



**Taliani v Ngisa (Civil Appeal NO. E039 of 2020)
[2022] KEHC 462 (KLR) (Commercial and Tax) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL NO. E039 OF 2020**

A MSHILA, J

MAY 23, 2022

BETWEEN

JULIUS INGOSI TALIANI APPELLANT

AND

RONALD MORARA NGISA RESPONDENT

RULING

1. The Notice of Motion dated 25th October 2021 was brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections IA, 1B and 3A of the *Civil Procedure Act*. The Application was supported by the sworn Affidavit of Paul Kamura Kirunge who sought the following orders;
 - a. Pending the hearing and determination of this Application, this Court be pleased to grant a temporary stay of execution of this Court's judgment made on the 13th October 2021 and the decree read on the 14th April 2020 in Milimani SPMCC 4863 of 2016 between the same parties herein pending the hearing and determination of² this Application.
 - b. The Court to grant stay of execution of this Court's judgment made on the 13th October 2021 and the decree read on the 14th April 2020 in Milimani SPMCC 4863 of 2016 as against the Applicant pending the hearing and determination of the Applicant's intended Appeal to the Court of Appeal upon such terms as to security as the court may deem just.
2. The judgment was entered by the Chief Magistrate on 14th April 2020 in favour of the Appellant herein. The Appellant/Applicant was dissatisfied with the said judgment and filed a Memorandum of Appeal to this court, which has been allowed by this court.



3. No prejudice will be suffered by the other parties if stay is granted. However, if the Appellant herein is allowed to execute the said judgment against the Applicant the execution will render the appeal nugatory.
4. The Applicant was apprehensive that if the execution proceeds the Applicant stands to suffer irreparable and substantial loss. The Applicant is ready to abide by the terms of stay given by the Court.
5. The parties were directed to file and exchange written submissions. Hereunder is a summary of the rival submissions;

Applicant's case (respondent)

6. The Applicant submitted that the Applicant moved with speed and that the present application has been brought without undue delay. In addition, the Applicant will suffer substantial loss if the execution was allowed to proceed with no assurance of possible recovery of the money. The appeal would be rendered nugatory. The Applicant relied on the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR.
7. The Applicant stated that he was willing to abide by any order as to security as may be ordered by this court.
8. It was also the Applicant's position that it is well settled and a common ground that the merits or otherwise of the appeal are not issues for determination at this stage. As long as it is apparent that there is a valid appeal properly lodged by the Applicant, the success or otherwise of such an appeal is an issue to be determined by the Appellate Court. It was therefore the Applicant's contention that he had fulfilled the requirements of Order 42 and was deserving of the orders sought.

Respondent's case (appellant)

9. It was the Respondent's submission that the Applicant has failed to give justifiable reasons as to why the Court should grant him a stay of execution barring the respondent from exercising his legal rights.
10. The power to grant orders for stay of execution pending Appeal is a discretionary power that must be exercised judiciously. The principles upon which the court may stay the execution have been settled in various cases and in line with the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010. The Applicant must approach the Court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the Appeal does not succeed as was held in the case of; *Antoine Ndiaye v African Virtual University* (supra).
11. The Applicant neither explained the exact loss he will suffer if execution ensues nor tendered evidence of the substantial loss he might suffer. The Respondent submitted that it is not enough for the Applicant to merely put forward general vague assertions of substantial loss. There must be empirical documentary evidence to support such contention. The Court ought not consider assertions of substantial loss on the face value but be guided by adequate and proper evidence of substantial loss when exercising its discretion.
12. Courts have ruled that the success of an Appeal would not be rendered nugatory if the decree is a money decree. It is the Appellant's submission that the Judgment in this case is a money decree hence refusal of a stay would not render the Respondent's Appeal nugatory as was held in the case of *Kenya Hotel Properties Limited versus Willesden Investments Limited* [2007] eKLR.



13. The Respondent merely states in his Affidavit that he is ready and willing to comply with the terms of the stay but has failed to propose or to provide any security which the Court shall direct to act as a mark of good faith that the Motion for stay is not just meant to deny the Appellant the fruits of his Judgment.
14. It was the Respondent's submission that having failed to depone his ability to provide security as is to be directed by the Court, the Applicant failed to meet the threshold required for grant of stay and therefore, the Applicant/Respondent's application is unmerited and should be dismissed with costs.

