



**Richu (Suing as the administrator of the Estate of Simon Momanyi Onchwati) v Achachi
(Civil Appeal E715 of 2021) [2022] KEHC 16865 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16865 (KLR)

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

CIVIL

CIVIL APPEAL E715 OF 2021

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

**MARY NYAMBURA RICHU (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF SIMON MOMANYI ONCHWATI) APPLICANT**

AND

DINAH MORAA ACHACHI RESPONDENT

*(An appeal from the ex parte judgment and decree entered on October 23, 2014,
consequential orders, ruling and order issued on February 14, 2020 and ruling and
order issued on October 6, 2021 in Nairobi Milimani CMCC No. 5229 of 2014)*

RULING

1. For determination is the motion dated November 3, 2021 by Mary Nyambura Richu (hereafter the applicant) seeking to stay execution of the ex parte judgment and decree entered on October 23, 2014, consequential orders, ruling and order issued on February 14, 2020 and ruling and order issued on October 6, 2021 in Nairobi Milimani CMCC No. 5229 of 2014 by restraining the respondent whether by herself, her agent, employees, servants or anyone acting on her behalf whether her servants, agents, or howsoever from harassing, threatening, advertising, publishing, attaching, auctioning proclaiming, giving instructions for auction attachment or otherwise doing anything prejudicial regarding the plaintiff's movable and immovable properties and or transferring of L.R No. Nairobi/Block/134/382 Phase 3A pending hearing and determination of the appeal. The motion is expressed to be brought inter alia under section 1A, 1B, 3 & 3A of the Civil Procedure Act, order 42 rule 6(1) & (2) and order 51 rule 1 of the Civil Procedure Rules.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the applicant who describes herself as the widow of the late Simon Momanyi Onchwati (deceased) who was the



defendant in Nairobi Milimani CMCC No. 5229 of 2014. She asserts that Dinah Moraa Achachi (hereafter the respondent) obtained *ex parte* judgment against the deceased on October 23, 2014 without the knowledge of the applicant as the deceased was never served with summons to enter appearance who in the material period was ailing. That the property known as LR No. Nairobi/Block134/382 Phase 3A (hereafter the suit property) is matrimonial property; that her interests therein were protected by a caution registered in the year 2008; and that the beneficiaries of the estate of the deceased stand to suffer irreparable damage if the suit property is sold, or otherwise alienated through execution.

3. The applicant further deposes that being aggrieved by the *ex parte* judgment and decree and orders and rulings delivered in the lower court on February 14, 2020 and October 6, 2021 on her applications to set aside the judgment and for review, respectively, she has preferred an appeal which raises substantial issues of law and fact with an overwhelming chance of success. She contended that unless the court grants stay, the execution process is likely to commence which event would render nugatory her appeal, if successful, and that she stands to suffer irreparable loss and damage if the respondent auctions the suit property before the issues in dispute are fully ventilated and conclusively determined. Finally, she deposes that the motion will not prejudice the respondent in any way and that it is in the interest of justice that prayers sought be granted.
4. The respondent opposes the motion through a lengthy replying affidavit dated March 23, 2022 which sets out the history of the matter. She views the motion as unmeritorious, threadbare, incompetent, misguided, unwarranted, bad in law, an afterthought, belated, *malas fides* and an abuse of the court process. She deposes that the affidavit in support of the motion is tainted with contradictions, innuendos, lies, misrepresentation and is only meant to prejudice the court against the respondent. Further that, the grounds upon which the motion is premised cannot support the prayers sought either in law or in fact as the applicant has failed to satisfy the test under the provisions of law upon which the motion is premised.
5. Restating the history of the litigation before the subordinate court, she states that the instant appeal has no chance of success. Further, the respondent contends that the motion is intended to deny her the enjoyment of the fruits of successful litigation while subjecting her to prejudice, loss of business, and investment prospects through unending litigation. She asserts that execution is a lawful process in furtherance of her rights and that it is in the interest of justice and fairness that the motion be dismissed. In conclusion she points out that the applicant has not offered security for the performance of the decree.
6. In a rejoinder to the respondent's affidavit the applicant reiterated the fact that the appeal is arguable and raises substantial points of law with overwhelming chance of success. That the court has inherent and unfettered discretion to give effect to the overriding objective of facilitating the just, expeditious, proportionate, and affordable resolution of the issues herein; and that the applicant stands to suffer irreparable loss and damage if execution were to proceed before the issues in dispute are fully ventilated.
7. The motion was canvassed by way of written submissions. Regarding the applicable principles, counsel for the applicant anchored his submissions on the decision in *Kiambu Transporters v Kenya Breweries [1997] eKLR*. On substantial loss, he called to aid the decisions in *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others [2013] eKLR*, *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, *RWW v EKW [2019] eKLR* and *Century Oil Trading Company Ltd v Kenya Shell Limited HCMCA No. 1561 of 2007*. Counsel submitted that the elderly applicant will be highly prejudiced by the permanent loss of her home if stay is denied and therefore urged the court to balance the competing interests of the respective parties. Citing the case of *Butt v Rent Restriction Tribunal (1982) KLR 417* counsel submitted that stay ought to be granted unless there is overwhelming reason against the



