



REPUBLIC OF KENYA



**Njenga & 2 others v Prime Bank Limited (Civil Appeal 138 of 2020)
[2023] KEHC 24137 (KLR) (Civ) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 138 OF 2020

CW MEOLI, J

OCTOBER 26, 2023

BETWEEN

JOHN KARANJA NJENGA 1ST APPLICANT

PAUL BORO NJENGA 2ND APPLICANT

**PETER NJENGA KARINGE T/A PETMARK DISTRIBUTORS 3RD
APPLICANT**

AND

PRIME BANK LIMITED RESPONDENT

RULING

1. For determination is the motion dated 01.10.2021 by John Karanja Njenga, Paul Boro Njenga, and Peter Njenga Karinge t/a Petmark Distributors (hereafter 1st, 2nd & 3rd Applicant/Applicants) seeking inter alia that the court be pleased to issue an order to stay execution of the ruling of the lower court delivered in Nairobi Milimani CMCC No. 3109 of 2016 pending the hearing and determination of the Applicants' appeal. The motion is expressed to be brought under Section 3A of the [Civil Procedure Act](#) (CPA), Order 42 Rule 6 of the Civil Procedure Rules (CPR) and is premised grounds thereon as amplified in the joint supporting affidavit sworn by the 1st & 2nd Applicants.
2. To the effect that the trial court delivered a ruling in respect of the Applicants' motion on 13.02.2020 and being aggrieved by the same the Applicants filed a memorandum of appeal on 12.03.2020 and that the Applicants have since applied for a typed copy of proceedings and the ruling of the trial court but are yet to receive the same leading to delay in the prosecution of the appeal. They depose that if Prime Bank Limited (hereafter the Respondent) proceeds to execute the orders of the trial court, the appeal would be rendered nugatory occasioning the Applicants substantial loss. In conclusion, they



state that the appeal is arguable and that they were condemned unheard prior to delivery of the ruling of trial court.

3. The Respondent opposes the motion by way of a replying affidavit deposed by George Mathui, who describes himself as the Legal Manager of the Respondent. He attacks the motion on grounds that it is a delaying tactic, brought in bad faith, is misconceived, incompetent, lacks merit and constitutes a flagrant abuse of the court process. That the Applicants have not discharged their duty to prove the nature of loss that they are likely to suffer should an order of stay be denied and have equally not offered security or a proposal on how to settle the decretal sum.
4. The deponent further states that the assertion that a stay of execution would not be prejudicial to the Respondent is misleading and wholly untrue because since 2016 when the original cause of action arose, the Applicants have deliberately sought to delay and obstruct the course of justice. Thereby depriving the Respondent its rightful fruits of judgement for a period of over six (6) years. In conclusion, he deposes that there has been delay in filing and serving the record of appeal and the court should refuse to aid the Applicants' attempt to obstruct the course of justice by dismissing the motion.
5. In a rejoinder by way of a further affidavit, the 1st & 2nd Applicants disputed the Respondent's assertions on the merits of the motion. They state that provision of security is discretionary in this instance, given the nature of the subject dispute. They reiterated that delay in filing the record of appeal is beyond their control due to delay in obtaining the typed and certified copy of proceedings of the trial court, compounded by the change in physical court access due to the Covid-19 Pandemic and the ruling in respect of the application earlier brought to re-instate the instant motion.
6. The motion was canvassed by way of written submissions. The Applicants' submissions opened by restating the affidavit material and regarding the applicable principles for grant of stay pending appeal, reiterated the provisions of Order 42 Rule 6 of the (CPR) and the decision in *RWW v EKW* [2019] eKLR. Submitting substantial loss, counsel argued that the Respondent is intent on proceeding with execution given the numerous Notices To Show Cause (NTSC) served upon the Applicants. Further if execution were to proceed the Applicants will be condemned unheard since the impugned decree was issued on an *ex parte* judgment and full execution will render the appeal overtaken by events and nugatory.
7. It was submitted that the instant motion was filed without undue delay, namely, two (2) days after the Respondent served the Applicants with a (NTSC). Concerning security, counsel expressed the Applicants' willingness to abide by any conditions as may be imposed by this court. While calling to aid the decisions in *Butt v Rent Restriction Tribunal* (1982) KLR 417-420 as cited in *Tsusho Capital Kenya Ltd v Antony Mbuthia Kiburi & Another* [2019] eKLR and *Savings & Loan Kenya Limited v Mary Wahito Mbugua Civil Suit No. 2695 of 1997* (unreported), counsel contended that the Applicants have an arguable appeal with a high chance of success. And that if stay of execution is not granted, substantial loss will be occasioned to the Applicants. The court was urged to allow the motion to avoid a miscarriage of justice upon the Applicants.
8. On behalf of the Respondent, counsel condensed his submissions into two (2) cogent issues for the court consideration. On the first issue, the decision in *Catherine Njeri Maranga v Serah Chege & Another* [2017] eKLR was relied on to submit that the order emanating from the ruling delivered on 13.02.2020 was a negative order incapable of execution. That for an order of stay to be efficacious, there must exist a positive element capable of execution. It was further contended that the trial court order neither obligated the Applicants to perform any act nor to refrain from doing anything when it dismissed the Applicants motion thus requiring intervention of this court. The court was urged to dismiss the motion, therefore.



