



**Laikipia University College v Kibia (Suing as the Legal Representative
of the Estate of Peter Maina Mwaura - Deceased) (Civil Appeal
E0022 of 2023) [2023] KEHC 26705 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E0022 OF 2023
CM KARIUKI, J
DECEMBER 21, 2023**

BETWEEN

LAIKIPIA UNIVERSITY COLLEGE APPELLANT

AND

**FRANCIS MWAURA KIBIA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF PETER MAINA MWAURA - DECEASED) RESPONDENT**

*(Being an appeal against the ruling of the Hon. F. Larabi
delivered on 8th May 2023 in Nyahururu CMCC 27/1/2018)*

RULING

1. By Notice of Motion dated 15/5/2022 the Applicant seek orders:
 - a. That this Honourable Court do certify the application as urgent and dispense with the service of the application at first instance.
 - b. That this Honourable Court be pleased issue an order of stay of execution of the ex-parte judgement entered in Nyahururu CMCC 271 of 2018 and the resultant decree pending the hearing and determination of this application inter partes.
 - c. That this Honourable Court be pleased issue an order of stay of execution of the ex-parte judgement entered in Nyahururu CMCC 271 of 2018 and the resultant decree pending the hearing and determination of this appeal
 - d. That the costs of this application abide by the appeal.
2. It is supported by grounds on Notice of Motion



- i. That the Respondent prosecuted Nyahururu CMCC 271 of 2018 and obtained ex-parte and obtained a judgement against the Appellant/Applicant on 9th March,2023.
 - ii. That the Appellant/Applicant filed the notice of motion dated 19th April,2022 seeking to set aside the Judgment on grounds that a Hearing notice was never served upon its advocates.
 - iii. That further the Appellant/Applicant had a defence on record raising triable issues.
 - iv. That vide a ruling dated 8th May,2023 the Applicant's application was dismissed denying it a chance to be heard.
 - v. That the Appellant/Applicant has since appealed the said ruling to this Honourable Court.
 - vi. That however there is nothing to stop the Respondent from executing the Judgment of the trial Court thus there is a great risk that execution shall happen in the pendency of the appeal rendering the appeal an academic exercise,
 - vii. That the Appellant/Applicant is willing to provide security for the appeal by depositing half of the decretal sum in a joint interest earning account.
 - viii. That the Appellant/Applicant has since requested for typed proceedings to expedite the filing of a record of appeal.
 - ix. That unless the orders sought are granted the Applicant stand to suffer irreparably as they shall be deemed to be condemned unheard.
3. It is also supported by affidavit of Amelda Wanjau affidavit sworn on 15/5/2022 and her further affidavit sworn on 17/5/2023
 4. Respondent Francis Mwaura Kibia filed replying affidavit sworn on 31/5/2023.
 5. Parties were directed to canvass the Application via submissions but only Applicant filed.

Appellant case and the Submissions.

6. Respondent prosecuted Nyahururu CMCC 271 of 2018 and obtained an ex parte judgement of Kshs. 3,370,550 with costs against the Appellant/Applicant and the applicant filed an application to set aside the said ruling which was dismissed on 8th May,2023. Dissatisfied with the said ruling the Applicant filed an appeal to this Honourable Court. In the appeal the applicant contends that it was denied a chance to be heard despite having a defence on record.
7. The Applicant contends that if execution is to occur then the appeal shall be rendered an academic exercise and is willing to provide security for the appeal by depositing half the decretal sum in a joint interest earning account.
8. The Respondent in opposition of the application filed a replying affidavit dated 31st May,2023 allegedly sworn by Francis Mwaura Kibia at Limuru but commissioned at Nairobi.

Issues for determination

9. The issues for determination are as follows:
 1. Whether the replying affidavit is defective.
 2. Whether the application for stay pending appeal is merited.



Analysis

Whether the replying affidavit is defective.

