



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO. E031 OF 2021

MARLBORO EXPRES LIMITED.....APPLICANT/APPELLANT

-VERSUS-

MARY NYABOKE AMORO AND JARED MARWANGA (Suing as the Administrator
of the Estate of Evans Nyambane Amoro, deceased)RESPONDENT

RULING

1. The Application dated 22nd October 2021 is brought under sections 3, 3A of the Civil Procedure Act and Order 42 rule 6, Order 50 rule 5, Order 51 rule 1 & 3, and Order 22 rule 22 of the Civil Procedure Rules.

2. The Applicants seek the following prayers:-

a. THAT the Application be certified urgent, service be dispensed with thereof and the same be heard *ex-parte* in the first instance. **(Spent)**

b. THAT this honorable Court be pleased to grant a Stay of execution of the judgment/decree in Sotik PMCC No. 161 of 2017 delivered on 28 September 2021, pending the hearing and the determination of this Application *inter-partes*. **(Spent)**

c. THAT this honorable Court be pleased to grant stay of execution of the judgment/decree in Sotik PMCC No. 161 of 2017 delivered on 28 September 2021 pending the hearing and full determination of the appeal in Bomet High Court Civil Appeal No. E031 of 2021.

d. THAT upon grant of prayer (3) above, the honorable Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the judgment in Sotik PMCC No. 161 of 2017.

e. THAT costs of this Application be in the cause.

3. The Application is based on the following grounds:

a. That judgment was delivered on 28th September 2021 in the following terms:

Liability at 50% against the defendant	
General Damages	– Kes. 2,320,000/=
Loss of Expectation of Life	– Kes. 150,000/=
Special Damages	- Kes. 120,000/=
Pain and Suffering	- Kes. 10,000/=
TOTAL	- Kes. 1,300,000/=

Costs and interests of the suit.

- b. That the Applicant is aggrieved by the said judgment on the issue of liability and quantum.
- c. That the Applicant has lodged an appeal against the judgment in Sotik PMCC No. 161 of 2017 to wit, Bomet High Court Civil Appeal No. E031 of 2021, which appeal has high chances of success.
- d. That there is an impending threat of execution by the Respondent against the Applicant since the stay of execution granted on 28th September 2021 shall lapse on 28th October 2021.
- e. That the Decree is for a substantial sum of Kes. 1,300,000/= which if paid to the Respondent and the Appeal is successful, the Applicant will not be able to recover the same from the Respondent and the Appeal will therefore be rendered nugatory.
- f. That the Applicant will suffer substantial loss and damage if the orders sought herein are not granted and further that the appeal will be rendered nugatory.
- g. That this Application has been filed timeously.
- h. That the Respondent will not be prejudiced in any way if the orders sought herein are granted.
- i. That it is in the interests of justice that the execution of the Judgment and/or Decree herein be stayed pending the hearing and determination of the Appeal.
- j. That the Respondent is a person of straw and will not be able to refund the decretal sum if they are allowed to execute and the appeal thereafter succeeds.
- k. That the Applicant is ready, willing and able to furnish such reasonable security as this honorable Court may deem fit and in particular, the Applicant is willing and able to furnish security by providing a bank guarantee as security for the whole decretal sum.

4. The said Application is accompanied by the Supporting Affidavit of Yobesh Tinega who is the General Manager for the Appellant/Applicant herein, dated 22nd October 2021 together with a copy of bank guarantee from DTB Bank annexed as Y.T2. The averments in the Supporting Affidavit mirror the grounds listed at paragraph 3 above.

5. The Application was urged through written submissions.

Applicant's Submissions

6. The Applicant submitted that its Application was based on Order 42, rules 4 & 6 and that all the conditions precedent to grant of stay had been satisfied. They cited the Court of Appeal case of **Halai & Another vs. Thorton & Turpin (1963), LTD, KLR 365 which was referred to in Nairobi Industrial Cause No. 1715 OF 2011, Elena Doudoladova Korir vs. Kenyatta University (2014) KLR.** It was their submission that if the Respondent was allowed to execute the judgment, they would suffer substantial loss since their appeal had high chances of success and that the decretal amount was quite substantive and the Respondent may not be able to pay back.

