



REPUBLIC OF KENYA



KENYA LAW
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**Patel & another v Salvatore (Civil Appeal 104 of 2021)
[2022] KEHC 14764 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 104 OF 2021
SM GITHINJI, J
SEPTEMBER 21, 2022**

BETWEEN

MANOJ NARSHI PATEL 1ST APPELLANT

PAUL PATRICK AHONGA 2ND APPELLANT

AND

GULISANO SALVATORE RESPONDENT

*(Being an Appeal from the Judgement of Honourable Dr. Julie Oseko (CM)
delivered on the 24th November, 2021 in CMcc No.323 of 2014 at Malindi)*

RULING

1. The appellant/applicant herein filed a Notice of Motion Application under Certificate of Urgency dated February 4, 2022 seeking the following orders: -
 - a. Spent.
 - b. That the execution of the decree issued in Malindi CMCC No. 323 of 2014 be stayed and Messrs Muli & Ole Kina Advocates for respondents be ordered not to execute the decree pending the hearing and determination of this application.
 - c. That there be a stay of execution of the decree in Malindi CMCC No. 323 of 2014 pending the hearing and final determination of this Appeal No. 104 of 2021 filed by the appellants against the Judgment delivered on November 24, 2021 by the lower court on such terms as appear just and proper; and
 - d. That the costs of this application be costs in the cause.
2. The Application is supported by the grounds on the face of the application and a supporting affidavit sworn by Shirshir Suryakant Gorsworn on the 4th day of February, 2022. He deponed that on the 24th



day of November, 2021 Judgment in Malindi CMCC No. 323 of 2014 was delivered in favour of the plaintiff. That the Decree and Certificate of the costs dated December 6, 2021 was issued by the Court. He also deponed that he has since filed an appeal against the said Judgment as per a copy of the Memorandum of Appeal dated December 15, 2021.

3. Further, that if the execution proceedings are issued and the decretal amount paid over to the Respondent, the appellants will not be able to recover the same from the respondent if the appeal filed in the High Court at Malindi is successful and consequently will render the Appeal nugatory. He also asserted that the appellant's insurers are willing to deposit by way of security of the decretal amount a sum of Kshs. 3,000,000.00 in a joint fixed deposit account of both counsels or any other security for a sum it deems just.

Response

4. The respondent filed a replying affidavit sworn by the respondent on the 22nd day of February, 2021. He deposed that the court ought not to deny a successful litigant of the fruits of its judgment and that the applicant has not demonstrated that this application meets the legal threshold set that the appeal would be rendered nugatory if the stay of execution is not granted. He also deposed that the appeal does not raise any serious issue for the consideration by this court since the decision of the trial court was well reasoned and no evidence adduced to the contrary and that the award is within the range of the magnitude of injuries suffered by the Respondent hence the appeal is a waste of court's time.

Submissions

5. The Appellants through their advocate C.B. Gor & Gor filed submissions on the 31st day of March, 2022. Counsel identified two issues for determination; whether the Applicants have satisfied the requisite conditions to be granted the stay of execution pending appeal and whether the application should be allowed.

On the first issue, he submitted that granting of stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* and outlined the conditions that the applicants ought to satisfy; that substantial loss may result unless the order is made, that the application has been made without unreasonable delay and that such security as the court orders for the due performance of such decree.

6. On the issue of substantial loss, counsel relied on the case of Nairobi Civil Application No. 238 of 2005 *National Industries Credit Bank Limited v Aquinas Francis Wasike & another* cited in the case of *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* (2016) eKLR. On unreasonable delay, counsel submitted that the said application was filed without unreasonable delay having been filed on February 4, 2022 about two months after judgment was delivered. He relied on the case of *Amal Hauliers Limited v Abdulnasir Abukar Hassan* (2017) eKLR which the court has taken note of.

On the last issue of security for the due performance of the decree, counsel submitted that they are ready and willing to provide security for the due performance of the decree by depositing an amount of Kshs. 3,000,000.00 in a joint account of both parties.

7. The respondent on the other hand through his advocate Muli OleKina Advocates filed submissions on the 12th day of May, 2022. The Counsel averred that the applicants have not proved that they shall suffer substantial loss should the application fail and therefore have failed to demonstrate that they are entitled to the orders of stay of execution. He relied on the case of *Kenya Shell Ltd v Kibiru & another*, Civil Appeal No 97 of 1986, Nairobi. Further, he relied on the case of *Stephen Wanjobi v Central Glass*



Industries Ltd, Nairobi HCCC No 6726 of 1991 where court held that financial ability of a decree holder solely is not reason for allowing stay.

Disposition

8. I have considered the application, the supporting affidavit, the replying affidavit in response and the submissions filed as well as the authorities relied upon by both counsels.

Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

9. I am duly guided by the case of *Visshram Ravji Halai v Thornton & Turpin* Civil Application No Nai 15 of 1990 [1990] KLR 365, where the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

10. Taking all relevant factors into account and in order not to render the intended appeal nugatory while at the same time securing the interests of the successful party, I do grant a stay of execution of the decree herein on condition that the applicant deposits a sum of Kshs. 4,000,000.00 in a joint interest earning account and the said condition be met within 30 days from the date of this ruling and in default the orders shall lapse and the respondent will be at liberty to execute. The costs of this application to abide the outcome of the appeal. This court so orders.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 21st DAY OF SEPTEMBER, 2022.

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S.M. GITHINJI

JUDGE

In the presence of; -



Miss Mwanguo holding brief for Mr Gor for the Appellant/Applicant

Mr Ole Kina for the Respondent