grant and that courts ought to be guided by the Constitution in interpreting the applicable laws. In conclusion it was asserted that the motion was filed without unreasonable delay.

8. Counsel for the respondent premised her submissions on the provisions of order 42 rule 6 of the Civil Procedure Rules and the decision in Macharia T/A Macharia & Co. Advocates v East African Standard (No.2) (2002) KLR 63. In response to the applicant's submissions on substantial loss counsel argued that the applicant has failed to clearly state what loss, if any, she stands to suffer if the order for stay of execution is denied. It was further submitted that the applicant has not bothered to explain why the court should grant stay of the judgment of the lower court given eight years ago and a ruling delivered in 2020.
9. That the instant motion only seeks to forestall execution and allowing the it will only occasion prejudice to the respondent by denying her the fruits of successful litigation. Relying on the decision in Ng'ang'a Kabae v Kabunyo Kimani [2005] eKLR counsel contended that the applicants have not offered any security for due performance of the decree hence no meaningful purpose would be served by allowing the motion. It was further asserted that the appeal as presented is not arguable and has no chance of success. Counsel argued that a successful applicant must satisfy all the conditions set out in order 42 rule 6 of the Civil Procedure Rules. The court was urged to dismiss the motion with costs.
10. The court has considered the material canvassed in respect of the motion. As drawn, the motion appears an omnibus of different reliefs and it is unclear what specific relief is sought and the particular decision of the lower court that is targeted. While a part of the live prayer in the motion appears to seek stay of execution pursuant to the provisions of order 42 rule 6(2) of the Civil Procedure Rules another part seeks an interlocutory injunction and appears to invoke the provisions of order 42 rules 6(6). However, it is clear from the material affidavit that there exists an unsatisfied money decree issued by the lower court on October 23, 2014 and whose execution by way of sale of the suit premises the applicant desires to halt pending appeal.
11. It would be appropriate to note at this juncture, that lengthy affidavit material and submissions by parties in respect of the motion overtly canvassed the substantive appeal and other auxiliary matters without distinguishing the principles which apply to an application for stay of execution as opposed to an application for a temporary injunction pending appeal. While it is pertinent to state that at this stage, that in an application seeking to stay execution the court is not concerned with the merits of the appeal, as will eventually become evident, the arguments touching on the appeal will have a bearing on the outcome of the application.
12. That said, the court will first consider whether the applicant has made a case for the grant of an order to stay execution. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See Butt v Rent Restriction Tribunal (Supra).
13. The applicant's prayer for stay of execution pending appeal, falls under order 42 rule 6(1) & (2) of the Civil Procedure Rules which provides that:
 - ' (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.'

14. The cornerstone consideration in the exercise of the discretion is whether the applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell Case* are especially pertinent. These are that:

- ' 1. ...
2. In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.'

15. The decision of Platt Ag JA, in the *Shell Case*, in my humble view sets out two (2) different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

' The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in order XLI rule 4 (now order 42 rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)'

16. The learned judge continued to observe 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 stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.' (Emphasis added)

17. Earlier on, Hancox JA in his ruling observed that

' It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would... render the appeal nugatory. This is shown by the following passage of Cotton LJ in *Wilson -Vs- Church (No 2) (1879) 12ChD 454* at page 458 where he said:-

'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.'

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.'

18. As stated in the *Shell case*, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of her money. The deponent to affidavit supporting the motion has sworn that the execution process is likely to commence and her appeal if successful will be rendered nugatory unless this honorable court grants the prayers now sought. Because she would have lost the suit property in which she and other alleged beneficiaries are currently residing; that the property was her matrimonial home with the deceased while living; and that she stands to suffer irreparable loss and damage if the respondent alienates by execution the suit property before the issues in dispute are fully ventilated and conclusively determined in the appeal.