7. The Applicant further submitted that the burden of proving financial capability shifted to the Respondent the moment the Applicant claimed that they would be unable to pay yet they did not provide any proof to disprove this claim. To this end, they relied on High Court at Mombasa **Civil Appeal No. 40 of 2014, Kenya Orient Insurance Company Ltd vs. Paul Mathenge Gichuki & Another (2014) eKLR.**

8. On the issue of time, the Applicant submitted that they had filed the appeal within the stipulated time period. They also submitted that they were ready to provide security in the form of a bank guarantee or in the alternative, that the Court should direct that the whole decretal amount be deposited in court pending the determination of the Appeal. They relied on the case of **Shanzu Beach Resort vs. Crown Marble and Quarts (2020) eKLR.**

9. Lastly, they argued that their appeal had high chances of success and if stay was not granted, then the same would be rendered nugatory since it raised substantive issues of law.

Respondent's Submissions

10. The Respondent submitted that the Applicant did not bother to provide particulars of how they would suffer substantive loss as a result of the judgment being executed and that the court should then put to strict proof. On this they relied on **Nairobi Civil Appeal No. 97 of 1986 Kenya Shell Ltd vs. Benjamin Karuga Kibiru & Another (1986) eKLR.** The Respondent also cited the cases of **Joseph Gachie t/a Joska Metal Works vs. Simon Ndeti Muema (2012) eKLR** and **Nairobi Civil Suit Misc Application No. 495 of 2012, Lucy Waihera Kimanga & 2 Others vs. John Waiganjo Gichuri (2015) eKLR** in respect of what constitutes substantial loss.

11. The Respondent further submitted that the Applicants had not discharged their legal burden to prove that the Respondents would be unable to refund the decretal amount should the appeal succeed. They stated that the Applicant's allegations that they were persons of straw was discriminatory contrary to Article 27 of the Constitution of Kenya.

12. On the issue of security, it was the Respondent's submission that the Applicant did not provide reasonable security as required by Order 42. They consider the security furnished by the Applicant inadequate and unacceptable since it was in the form of a bank guarantee from an insurance company which they allege was known for a multifarious number of unpaid claims. They asked the court to balance the interests of both parties in considering the security and generally in determining whether to grant the stay. On this they relied on Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others (2015) eKLR, Nduhiu Gitahi & Another vs. Anna Wambui Warugongo (1988) 2 KAR, 100, Absalom Dova vs. Tarbo Transporters (2013) eKLR and Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd (2019) eKLR.

13. I have considered the Application before me and the respective submissions of the parties together with the cited case law. The only issue for determination is whether the Application for stay of execution has merit.

14. The law on Stay of Execution is premised on **Order 42 of the Civil Procedure Rules, 2010**. It provides as follows:

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

15. The principles therefore are well settled according to subrule 2 and they are:

i. That the court must be satisfied that the Applicant will suffer substantial loss if stay is not granted;

ii. The court must be satisfied that the Application for stay has been brought without undue delay; and

iii. The court must be satisfied that the Applicant has provided security for the due performance of the decree.

16. The court in considering whether to grant stay makes that decision based on its own discretion upon proper assessment of the circumstances of the suit and the interests of the parties. For instance, where an appeal had been preferred against the judgment of the lower court, the court will consider whether the grounds raised in the appeal are indeed arguable and are not frivolous. This will be necessary because should the appeal succeed, then a failure to grant stay of execution would render the appellate decision nugatory.

17. The above position was expounded in James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR, where the court stated as follows:

" No doubt, in law, the fact that the process of execution has been put in motion, or likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

18. The above decision was rendered by the High Court of Uganda in Pan African Insurance Company (U) Limited vs. International Air Transport Association (HCT-00-CC-MA-086-2006) (U) UGCOMM 24 (27 March 2008) where it was held that a court can only exercise the discretion to grant a stay of execution if there were special circumstances and good cause to justify a stay including, and where proved, the inability of the victorious party to refund the decretal amount in the event of a successful appeal was one of such reasons is proved.