Issues for Determination

15. The Court has considered the Application, Response and the written submissions by the parties and the following issues have been framed for determination;
 - a. Whether the Court should issue a stay of execution pending appeal; and whether the Application has satisfied the conditions for Granting Stay of Execution Orders?

Analysis

Whether the Court should issue a stay of execution pending appeal; and whether the Application has satisfied the conditions for Granting Stay of Execution Orders;

16. On 7th August, 2020, Honourable D.M. Kivuti delivered judgment in favour of the Respondent/Appellant as the Plaintiff in Chief Magistrate Civil Suit No. 4863 of 2016 and being dissatisfied with part of the said decision, the Appellant appealed against part of the aforesaid Judgment in this Court. On 13th October, 2021, this Court allowed the Respondent/Appellant's Appeal on the issue of interest.
17. Consequently, the Applicant filed the Application herein seeking a stay of execution to bar the Respondent/Appellant from executing the aforesaid Judgments.
18. The principles that guide the Court when deciding on application for stay of execution pending appeal are clearing set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides:
 - (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 sub rule (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.
19. In summary, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an Applicant should satisfy the Court that: -



- a. Substantial loss may result to him unless the order is made;
 - b. That the Application has been made without unreasonable delay; and
 - c. The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.
20. Further to the above, in *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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.
21. Substantial loss – It was the Applicant's argument that he will suffer substantial loss if the execution was allowed to proceed with no assurance of possible recovery of the money.
22. The issue of substantial loss was discussed in the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410 as follows;
- “It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”
23. The Applicant has not explained to the Court the nature of substantial loss that he is likely to suffer. He merely stated that he will suffer substantial loss and this is not sufficient as this Court cannot make an assumption that the Applicant will indeed suffer substantial loss.
24. Delay - Judgment in this Appeal was delivered on 13th October 2021 and the instant Application was brought on 25th October 2021. This Court is satisfied that there was no undue delay on the part of the Applicant and that the application was brought in a timely manner.
25. On the issue of security for due performance, the Applicant did not offer any security but simply stated that he is willing to abide by any order as to security as may be ordered by this court.
26. In *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR the court stated: -
- “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 the 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. From the above persuasive decision, it is clear that the issue of security is discretionary and it is upon the court to determine the same.
28. All of the above notwithstanding, the Court wishes to address the Applicant's Application as follows;
29. It is important to note that the Applicant herein did not challenge the decision of the Chief Magistrate's Court. This was also noted by the Court in its judgment of 13th October 2021 where the judge stated;

“ Before I proceed however, I find it necessary to mention that the Respondent has not filed a proper appeal before this Court. If the Respondent was dissatisfied with the trial court's decision, he should have filed a memorandum of cross appeal rather than attempting to sneak a cross appeal at the submissions stage.”
30. Further, this Court noted with concern that the Applicant in his Supporting Affidavit dated 25th October 2021 at paragraph 9 stated that the grounds for the appeal were based on the decision by the Magistrate and not the decision delivered by this court on 13th October 2021.
31. It is clear that the Applicant does not, in his supporting Affidavit, fault the judgment of this Court delivered on 13th October, 2021. Therefore, it is this Court's view that there is no basis on which the Applicant would like to file an Appeal at the Court of Appeal.
32. With utmost respect, the Applicant is represented by counsel who need not be educated on the hierarchy of the appellate process. It is apparent that the Applicant is attempting to Appeal the decision of the Magistrate Court directly to the Court of Appeal without having first filed his Appeal in this instant Court.
33. In light of the above, this court finds that there is no proper Appeal filed by the Applicant to warrant a stay of execution order.

Findings and Determination

34. For the forgoing reasons this court makes the following findings and determinations.
 - a. The application is devoid of merit and it is hereby dismissed with costs;
 - b. The applicant shall bear the costs of this application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23RD DAY OF MAY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Masai for the Appellant

Makori for the Respondent

Lucy-----Court Assistant