10. The replying affidavit in opposition of the application was purportedly sworn by Francis Mwaura Kibia at Limuru but the stamp of the commissioner for oaths affixed indicates that it was commissioned at Nairobi. Section 5 of the [Oaths and Statutory Provisions Act](#) states the mandatory provisions for the commissioning of affidavits that;

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

11. In the case of [Regina Munyiva Nthenge v Kenya Commercial Bank Ltd](#) (2005) eKLR where an affidavit had been purportedly sworn at Machakos but commissioned in Nairobi, the Court stated that:

“The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the [Oaths and Statutory Declaration Act](#) provides that-

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat.”

The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia Commissioner of Oaths on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that stamp was just affixed. This Court would have no alternative but strike off the replying affidavit as it is not properly commissioned and that means that the application would stand unopposed.”

12. Also, in the [in re Estate Dominic Odhiambo \(Deceased\)](#) [2020] eKLR

“Bearing that definition of what an oath is, the question 1 must answer is whether the 1st petitioner took an oath before a Commissioner for Oaths

..... In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the [Civil Procedure Rules](#) or Article 159(2)(d) of the [Constitution](#). This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits and the Petition for grant not being supported by the affidavit in question is no petition at all.

In addition, the other reason why this court would not issue a grant in respect of the petition for grant filed by the Two Respondents/Petitioners herein is that, the affidavits sworn by the 1st petitioner on 13th October 2015 for proposed administrator and P & A 11 are fatally defective as they are allegedly sworn at Siaya but the advocate commissioning has appended



a stamp and signature with an address of P.O. Box 883Kisumu. This offends section 5 of the *Oaths and statutory Declaration Act.*”

13. The above decisions were also echoed in the case of *Mary Gathoni & another v Frida Ariri Otolu & another* [2020] eKLR,
14. Going by the above decisions it is submitted that the replying affidavit sworn by Francis Mwaura Kibia on 31st May,2023 is defective and ought to be struck out and the application proceeds as undefended.

Whether the applicant is entitled to the orders of stay of execution pending the hearing of the appeal.

15. The instant application is brought under Order 42 rule 6 (2) of the *Civil procedure Rules* which provides that: -

No order for stay of execution shall be made under sub-rule (1) unless: The Court is satisfied that;

- a. Substantial loss may result to the applicant unless the order is made and that;
 - b. The application has been made without unreasonable delay and;
 - c. 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.
16. On the whether the application has been brought without unreasonable delay, it is clear that the ruling on the application seeking to set aside the ex parte judgment was delivered on 8th May,2023 after which the respondent was free to execute. The application for stay was brought on 15th May,2023 which was roughly seven days after delivery of the ruling. On this limb we submit that the application-is-brought without undue delay.
 17. Secondly on the issue of substantial loss it is submitted that applicant client has satisfied that irreparable loss and damage shall be suffered by Laikipia University should the stay of execution not be granted and that the appeal will be rendered nugatory as the decretal sum once paid may not be recoverable.
 18. In the case of *Mukuma v Abuoga* (1988) KLR 645 the Court of Appeal defined substantial loss
“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
 19. Further in the case of *Consolidated Marine. v Nampijja & Another*, Civil App. No. 93 of 1989 (Nairobi) the Court stated that: -
“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
 20. *Butt v Rent Restriction Tribunal*, Madan JA (as he then was) held as follows:
“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general Rule ought to exercise its best discretion in a way so as not to prevent the Appeal if. Successful being nugatory.”



21. Thirdly on the issue of security the Applicant submits that it is willing to deposit half of the decretal sum in a joint interest earning account as security for this appeal.
22. Finally, it is submitted that the issue of whether the applicant has an arguable appeal from the grounds raised in the memorandum of appeal dated 15th May, 2023 and served upon the Respondent's counsel, the Appellant maintains the appeal has strong chances of success as a Judgement was entered ex parte.
23. The case of [Josephine Koki Raymond v Philomena Kanini Maingi \(personal representative of Maingi Musila Mutava \(Deceased\) & another](#) [2018] eKLR where the Court of Appeal held as follows on whether an appeal is arguable;

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised

An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”

24. [Royal Media Services Limited v Veronica Chepkemoi](#) [2015] eKLR,
25. In his Affidavit the Respondent depones;
 - a. The judgment in the primary suit is a full judgment as both the Plaintiff and defence case were closed.
 - b. Respondent advocates responded to the issue of service of a hearing notice and the Applicant never raised any counter argument to the same.
 - c. Principles applied for stay of execution pending hearing of a suit interparties and appeal are the same,
 - d. The errors painted out by the Applicant do not touch on the substratum of the matter but the form.
 - e. The Appeal before the court is not one which can be considered arguable.
 - f. The fact that the applicant had a defence on record is not a basis for allowing their application as they had a chance to defend the primary suit but they wasted it.
 - g. If the Applicant application is to be allowed, they should be ordered to deposit the entire decretal sum in court or in counsels joint interest earning account.
 - h. No prejudice will be suffered by the applicant is sought orders are denied.

