



**Directline Assurance Company Limited v Gathoni (Civil Appeal
E241 of 2023) [2023] KEHC 26097 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E241 OF 2023
HM NYAGA, J
NOVEMBER 29, 2023**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPLICANT

AND

DAVID KARIUKI GATHONI RESPONDENT

RULING

1. Vide a Notice of Motion dated 31st August, 2023 the Applicant seeks stay of the execution of the judgment in Nakuru CMCC No. E253 of 2022 and for costs to abide the outcome of the Appeal.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by Kelvin Ngure who is the Deputy Claims Manager of the Applicant on 31st August, 2023. He averred that the lower court entered a judgement against the Applicant on 2nd August, 2023 whereby it awarded the Respondent a sum of Ksh. 798,953.00 and interest that had accrued on the principal sum since the date of the decree, costs of the suit and interest on costs at 12% from the date of judgement till payment in full.
3. He deponed that the Applicant has lodged an appeal against the judgement that they believe is meritorious and has high chances of success.
4. He averred that Applicant is apprehensive that the Respondent will proceed with execution at any given moment and if stay of execution is not granted, the Applicant will suffer undue substantial loss.
5. He deposed that the Applicant is willing to furnish a bank guarantee from a reputable bank for the due performance of the decree or order as shall be directed by this Honourable court pending the hearing and final determination of the Appeal.
6. He deponed that in the event that the Appeal is successful, the respondent will most probably not be in position to compensate the Applicant of the losses incurred as he is not person of means.



7. It was therefore his view that this court has inherent powers *ex debito justitiae* to order stay of execution.
8. In response to the application, the Respondent through her replying affidavit sworn on 18th September, 2023, averred that the Applicant has not satisfied the conditions required under Order 42 Rule 6 of the Civil Procedure Rules and is therefore not deserving of the orders sought.
9. He is opposed the facility of bank Guarantee proposed by the Applicant for grounds that the Applicant has a multifarious number of unpaid claims wherein it had offered bank guarantee as security and therefore the same is unsafe and not reliable in the circumstances.
10. He also believes that a bank guarantee is subject to conditions and may be used by the Applicant to show case liquidity when it is not and that the bank guarantee does not earn interest as compared to normal cash.
11. He prayed that in the event this Honourable court is inclined to allow the application, the Applicant be directed to deposit the decretal amount together with costs in a joint interest earning account registered in the joint names of the advocates for the parties herein.
12. He averred that he respondent is working hard to delay him from executing his decree and that this application is used to waste the court's time, and prayed that the Application be dismissed with costs.
13. The Application was canvassed through written submissions. Only the Respondent's submissions are on record.

Respondent's Submissions

14. In regards to substantial loss, the Respondent cited the case of *James Wangalwa vs Agnes Naliaka Cheseto* [2021] eKLR in which the court defined as to what amounts to substantial loss and submitted that no substantial loss has been proved by the Applicant as the decree issued by the trial court was as a result of a fruitful judgement for compensation to him.
15. The Respondent invited this court to consider the decision in *In re Estate of Atanasio Karanu* [2018] eKLR where the court denied stay of execution on basis that substantial loss had not been demonstrated.
16. On the issue of Security, the Respondent contended that for a bank guarantee, money depreciates unless it is kept in an interest earning account.
17. He reiterated that the Applicant has a multifarious number of unpaid claims wherein it has offered the said facility as security hence availability of the same as security for ultimate execution of the decree is not guarantee and reliance thereon would be unsafe.
18. The Respondent referred this court to the case of *Marlboro Express Limited vs Mary Nyaboke Amoro & another* HCCA NO.E031 OF 2021, where R. Lagat-Korir J. held as follows;

“I must state that the Court is not bound by the type of security furnished by the Applicant. It must instead weigh and consider whether the same will serve the purpose for which it is intended, with the ultimate goal being to guarantee the due performance of the decree, while not unduly punishing the Applicant”
19. The Respondent thus proposed that Applicant deposits the entire decretal amounts to his advocates Kiamah Kibathi & Co. Advocates firm account subject to the said firm of issuing a professional undertaking to pay back the applicant the decretal sum in the event the Appeal succeeds or in the



alternative the decretal sum be deposited in the joint interest earning account registered in the names of the advocates for the parties.

