



**University of Nairobi v N.K Brothers Limited (Civil Suit 309 of 2013)  
[2022] KEHC 671 (KLR) (Commercial and Tax) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 671 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 309 OF 2013  
JN MULWA, J  
APRIL 21, 2022**

**BETWEEN**

**UNIVERSITY OF NAIROBI ..... APPLICANT**

**AND**

**N.K BROTHERS LIMITED ..... RESPONDENT**

**RULING**

1. Before the court is a Notice of Motion dated 17<sup>th</sup> August 2020 brought under Section 1A, 1B & 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. The Applicant seeks orders of stay of execution of the judgment and decree delivered by this court on 30<sup>th</sup> January 2020 pending the hearing and determination of its intended appeal to the Court of Appeal. It also seeks an order that costs of this application be in the cause.
2. The application is premised on grounds stated at the of the application and supported by an Affidavit sworn on even date by the Applicant's Vice Chancellor, Professor S.G. Kiama. He avers that the Applicant's case was dismissed with costs in the judgment delivered herein on 30<sup>th</sup> January 2020 by Justice F.A. Ochieng. Subsequently, on 3<sup>rd</sup> February 2020, the Applicant lodged a Notice of Appeal against the whole judgment together with a formal request for typed court proceedings. He contends that there is an imminent risk that the Respondent will commence execution proceedings to defeat the Applicant's intended Appeal thus it is in the interest of justice that the stay orders sought be granted.
3. In opposition, the Respondent filed a Replying Affidavit sworn on 28<sup>th</sup> August 2020 by its Chief Executive Officer, Rajesh Dayaram Rathod. He averred that there is no imminent threat of execution as the Respondent is yet to present its Bill of Costs for taxation. He states that the Applicant's intended appeal has no chances of success but is only meant to frustrate the Respondent. Further, he deposes that in any event, the Respondent Company is financially stable and thus able to reimburse the judgment



sum in case the Applicant's intended appeal succeeds. Additionally, he contends that a Notice of Appeal and intention to Appeal cannot be the basis of staying execution. Lastly, he states that the Applicant has not taken any tangible steps towards filing the Appeal since its letter of 3<sup>rd</sup> February 2020 requesting for typed proceedings.

4. By the above averments by both parties, I find only one issue for determination; whether the Applicant has satisfied the conditions necessary for the grant of stay of execution pending appeal.
5. Stay of execution pending appeal is governed by Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* (CPR) which provide 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.”
6. From the above provisions, it is clear that a party seeking a stay of execution pending appeal must satisfy the court that substantial loss will occur if stay is not granted; that the application has been made timeously and/or without undue delay; and must provide security for the due performance of the decree.
7. It is also important to note that the grant of stay of execution pending appeal is a matter of the discretion of the court which discretion must not be exercised capriciously. In *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal stated thus: -

“It is in 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 from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459”
8. To begin with, the Respondent contends that the Applicant cannot seek a stay of execution pending appeal when it has not filed any appeal as of yet. On the part of the Applicant, it is submitted that the fact that it has lodged a Notice of Appeal is enough as there is no requirement that a Memorandum of Appeal or Record of Appeal be filed before an Appeal may be deemed to have been lodged.
9. Under Order 42 Rule 6(4) CPR, an appeal to the Court of Appeal is deemed to have been filed when a Notice of Appeal has been lodged as required under the Court of Appeal Rules. In the instant case, I note that on 3<sup>rd</sup> February 2020, the Applicant's advocates filed a Notice of Appeal against the judgment dated 30<sup>th</sup> January 2020, pursuant to Rule 75 of the *Court of Appeal Rules*, and served the Respondent's advocates on the same day.



In the premises, I am satisfied that for purposes of seeking the stay orders, an appeal has been duly filed.

### Substantial Loss

10. As regards substantial loss, the Applicant submitted that if the colossal decretal sum of Kshs. 105,000,000/=, which consists of public funds, is paid, the Respondent will not be able to refund the same in the event that the appeal succeeds, and the appeal will be rendered nugatory or an academic exercise. The Applicant reiterates that the Respondent's financial liquidity is unknown and faulted the Respondent for failing to discharge the burden of proving that it has enough resources to refund the decretal amount should the appeal succeed. Reliance was placed on *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* [2016] eKLR where the court stated that in such a case, the evidential burden shifts to the Respondent since that is a matter which is peculiarly within its knowledge.
11. According to the Respondent however, the Applicant has not demonstrated what loss it will suffer if stay is not granted but is cunningly requesting this court to frustrate the Respondent's right to enjoy the fruits of its judgment.
12. In the case *Winfred Nyawira Maina v Peterson Onyiego Gichana* [2015] eKLR, Gikonyo J. stated that:

"The substantial loss under order 42 rule 6 of the *Civil Procedure Rules* especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. But it is not enough for the Applicant to merely state that the Applicant cannot refund the sum paid. There must cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. Evidential burden does not arise on mere averment that the Respondent cannot refund the money as the Applicant intends the court to believe." [Emphasis mine]

13. Gikonyo J. went on to state that:

"The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See Halsbury's Laws of England, 4<sup>th</sup> Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent..."