9. In the alternative, and without prejudice to the foregoing, counsel proceeded to address the substance of the motion. Anchoring his submissions on the decisions in *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others* [2012] eKLR, *Samvir Trustee Ltd v Guardian Bank Ltd* [2007] eKLR, *Macharia t/a Macharia & Co. Advocates v East Africa Standard* [2002] eKLR and *Vishram Ravji Halai v Thornton & Turpin Civil Application* [1990] eKLR he submitted that despite the grant of stay of execution being an exercise of discretion, certain conditions pursuant to Order 42 Rule 6 of the (CPR) apply, and which the Applicants have failed to meet. On delay it was argued that despite the court order issued on 13.02.2020, the Applicants only deemed it fit to present the instant motion on 01.10.2021, being more the 1 year 8 months late.
10. Concerning substantial loss, counsel called to aid the decisions in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, *Macharia t/a Macharia & Co. Advocates (supra)* and *Meteine Ole Kilelu & 19 Others v Moses K. Nailole* [2009] eKLR to contend that execution cannot be construed as substantial loss. Further that bare assertions that substantial loss will result or that if the appeal were to be successful, the same will be rendered nugatory do not suffice; the Applicants must clearly articulate, which they have failed to do, the nature of anticipated substantial loss before the court intervenes by an order of stay of execution.
11. Finally, it was submitted that the requirement on security is at the discretion of the court and while not intended to fetter the right of appeal should not aid litigants to delay execution of decrees through filing of vexatious and frivolous appeals. The decision in *Gianfranco Manethi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR was cited in that regard. In conclusion the court was urged to dismiss the motion with costs.
12. The court has considered the material canvassed in respect of the motion. It would be apt to note at this juncture that the court is not concerned with the substantive appeal that being a preserve of the appellate court. However, as a preliminary issue the Respondent has submitted that the order emanating from the ruling delivered on 13.02.2020 was a negative order incapable of execution as the trial court neither obligated the Respondent to perform any act nor to refrain from doing anything when it dismissed the Applicants' motion. Therefore, the instant motion ought to be dismissed on that ground. The Applicants did not address the issue.
13. From the rival affidavit material, the court gathers the following. The trial court entered an *ex parte* judgment in Nairobi Milimani CMCC No. 3109 of 2016 on 14.10.2016 and a decree thereafter issued in favour of the Respondent. The Applicants then moved the trial court *vide* a motion saliently seeking that the *ex parte* judgment entered against them be set aside and leave to file a defence out of time. The Applicants' motion was dismissed *vide* a ruling of the trial court delivered on 13.02.2020.
14. The live prayer before this court is prayer 3 which seeks "stay of execution of the ruling of the lower court delivered on 13.02.2020 pending determination of the instant appeal". As rightly argued by the Respondent, the dismissal order is in the nature of a negative order and is incapable of execution. The Court of Appeal in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application) E383 of 2021)* [2021] KECA 363 (KLR) stated as follows; -

"We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the



sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences vs Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal”. The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”

Further, in the more recent case of *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

“16. In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others*__ [1976] KLR 63 at page 66 paragraph C).”