Analysis & Determination

20. Having considered the application, affidavits and the submissions on record, it is my considered view that the following issues fall for determination: -
1. Whether the Applicant has met the threshold for grant of stay pending appeal.
 2. What would be the most appropriate security to grant under the circumstance?

Issue No.1- Whether The Applicant Has Met The Threshold For Grant Of Stay Pending Appeal

21. Order 42 Rule 6(2) of the Civil Procedure Rules provides:
- (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.”
22. In the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

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 that appeal court reverse the judge’s discretion.

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.

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

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.”

23. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
24. With the above in mind, the Court must then determine what substantial loss the appellants will suffer if stay of enforcement of the judgment of the subordinate court is not made in their favour.



25. On whether the Appellants will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in *Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from 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 of 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 the 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 judgement.”

26. In the instant case the Applicant claim that in the event the Appeal is successful the respondent will not be in a position to compensate it for the losses that may be incurred as he is not a person of means.

27. The law is that once an applicant expresses apprehension about the respondent’s ability to refund the decretal amount, the evidential burden of proof shifts to the respondent to rebut that apprehension. This proposition was re-iterated by the Court of Appeal in *ABN Amro Bank NK V Le Monde Foods Limited*, Civil Application No. 15 Of 2002 [NRB] where it stated as follows:

“...in those circumstances, 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 the bank and so on...”

28. In this case, the applicant’s claim that the respondent is not a man of means and he may be unable to refund the decretal amount if the appeal is successful has not been rebutted by any evidence.

29. It is worth noting that the respondent’s replying affidavit did not contain any averment regarding his financial standing. In the premises, I am satisfied that the respondent has failed to establish that he is capable of refunding the decretal amount should the appeal succeed. As a corollary, I am persuaded to find that the applicant has demonstrated that it is likely to suffer substantial loss as defined by Gikonyo J in *James Wangalwa & Another vs Agnes Naliaka Chesoto*, (supra) if the stay orders sought are not granted.

30. In regards to whether this Application has been filed without unreasonable delay, I note the lower court judgement was delivered on 2nd August, 2023 and this application was subsequently filed on 1st September, 2023. The application herein was therefore filed timeously.

31. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree.

32. Whether the Appellants, have an arguable appeal? Clearly this is a question to be answered by the appellate court. However, having perused the Draft Memorandum of Appeal it raises some legal issues.



An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before court; one which is not frivolous.

33. The three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. In the case of Trust Bank Limited vs Ajay Shah & 3 Others, [2012] eKLR at page 23 the court stated that;

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 it without merit.”

34. In the instant case the Applicant has satisfied the three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the Civil Procedure Rules, 2010. Consequently, I hereby grant stay of execution pending hearing and determination of the Appeal.

Issue No.2- What Would Be The Most Appropriate Security To Grant Under The Circumstance?

35. The Applicant proposes a provision of a bank guarantee of the decretal sum while the Respondent in his affidavit proposes that the decretal sum be deposited in the joint interest earning account in the name of both advocates for the parties herein.

36. The Respondent avers that the bank guarantee offered as security is unsafe. I have considered his averments and submissions in that regard. The Applicants have neither advanced any grounds in support of its proposal nor controverted the Respondent’s averments thereof.

37. In determining the security, the court has to strike a balance on the interests of the appellant and those of the respondent. In striking such a balance the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.

38. In the case of Henry Sakwa Maloba vs Bonface Papando Tsabuko (2020) eKLR the High Court reiterated the finding in the case of Century Oil Trading Company Limited vs Kenya Shell Limited Nairobi (2008) eKLR, where the court stated:

“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 of 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 the 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”.

39. In conclusion, I find that the application dated 31st August, 2023 meets the threshold for the grant of stay of execution. I therefore order as follows;

1. That execution of the judgment and the ensuing Decree in Nakuru CMCC No. E253 of 2022 be and is hereby stayed pending the hearing and determination of the appeal on condition that the entire decretal sum be deposited by the Applicant in an interest earning account in the joint names of Counsel for the parties within 30 days of the date hereof;
2. In default the stay orders shall lapse automatically without further reference to the court.



3. Costs of the subject application shall abide the appeal.
4. Directions on the appeal will be given after delivery of this ruling.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF NOVEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Kipsugut

Mr. Awino for Appellant/Applicant

Ms Kadabo for Respondent

