



REPUBLIC OF KENYA



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**Otange Group Limited v Mong'are (Civil Appeal 41 of 2021)
[2022] KEHC 13141 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL 41 OF 2021
RL KORIR, J
SEPTEMBER 28, 2022**

BETWEEN

OTANGE GROUP LIMITED APPELLANT

AND

GIDEON MONG'ARE RESPONDENT

RULING

1. The present Application before the Court is by way of Notice of Motion under Certificate of Urgency dated November 25, 2021 together with a supporting affidavit from Victor Mose Birundu, a director in the Applicant Company. It is premised under section 3, (3A) of *Civil Procedure Act*, Order 42, Rule 6 Order 50, Rule 5, 51 Rules 1&3 and Order 22 Rule 22 of the *Civil Procedure Rules, 2010*.
2. The said Application seeks a stay of execution pending appeal of the judgment delivered by Hon Omwange J, in Sotik PMCC No 129 of 2019. The prayers in the said Application are as follows:-
 - i) Spent
 - ii) That this honorable Court be pleased to grant stay of execution of the judgment/decree in Sotik PMCC No 129 of 2019 delivered on November 9, 2021, pending the hearing and determination of this Application interpartes.
 - iii) That this honorable Court be pleased to grant stay of execution of the judgment/decree in Sotik PMCC No 129 of 2019 delivered on November 9, 2021, pending the hearing and full determination of the appeal in Bomet High Court Civil Appeal No E041 of 2021.
 - iv) That upon grant of prayer No 3 above, this 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 129 of 2019.
 - v) That the costs of this Application be in the cause.



3. The Application is premised on the following grounds:-
- i) That judgment herein was delivered on November 9, 2021 in the following terms:
Liability at 100% against the third party
General Damages – Kshs 350,000/=
Special Damages – Kshs 3,900/=
Total Amount – Kshs 353,900/=
Costs and interests of the suit.
 - ii) That the Applicant is aggrieved by the said judgment on the issue of liability and quantum.
 - iii) That the Applicant has lodged an appeal against the judgment in Sotik PMCC No 129 of 2019 to wit, Bomet High Court Civil Appeal No E041 of 2021, which appeal has high chances of success.
 - iv) That there is an impending threat of execution by the Respondent against the Applicant since the stay of execution granted on November 9, 2021 shall lapse on December 8, 2021.
 - v) That the Decree is for a substantial sum of Kshs 353,900/= 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.
 - vi) That this Application has been filed timeously.
 - vii) That the Respondent will not be prejudiced in any way if the orders sought herein are granted.
 - viii) That it is in the interest of justice that the execution of the judgment and/or decree herein be stayed pending the hearing and determination of the appeal.
 - ix) 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.
 - x) That the Applicant is ready, willing and able to furnish such reasonable security as this Honourable 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. On February 18, 2022, the Respondent filed a Replying Affidavit dated February 16, 2022. He vehemently opposed the Application stating that its purpose was to delay him from enjoying the fruits of the judgment. He averred that the matter was old and that any further delays would not only be prejudicial to him but would be a waste of court process. He prayed that the Court allows the Applicant to deposit at least three-quarters of the decree amount and costs and the balance in a joint interest-earning account in the names of their advocates.
5. The Respondent also averred that the Applicant's claims in the intended appeal are unfounded because they failed to adduce evidence to rebut his claims. Further, that the Applicant had failed to satisfy the Court on the issue of substantial loss. He also refuted the claims that he was a man of straw.
6. Parties took directions on December 15, 2021 to canvass the Application by way of written submissions.



Applicant's Submissions

7. The Applicant filed its written submissions dated December 18, 2021 on December 20, 2021. The Applicant submitted that Order 42 of the Civil Procedure Rules 2010 outlined the circumstances under which the court may grant stay of execution of a decree or order pending appeal. They cited the case of *Halai & Another vs Thornton & Turpin (1963) Ltd (1990) KLR 365* cited in Industrial Cause Number 1715 of 2011, [*Elena Doudoladova Korir v Kenyatta University \(2014\) KLR*](#).
8. They further submitted that the judgment was for a substantial amount and they were apprehensive that they may not be able to recover from the Respondent should the appeal succeed. To this end, they cited the case of High Court of Kenya at Mombasa Civil Appeal No 40 of 2014, [*Kenya Orient Insurance Company Limited vs Paul Mathege Gichuki & Another \(2014\) eKLR*](#).
9. The Applicant submitted that the Application had been filed without unreasonable delay and that they had an arguable appeal which had high chances of success. That, therefore, if the orders sought were not granted by the court, they were likely to suffer substantial loss and the appeal would be rendered nugatory.
10. Lastly, they submitted that they were willing to furnish security in the form of a bank guarantee from a suitable bank as directed by the Court. They referred to annexure VMB2 and stated that the Respondent had not furnished proof that he was capable of refunding the decretal sum and that they were unaware of the Respondent's resources. They referred to the case of [*Shanzu Beach Resort versus Crown Marble Quartz \(2020\) eKLR*](#) in this regard.