15. Applying the above dicta, prayer 3 as crafted cannot issue. Despite the apparent drafting blunder, a court of law ought to aim at doing substantive justice, given the background of this matter. In so doing this court invokes its inherent power under section 3A of the [Civil Procedure Act](#) to deem prayer 3 of the motion as one for stay of the decree emanating from the *ex parte* judgment in Nairobi Milimani CMCC No. 3109 of 2016 which decree was the subject of the motion in the lower court. The Respondent’s objection is therefore placed aside in the interest of substantive justice.
16. That said, the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt* (supra). The Applicants prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules which provides that: -
 - “(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”

17. The cornerstone consideration in a motion to stay execution is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell Case are especially pertinent. These are that: -

- “1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

18. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore gives context to the 4th holding above. The Platt Ag JA (as he then was) stated inter alia that

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”

19. The learned Judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare



case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added)

20. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, ...render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -Vs- Church (No 2)* (1879) 12ChD 454 at page 458 where he said: -

“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.”

21. In an application of this nature, the successful applicant ought to depose expressly, how substantial loss will arise, whether due the hardship resulting from making payments towards the decree, or the impossibility or difficulty in recovery of sums paid out, in the event the appeal succeeds. The Respondent has vehemently contested that the Applicants have not evinced and or discharged their duty of proving the nature of loss that they are likely to suffer should an order of stay be denied.
22. Here, the Applicants ground (a) on the face of the motion and submissions refer to the Applicants apprehension of substantial loss through inability to recover any sums paid out in the event of the appeal succeeding. However, the supporting affidavit appeared only to make tangential reference thereto at paragraph 11 where it is merely deposed that the ”appeal may be rendered nugatory and substantial loss suffered if the orders sought are denied.” The Respondent’s answer to paragraph 11 is that the fact of execution is not proof of substantial loss. There was no response to the implied challenge in the Applicants’ grounds and submissions regarding its financial ability to refund the decretal sums if the appeal succeeds.
23. As stated in the *Shell* case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of its money. While the Applicants made a poor presentation of their apprehension of substantial loss, it cannot be said that they completely failed to demonstrate the likelihood of substantial loss. They have attached to their affidavit material a (NTSC) for Kshs. 16,737,734.64 (annexure “JK3”) which is a substantial sum if execution were to proceed. In a proper case, demonstrated difficulty in recovery of the decretal sum would qualify as sufficient reason (as anticipated in Order 42 Rule 6(1) of the Civil Procedure Rules) to be considered by the court.
24. Whatever the case, it is settled that in the exercise of its discretion, the court must balance the competing interests of the parties so as not to prejudice the matter pending appeal. In that regard, the observations made in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision



of Sir John Donaldson M. R. in *Rosengrens -Vs- Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, apply to the instant motion:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal..”

25. Concerning security, the Respondent contended that there was no offer by the Applicants despite security being a requirement for the grant of stay of execution. The Applicants have argued that the same is discretionary and through submissions, counsel has expressed the Applicants’ willingness to abide by any conditions as may be granted by this court for performance of the orders sought.
26. Finally, regarding delay, this is an important issue as the period of delay as well as explanation thereof is a key consideration in an application of this nature. The impugned ruling of the lower court was delivered on 13.02.2020 and the appeal filed on 12.03.2020. However, it was not until 04.10.2021 that the present motion was filed, this being an inordinate and unexplained delay. The court equally takes judicial notice that the intervening period between the ruling and filing of the instant motion covers the onset of the of the Covid-19 Pandemic during which the court eventually transitioned to the e-filing system. Thus, a diligent party could have taken advantage of the e-filing system. Be that as it may, this court is of the view that any undue prejudice on the part of the Respondent if the motion is allowed can be compensated through costs.
27. In view of all the foregoing and considering the Applicants’ plea that they risk being condemned unheard if this motion fails, the court is persuaded, albeit reluctantly, to grant stay of execution of the decree in the lower court pending appeal, subject to the Applicants depositing into Court a sum of Kes. 2000,000/- (Two Million) into court within 30 days of today’s date. The costs of the motion will be awarded to the Respondent in any event.

DELIVERED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Odhiambo h/b for Mr. Kinyanjui

For the Respondent: Mrs. Okina

C/A: Carol

