 75 of the Civil Procedure.
16. Secondly, Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) 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.”
17. In *Butt Vs. Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal enumerated on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus: -
18. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
 - ii. 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.
 - iii. 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.
 - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.



19. Accordingly, an application for stay invokes the discretionary powers of this court under the aforementioned order that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal
20. After careful analysis of the instant application, I am inclined to grant the Applicant the stay orders sought. The Applicant has demonstrated the substantial loss he will suffer if the orders are not granted in that he risks being cited for content of court orders that he allegedly has no capacity and/or ability to ensure compliance. For the same reasons, the Applicant has established that the intended appeal will be rendered nugatory should the stay orders not be granted.
21. I also find that there was no delay in filing the application for stay pending appeal.
22. In Cotton LJ in *Wilson -Vs- Church* (No 2) (1879) 12ChD 454 at page 458, Hancox JA stated thus: -

“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.”
23. Consequently, the Applicants must furnish security for the due performance of the decree. This court has the delicate task of balancing the interests of both the Applicant and the Respondent. 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. (see [RWW Vs. EKW](#) [2019] eKLR)
24. The Court of Appeal in *Ndubiu Gitabi and Another Vs Anna Wambui Warugongo* [1988] 2 KAR 621, while affirming the decision of Sir John Donaldson M. R. in *Rosengrens Vs Safe Deposit Centers Limited* [1984] 3 ALLER 198 stated: -

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending Appeal the court is faced with a situation where judgment has been given. It is subject to Appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that Appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the Appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the Appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult



for the Applicant, so as to tempt him into settling the Appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

25. Moreover, in *Mwaura Karuga t/a Limit Enterprises Vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was observed:

“... 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.”

26. And in *Gianfranco Manenthi & another Vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court 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 money decree of the lower court for an order of stay must satisfy this condition on security.

27. In the circumstances and taking into consideration the provisions of Section 1A and 1B of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules and the foregoing reasons I make the following orders: -

- i. The Applicant is granted leave to appeal against the orders of Hon V Kiplagat (SRM) given on December 15, 2022 in CMCC No E129 of 2022 Rose Wanjiku Munene vs Zachary Njuguna Muriithi & Others and the memorandum of appeal annexed to the supporting affidavit be deemed as duly filed.
- ii. That pending the hearing and determination of this Appeal, there shall be a stay of execution of the trial court orders of December 15, 2022 in CMCC E129 of 2022 Rose Wanjiku Munene vs Zachary Njuguna Muriithi & Others pending hearing and determination of the appeal.
- iii. The Applicant shall furnish security of Kshs 100, 000 for performance of the decree. The said amount shall be deposited in court within the next 30 days from today.
- iv. That in the event of failure to comply with the order in (c) above, the order in (b) shall stand vacated.
- v. The cost of this application shall be in the Appeal.

DATED AND DELIVERED AT OLKALOU THIS 28th DAY OF SEPTEMBER 2023

CHARLES KARIUKI

JUDGE