Respondent's Submissions

11. In his submissions, the Respondent stated that the requirements of Order 42 were not met by the Applicant. That the Applicant failed to demonstrate the manner in which they would suffer substantial loss in the event the Orders were not granted. To this end, he cited the case of [*Kinyunjuri Muguta vs Wotuku Muguta \(2018\) eKLR*](#). Further, that the fact that the process of execution was in motion or was likely to be put in motion did not amount to substantial loss. He cited the case of [*James Wangalwa & Another vs Agnes Naliaka Cheseto \(2012\) eKLR*](#).
12. The Respondent submitted that the Applicant had not demonstrated that he was a person of straw which was a question of fact. He argued that mere allegations that he was man of straw were insufficient to justify a stay of execution. To this end, he relied on the case of [*George Kimotho Ilewe vs Anastacia Wanza Muthuka & Joseph Mutuku Ngewa \(Suing as Legal Representative of the Estate of Judy Kioo Wanza – deceased\) \[2012\] eKLR*](#).
13. On the issue of security, citing the case of [*Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd \[2019\] eKLR*](#), the Respondent urged the Court not to subject him to further tussles relating to pursuing payment emanating from a bank guarantee because he had already been subjected to the trauma of the accident and the subsequent trial in the trial court since 2019. To support this position, he referred the Court to the case of [*Bernard Kigada & Another vs Tom Ochieng Odeny \(2012\) eKLR*](#). He finally urged the Court to dismiss the Application on the premise that the Applicant had failed to provide sufficient reasons for the grant of the said orders.
14. I have considered the Application, the rival affidavits and the submissions of the parties. The only issue for determination is whether or not the Application has merit.



15. The law governing stay of execution pending Appeal is premised on Order 42 Rule 6 of the Civil Procedure Rules which states 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 appeal case of 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.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.'

16. Nzioki J in the case of Elena Doudoladova Korir vs Kenyatta University [2012] eKLR at paragraph 7 made reference to the Court of Appeal case of Halai & Another vs Thorton & Turpin (1963) Ltd [1990] KLR 365 where it was held that:-

' The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo vs Straman FA Ltd [2013/eKLR in which it was held thus;

'In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.'



17. Thus, an Applicant seeking stay of execution pending appeal must satisfy the following parameters before the Court:-
- i. That substantial loss may result to them unless the order sought for is granted by the Court;
 - ii. That the Application had been brought without unreasonable delay; and
 - iii. That the Applicant has given such security as the Court orders for the due performance of such a decree or order which may be binding on them.

18. In determining whether to grant an order for stay of execution pending appeal, the Court must balance the rights of an Appellant to appeal and the interests of a decree-holder who should not be prejudicially precluded from enjoying the fruits of their judgment, as rightfully submitted by the Respondent. This was the determination in [RWW vs EKW \[2019\] eKLR](#), where the Court stated thus:-

' 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 weigh 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.](#))

19. The concept of substantial loss forms the cornerstone of an order for granting stay (see [Kenya Shell Limited vs Kibiru & Another \[1986\] KLR, 410](#) and [Silverstein vs Chesoni \[2002\] 1 KLR 867](#)). In this case, the Applicant argues that the decretal sum of Kshs 353,900/= was substantial and that they were unlikely to recover the same from the Respondent should the Court fail to grant the Orders sought.
20. Once a claim on the financial capabilities of a party have been made, such as in the present case, it behoves that party against whom such a claim has been made to prove to the Court that he was not a person of straw and could therefore refund the decretal amount. This remains an evidential burden at all times and can only be discharged by the Respondent. In [ABN Amro Bank vs Lemond Foods Limited Civil Application No 15 of 2002](#) the Court Appeal held that:

' 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 bank and so on.'

21. The Respondent in response stated at paragraph 10 of his Replying Affidavit that he was a pastor in a church in Nairobi, that he was also employed by Kartasi Industries, that he had ancestral land in Keumbu Division in Kisii County and therefore had enough assets and investments to refund any adjudged amount. He further averred that the amount of award money was not substantial that he would be unable to refund should he be required to do so.