19. The respondent for her part has correctly asserted that execution is a lawful process and pointed out that the applicant has not offered security for the performance of the decree. In *George Gathura Karanja v George Gathuru Thuo & 2 Others [2019] eKLR*, the Court of Appeal stated that:

' [A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kang'ethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this court stated inter alia thus:

'Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.'

20. Although the court is not altogether persuaded by the applicant's emotive language which is evidently used to cast her as a victim of the respondent who is depicted as the villain, it is nigh possible that if the execution proceeds, damages for the loss of the suit property might not be reasonable compensation in the event the appeal were to succeed. Substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay of execution. That is what must be prevented.

21. The genesis of this dispute was a 'business loan' in the sum of Kes.3500,000/- advanced in bits by the respondent to the deceased in 2009 and in part apparently secured against the suit property. Ex parte judgment having been obtained against the deceased in 2014 the debt outstanding must have escalated dramatically by now, and possibly the debt may be close to outstripping the value of the suit property which the applicant claims to be her matrimonial home while asserting that the deceased was not served



with summons to enter appearance in the lower court. While the respondent disputes the latter fact, she does not expressly dispute the marital relationship alleged between the applicant and the deceased, and as demonstrated through a copy an 'affidavit of marriage' under customary law, contained in the applicant's material.

22. In my considered view upon reviewing all pertinent facts, the matter herein appears more amenable to an exercise of the court's discretion under order 42 rule 6(6) of the [Civil Procedure Rules](#) which provides:

' 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.'

23. Regarding the nature of an injunction, the Court of Appeal stated in [Charter House Investments Ltd. V Simon K. Sang & 3 Others \(2010\) eKLR](#) that : -

' Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.'

24. Further, in [Madhupaper International Limited v Kerr \[1985\] KLR 840](#) the Court of appeal exhorted that:

' The Court of Appeal's jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.'

25. Visram J (as he then was), in my humble view distilled the applicable principles in [Patricia Njeri & 3 Others -Vs- National Museums of Kenya \[2004\] eKLR](#). The learned judge stated:

' The appellant did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be 'exercised judicially and not in a whimsical or arbitrary fashion.' This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an appellant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The appellant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital).



- b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).
- c) The appellant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).
- d) The court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital). See also Mukoma –Vs-Abuoga [1988] KLR 645.'

26. In the court's view, the appeal presented in the memorandum of appeal and as augmented in submissions does not appear frivolous, notwithstanding the inelegant drafting. In [*Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others \[2013\] eKLR*](#) that:

' The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.'

27. And while it is true that the lengthy litigation herein has delayed the respondent's reaping of the fruits of her judgment, this court agrees with the appellant that the suit property ought to be preserved pending the final determination of issues arising in the appeal because the applicant may suffer loss for which damages may not be reasonable compensation. Which event could well render nugatory her appeal, if successful. In addition, the balance of convenience appears to tilt in the applicant's favour as she is in occupation of the suit premises together with other alleged beneficiaries of the estate of the deceased.

28. To my mind, an interim injunction in the circumstances of this case will not occasion more hardship upon the respondent than it would avoid; if the appeal resolves in her favour, she will be at liberty to proceed to execute the decree affirmed in her favour not just in respect of the suit property but any other assets of the deceased. Moreover, to preempt unnecessary delays on the part of the applicant, the court in its discretion and in furtherance of the overriding objective is empowered to make appropriate directions to ensure expedition of the appeal.

29. In view of all the foregoing, the court is persuaded to grant an injunction pending the determination of the appeal, effectively restraining the respondent from attaching or selling the suit property in execution of the judgment and decree of the lower court. This order is subject to the following conditions: -

- a. The applicant shall deposit into court a sum of Kes. 150,000/- (One Hundred and Fifty Thousand) as security for costs within 30 (thirty) days of today's date;
- b. The applicant shall file and serve the record of appeal within 60 days (sixty) days of today's date;
- c. The injunctive order herein shall lapse in the event of default in respect of any of the conditions (a) or (b) above, or in accordance with the provisions of order 40 rule 6 of the [*Civil Procedure Rules*](#) if the appeal is not fully prosecuted within 12 (twelve) months of today's date.
- d. For the avoidance of doubt the time prescribed in the conditions (a), (b) and (c) above shall be construed in accordance with the provisions of order 50 rule 4 of the [*Civil Procedure Rules*](#).



30. The costs of the motion will abide the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF
DECEMBER 2022**

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Ondieki

For the Respondent: Ms. Nyaguthii

C/A: Adika