- (32) Has the Applicant established to the required standards that the Respondent cannot refund the decretal sum if he succeeds? And has he laid before court such prima facie evidence as to cause a shift of evidential burden to the Respondent? The Applicant has just averred that the decretal sum of Kshs. 5,600,000 is a huge amount and the Respondent cannot refund the decretal sum herein should the appeal succeed. He has stated that he has honestly made those statements and so the evidential burden is shifted to the Respondent to state her assets and ability to refund the decretal sum herein in case the appeal succeeds. The Applicant relied heavily on the case of ABN Amro Bank N.V.



(*supra*) but missed an important detail in the judgment of the Court of Appeal when it stated that:-

“...The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns”. [Underlining mine]

Following the case of Amro Bank (*supra*) and what the Court of Appeal said in the case of Kenya Shell, the Applicant should place cogent evidence before the court which show that the Respondent cannot refund the money, and it is in face of such limitation that the Respondent should discharge the evidential burden that she is of sufficient means to make a refund of the decretal sum. If it were to be otherwise, what Applicants will do, is to merely state that the Respondent is not able to refund the decretal sum in the event the appeal succeeds. And that would be shifting of the legal burden from the Applicant to the Respondent, which I have already stated never shifts from the Applicant for as long as it is him who is asserting the particular fact. The law never intended to be and will never go that way.

14. Similarly, the Applicant in the instant case has not placed before the court any prima facie evidence of the Respondent’s alleged financial limitation such as company returns filed by the Respondent as was done in the case of *ABN AmroBank N.V. v Le Monde Foods Limited* [2002] eKLR. The Applicant is merely worried that the Respondent’s financial liquidity is unknown and this cannot be a basis for shifting the evidential burden to the Respondent to prove its capability to repay the decretal amount. The upshot therefore is that the Applicant has not demonstrated what substantial loss it would suffer if stay is not granted. In the premises, I associate myself with the sentiments of Platt Ag. J.A. (as he was then) in *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 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 a stay. That is what has to be prevented.”

#### **Whether the application has been filed without undue delay**

15. As to whether the Application was filed without undue delay, the Applicant submitted that the delay in filing the present application was inadvertent as it resulted from the scaling down of court registry operations due to the covid-19 pandemic in 2020 and, is therefore excusable. In this case, the judgment appealed against was delivered on 30<sup>th</sup> January 2020 whilst this application was brought on 17<sup>th</sup> August 2020, almost six months later.
16. The court takes judicial notice that the first case of Covid-19 in the country was reported in March 2020 which was over a month after delivery of the impugned judgment. This indeed affected court operations but it is public knowledge that soon after, an alternative channel for filing court documents namely, e-filing, was availed to all litigants in order to keep the wheels of justice rolling. The Applicant has not indicated whether it attempted to use this channel in filing the present application and encountered any challenges. Further, I note that the Applicant has urged the court to take note of



the fact that it was awaiting typed proceedings which it had requested from the court. That was not necessary for purposes of the instant application. In the premises, I hold the view that although the delay of six months was not sufficiently explained, the same has not prejudiced the respondent in a manner that may not be compensated in costs.

### **Security**

17. On this, the Applicant submitted that it is ready and willing to furnish reasonable security that the court may order and urged the court to take into consideration the fact that the same shall be derived from public funds. By so stating, it is my view that the Applicant has satisfied the said condition.
18. Bearing the foregoing in mind, and in the interest of justice, I find that this is a case where a conditional stay should be granted. Accordingly, the following are the orders that commend themselves:
  - a. There shall be a stay of execution of the judgment delivered on 30<sup>th</sup> January 2020 pending the hearing and determination of the appeal, on condition that the Applicant provides a bank guarantee for the sum of Kshs. 46,996,101.07/= from a reputable bank within 60 days from the date of this ruling.
  - b. In default, this application shall be deemed to have been dismissed and execution may issue.
  - c. Costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.**

**J.N.MULWA**

**JUDGE.**