Issues, Analysis and Determination

26. After going through the proceedings, pleadings and submissions, I find the issues to be Whether the replying affidavit is defective? Whether the threshold of grant of stay of execution has been demonstrated by the applicant? And orders as to costs.
27. On first issue, the defectiveness of the Replying affidavit, it is urged that the replying affidavit in opposition of the application was sworn by Francis Mwaura Kibia at Limuru but the stamp of the commissioner for oaths affixed indicates that it was commissioned at Nairobi. Section 5 of the [Oaths and Statutory Act](#) which are in mandatory terms, make provisions for the commissioning of affidavits.



28. The Section provides;
- “Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.
29. Case law support that legal principle and affirm that deviation from the said principle renders affidavit incurable. See the case of *in re Estate Dominicus Odhiambo (Deceased)* [2020] eKLR which held;
- “Bearing that definition of what an oath is, the question 1 must answer is whether the 1st petitioner took an oath before a Commissioner for Oaths
- In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the *Civil Procedure Rules* or Article 159(2)(d) of the *Constitution*. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits and the Petition for grant not being supported by the affidavit in question is no petition at all.
- In addition, the other reason why this court would not issue a grant in respect of the petition for grant filed by the Two Respondents/Petitioners herein is that, the affidavits sworn by the 1st petitioner on 13th October 2015 for proposed administrator and P & A 11 are fatally defective as they are allegedly sworn at Siaya but the advocate commissioning has appended a stamp and signature with an address of P.O. Box 883 Kisumu. This offends section 5 of the *Oaths and statutory Declaration Act*.”
30. The respondent did not bother to respond to the issues either via submissions or further affidavit. Thus, court upholds that the affidavit is defective and thus struck out from the record.
31. The next issue is on merit of the application for stay of execution. The application is brought under Order 42 rule 6 (2) of the *Civil procedure Rules* which provides that: -
- No order for stay of execution shall be made under sub-rule (1) unless: 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;
- 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.
32. On the whether the application has been brought without unreasonable delay, it is clear that the ruling on the application seeking to set aside the ex parte judgment was delivered on 8th May, 2023 after which the respondent was free to execute. The application for stay was brought on 15th May, 2023 which was roughly seven days after delivery of the ruling. On this limb it is submitted that the application-lodged timely.
33. In the case of *Mukuma v Abuoga* (1988) KLR 645 the Court of Appeal defined substantial loss;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”



34. Further in the case of *Consolidated Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi) the Court stated that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

35. In *Butt v Rent Restriction Tribunal*, Madan JA (as he then was) held as follows:

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general Rule ought to exercise its best discretion in a way so as not to prevent the Appeal if Successful being nugatory.”

36. Thirdly on the issue of security the Applicant submits that it is willing to deposit half of the decretal sum in a joint interest earning account as security for this appeal.

37. What is at stake is ex parte judgement of Kshs. 3,370,550 which respondents is poised to recover via execution. The respondent does not demonstrate ability to refund the same should the appeal succeed thus, it is plausible to hold that the appeal may be rendered nugatory if subject matter is not preserved. To balance parties interest the applicant has offered to deposit half decretal amount as security.

39. Thus, I find apt to grant a conditional stay as follows.

- i. The stay of execution of the impugned decree pending appeal is allowed on condition that the half of the decretal amount shall be deposited in interest earning account in parties advocates joint names within 30days from dates herein.
- ii. In default execution to proceed forthwith.
- iii. Costs in the appeal.

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 21ST DAY OF DECEMBER 2023

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C KARIUKI

JUDGE