22. From the above, it is my finding that the Respondent has adequately defended his financial position and as such, discharged the evidential burden of proof. I am also persuaded that on a balance of probability, the said income-earning activities that he has stated in his Affidavit alongside his ownership of other assets such as ancestral land are sufficient, should he be required to refund the decretal sum.
23. Secondly, the Court must address itself to the intended appeal and consider whether the same is arguable and will be rendered nugatory should the said order not be granted. The Court of Appeal in *Chris Mungai N Bichage vs Richard Nyagaka Tongi & 2 Others (2013) eKLR* pronounced itself as follows:-
- ' 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.'
24. The principle of arguability was decided in the Court of Appeal case of *Trust Bank Limited and Another v Investech Bank Limited and 3 Others [2000] eKLR* where it was held as follows:
- ' The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed, an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case'
25. The Court of Appeal at Nairobi also explained what an arguable entailed in the case of *Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo (Deceased) vs Mutunkei (Civil Appeal (Application) Number E041 of 2020) [2021] KECA 235 (KLR) (3 December 2021) (Ruling)* where it held thus:-
- ' 12. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the appeal is arguable inter alia whether the Court erred in admitting the oral agreement allegedly entered into between the deceased and the respondent as evidence of the sale of the suit property by the deceased to the respondent. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.'
26. I have perused the Memorandum of Appeal dated November 17, 2021 which is the thrust of the intended Appeal. The main grounds raised therein relate to issues of liability and quantum. It is my finding that the 10 grounds of appeal do indeed raise arguable issues in law and should the orders sought herein not be granted, the appeal will generally be useless and pointless.
27. I also consider the timelines in this Application. From the Record, judgment in Sotik PMCC No 129 of 2019 was delivered on November 9, 2021. The Applicant then filed a Memorandum of Appeal dated November 17, 2021 on November 19, 2021. This was an interval of 10 days. The Applicant has also already filed a Record of Appeal vide Bomet High Court Civil Appeal No E041 of 2021 on June 7, 2022. From this, it is my finding that the present Application was brought without undue delay.



28. The third requirement is that the Applicant must furnish security. The Court at this instant is called upon to examine the said security and determine whether it is suitable in the circumstances. In principle, the security furnished by an Applicant must be capable of ensuring the eventual performance of the judgment decree.

29. Nyakundi J in *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd* [2019] eKLR, observed:

' The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.'

30. In *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others* [2015] eKLR, the court stated thus:-

' The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words 'ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.'

31. In the present case, the Applicant filed alongside the supporting affidavit of Victor Mose Birundu, an annexure VMB2 which is a bank guarantee from Family Bank. I have carefully perused the said bank guarantee dated August 31, 2021. Under clause 2 on duration, the said guarantee is stated to run for a period of 12 months with an option to renew. The Applicant herein has not provided the Court with a renewed bank guarantee for its consideration. The said guarantee also has a limit amount of Kshs 50Million and its purpose is indicated as: 'This facility will be utilized for providing security awards and or costs awarded in various court cases claims pending before court.'



32. From my assessment of the above guarantee, it is insufficient to cover the decretal amount unless it is duly renewed or an alternative security furnished in this regard. Indeed, in *Butt vs Rent Restriction Tribunal (1982) KLR 417*, the Court of Appeal held that:-

' (5) 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.'

33. In principle, stay of execution will be granted based on the Court's discretion. However, this discretion must be exercised in consideration of the circumstances of a case and in accordance with all the requirements under Order 42. Additionally, the Court must exercise its discretion in a manner that avoids injustice or hardship. (See the case of *Shah vs Mbogo and Another (1967) EA 116*).

34. It is trite that no party should ever be driven away from the seat of justice. I have considered the facts, the law and the circumstances of this case in exercising my discretion and it is my finding that the interests of justice would be best served by allowing the Applicant's prayer for stay.

35. In the end, I find that this Application has merit. I grant Stay of Execution of judgment/decreet in Sotik PMCC No 129 of 2019 pending hearing and determination the Appeal in Bomet High Court Civil Appeal NO E041 of 2021 on condition that:-

- i. The Applicant/Appellant shall release 50% of the decretal sum to the Respondent within 30 days.
- ii. That the Applicant/Appellants shall provide a suitable bank guarantee for the balance of the decretal sum within 30 days.

36. The Applicant, though successful, is denied costs of the Application with the result that each party bears their own costs in this Application.

37. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF SEPTEMBER, 2022.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr.Kefa for the Appellant/Applicant, Kiprotich (Court Assistant).

and in the absence of the Respondents.