19. In this case the Applicant has argued that they will suffer substantial loss if they succeeded on appeal as the Respondent may not be able to refund the decretal sum. The Respondents only stated that such statements were discriminatory towards them but they failed to controvert the said claims. As a result, this Court is unable to draw a clear conclusion that they will be able to refund the decretal amount, should the appeal succeed.

20. In this case therefore I am persuaded that the Applicants would suffer substantial loss.

21. On the second aspect of time, I note from the trial file that judgment was entered on 28th September 2021 and the Memorandum of appeal filed on 15th October 2021. The present Application was also filed on 22nd October 2021. An Order for stay of execution had been granted by the trial court on 28th September 2021 and was expected to lapse on 28th October 2021, hence the present Application. The present Application has therefore been brought timeously and the second requirement has been met.

22. The third requirement is where failure to grant stay will render the subsequent appeal nugatory. The Applicants suggested that their appeal had high chances of success. All that the court is required to do at this stage is to peruse the Memorandum of Appeal for determination of whether it indeed raises triable issues in law and therefore capable of being sustained and properly argued in court. If arguable, then an Order for stay of execution of judgment would be necessary under the circumstances so that the eventual outcome of the decision from the appellate court does not become futile or unavailing.

23. In **Chris Munga N.Bichage vs. Richard Nyagaka Tongi & 2 Others (2013) Eklr**, the Court of Appeal stated thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say, it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

(See also **Civil Application No. 127 of 2019, Anti-Counterfeit Authority vs. Francis John Wanyange & 4 Others (2019) eKLR and Butt vs. Rent Restriction Tribunal [1979]**)

24. With the above in mind, and having perused the Memorandum of Appeal, I find that the 7 grounds raised by the Appellant (Applicants herein) raise arguable points of law prima facie and should an Order for stay not be granted, then the appeal will be rendered nugatory. Overall, it is axiomatic that the purpose for granting stay of execution is to preserve the subject matter that is in dispute while balancing the conflicting interests of the party who wishes to appeal and the one who should enjoy the fruits of his or her judgment. This was aptly enunciated in **RWW vs. EKW (2019) eKLR** as follows:

“ 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 weight 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.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

See also **Mohammed Salim T/A Choice Butchery vs. Nasserpuria Memon Jamat (2013) Eklr**

25. Lastly, Order 42 requires that an Applicant seeking an Order for stay of execution pending judgment must furnish security as the Court will deem fit. In the present Application the Applicants stated that their Insurer was ready and willing to provide security through a bank guarantee. The Respondents on the other hand are opposed to the said security in the form of a bank guarantee as they were fearful that the Insurance Company may not be able to make good the claim should the appeal not succeed.

26. An order for security is not meant to be one that stifles the interests of justice. At the same time, security must be adequate. However, not every kind of security is accepted by the court. It must be one that serves the purpose of ensuring that the ultimate performance of the decree or judgment debt should any pending appeal not succeed, as well as protect the interests of the parties pending the determination of the appeal. This was the guidance given by the court in **Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR**, where it stated thus:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

27. 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 a decree while not unduly punishing the Applicant interests of justice. See: **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; KAR 100; [1988-92] 2 KAR 100.**

In this case I am persuaded by the arguments advanced by the Respondents that the bank guarantee offered by the Applicant was not suitable in the circumstances of this case.

28. In the end, it is my finding that the application is merited. I grant stay of execution on the following conditions:

i. That the Applicant releases part of the decretal sum being three hundred thousand shillings (Kshs 300,000/=) to the Respondent within 30 days.

ii. The balance of the decretal sum be deposited in a joint interest earning account within 30 days.

iii. The Applicant shall file the Record of appeal within 45 days from the date of this ruling.

iv. Costs of this Application shall be in the appeal.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 27TH DAY OF JANUARY, 2022

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered virtually to the parties and emailed to the following addresses: -

Kimondo Gachoka & Co. Advocates for the Applicant

Ben K. Gichana Advocate for the Respondent