



Gathuri v National Bank of Kenya Limited & another (Civil Appeal E610 of 2021) [2022] KEHC 14516 (KLR) (Civ) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E610 OF 2021

JN MULWA, J

OCTOBER 27, 2022

BETWEEN

JOSEPH WANJAU GATHURI APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT

HORIZON & ASSOCIATES LIMITED 2ND RESPONDENT

(An appeal from the Ruling and Order of the Chief Magistrate's court at Nairobi (Hon. L. L. Gicheha) dated 7th May 2021 in Civil Case No. 5584 of 2007)

RULING

1. This is a ruling in respect to a notice of motion dated October 8, 2021 brought by the appellant under order 42 rule 6 of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure Act](#). The appellant seeks a stay of execution of an order issued by Hon L L Gicheha on May 7, 2021 in CMCC No 5584 of 2007 - National Bank of Kenya Limited v Wallace A Mayavi T/A Wall Office Supplies and Horizon & Associates Limited, pending the hearing and determination of the appeal herein. He also asks that costs of this application be in the appeal.
2. The application is predicated on the grounds on the face of the motion and supported by the appellant's affidavit.
3. In opposition, the 1st respondent filed a replying affidavit sworn by its legal officer, Chrispus Maithya.
4. The 2nd respondent on the other hand supports the application.



5. The application was canvassed by way of written submissions which the court has taken note of. The only issue for determination is whether the appellant has made out a case for the grant of stay of execution pending appeal.
6. The conditions necessary for the grant of stay of execution pending appeal are laid out in order 42 rule 6(1) & (2) of the *Civil Procedure Rules* which provides that:

“6.

- (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.”

7. From the said provision, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
8. It is not contested that the instant application was brought without undue delay hence this requirement has been satisfied.
9. As regards substantial loss, the appellant submitted that if stay is not granted, he risks being held in contempt of court because it is impossible for him to comply with the impugned order given that he is not a director of the 2nd respondent company. He also argued that he may be forced to pay part of the decretal sum over a case in which he is a stranger. According to the 1st respondent however, the appellant does not stand to suffer any loss if stay is not granted since the impugned order of May 7, 2021 simply required the appellant to attend court to be examined on oath regarding the company's financial status and to produce its books of accounts. Further, the 1st respondent submitted that there



is no warrant for the appellant's arrest and no declaration has been made that he is personally liable to settle the decretal sum.

10. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR*, Platt JA stated thus:

“ ... 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented...”

11. In the instant case, no iota of evidence has been annexed to the appellant's supporting affidavit to demonstrate, even on *prima facie* basis, that he has no association whatsoever with the 2nd respondent company. Secondly, the 2nd respondent's veil of incorporation has not been lifted and there is a court order requiring the appellant to personally settle the decretal sum in place of the judgment debtor. I therefore find that the respondent has not demonstrated the substantial loss he stands to suffer in the absence of stay of execution of the lower court order of May 7, 2021.

12. On security, the appellant contended that it is unnecessary to provide any in this case since the order appealed against is not a money decree but simply requires him to attend court for purposes of cross-examination and production of books of accounts. Further, he submitted that for him to be able to provide any security, he will be forced to sell property in order to raise the required amount. On the other hand, the 1st respondent submitted if this court is minded to grant the stay orders sought then the appellant must provide security.

13. This court has a duty to balance the appellant's right to pursue his appeal against the equal right of the respondent as the beneficiary of a favourable order which has not been set aside. This can only be possible if the appellant offers security but it is evident that he is not willing to do so. In the premises, the court finds that the applicant has not satisfied this requirement.

14. For the foregoing, the appellant's notice of motion dated October 8, 2021 lacks merit and is hereby dismissed with costs to the 1st respondent.

orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 27TH OCTOBER 2022.

**J N MULWA
JUDGE.**

