



**Mwananchi Credit Limited v Marambu (Civil Appeal 174 of 2022)  
[2022] KEHC 16559 (KLR) (Commercial and Tax) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL 174 OF 2022  
A MABEYA, J  
DECEMBER 20, 2022**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... APPELLANT**

**AND**

**ANN KARINGE MARAMBU ..... RESPONDENT**

**RULING**

1. This is a ruling on the appellant’s notice of motion dated 16/11/2022. The same was brought under sections 1A, 1B, 3A, 63(e) *Civil Procedure Act*, Order 42 Rules 6, Order 51 of the *Civil Procedure Rules* 2010.
2. The appellant sought a stay of any intended execution arising from the judgment and consequential orders issued in SCC COMM E1025 of 2022 pending the determination of this appeal.
3. The application is based on the annexed affidavit of Sylvia Wanjiru Njoroge. The grounds are that the appellant advanced a loan of Kshs.421,459/- to one Solomon Mwangi (“the borrower”) in or about October, 2019. The respondent guaranteed the borrower and offered her motor vehicle registration no. KCH 534Y (“the vehicle”) as security.
4. The borrower defaulted in loan repayment. He had also taken another loan of Kshs.200,000/- on 4/5/2021 on which he also defaulted. The default persisted whereby the appellant respondent repossessed the vehicle.
5. After repossession, the appellant learnt of the death of the borrower on 16/7/2021. The respondent proposed settlement and made partial payment towards repayment of the loan. However, she subsequently filed a case in the Small Claims Court against the appellant which led to this appeal.



6. Judgment in favour of the respondent was made in that court on 18/10/2022. By that judgment, the appellant was ordered to release the vehicle unconditionally. It was contended that the court failed to consider the capacity of the respondent to commence the suit in that court on behalf of her deceased brother without having taken out a grant.
7. The appellant was served with the release order and was apprehensive of being subjected to contempt proceedings. That the appeal raises triable issues and the release of the motor vehicle may render the appeal nugatory.
8. In opposition, the respondent swore a replying affidavit on 9/12/2022. She averred that the application was a ploy to prevent her from enjoying the fruits of a successful litigation. That the appellant had not demonstrated the substantial loss that would be suffered or how the appeal would be rendered nugatory if the vehicle is released to her. That no security had been offered for the stay sought and, in any event, the vehicle was depreciating in value.
9. The respondent undertook not to sell the vehicle until the appeal is determined. She contended that the appeal had no chances of success as she was not the administrator of the estate of the borrower and therefore the applicant could not enforce payment of the loan against her.
10. The court has considered the parties positions. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides the principles for granting a stay. That the applicant must demonstrate that he will suffer substantial loss if the is not granted and must offer security for the due performance of the order that might ultimately be binding on him. Further, the application must be made timeously.
11. On whether the application was made timeously, the order of the lower court was made on 18/10/2022 while the application was lodged on 16/11/2022. That was within a month of the order being made. As such, there was no delay in lodging the application.
12. The second limb is substantial loss. In the present case, the appellant advanced loan facilities to the borrower who is now deceased. The respondent guaranteed the loan and offered the vehicle as security.
13. The appellant averred that the borrower defaulted in the loan repayment and that the subject vehicle had already been repossessed prior to his demise. That it was only upon repossession that it discovered that the borrower had passed on. That should the vehicle be released as ordered, its appeal would be rendered nugatory as it may not be possible to recover the outstanding loan should the appeal succeed.
14. Conversely, the respondent contended that the appellant had not demonstrated how the release of the vehicle would lead to substantial loss or how the appeal shall be rendered nugatory.
15. In *Mukoma v Abuoga* (1998) KLR 645 it was held: -

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
16. In order to prevent substantial loss and therefore render the appeal nugatory, the court ought to preserve the status quo. That in the event the appeal succeeds, the success should not be a paper judgment. On the other hand, the successful litigant should not unnecessarily be kept away from enjoying the fruits of his/her judgment.
17. In the present case, the fact of the borrowing by the borrower is not denied. It is also not denied that he defaulted before his demise. The respondent does not deny that she guaranteed the debt.



18. In *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another* [2015] eKLR, it was stated: -

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”

19. The appellant is a small financial institution. It is sworn that it has capital in excess of Kshs.20 million. It alleges that it can repay the respondent if the appeal fails. It lent out money to the deceased borrower which was guaranteed by the respondent. The first loan for Kshs.421,459/- is said to have been repaid and there is an outstanding sum of Kshs. 252,444/-. This was as loan that was clearly guaranteed by the respondent and which she has admitted.
20. As regards the second loan of Kshs. 200,000/- given on 4/5/2021, it is said that there is an outstanding colossal sum of Kshs.899,166/-. How that amount trebled in less than a year it is not clear. Further, it is not clear whether the respondent guaranteed the second loan.
21. While the estate of the deceased remains the principal debtor, the respondent is likewise indebted to the appellant by virtual of her guarantee. She has been out of use of her vehicle since February, 2022. Possession in her favour has been ordered. The loan is yet to be repaid. She has however sworn that she would not dispose off the vehicle. The same will also be depreciating.
22. It is true that if the vehicle is released to the respondent as ordered, then there is a real risk that the only guarantee of payment of the debt owed to the appellant may be lost. That might lead to substantial loss. But the respondent is also entitled to the fruits of her judgment. She had also paid to the appellant before the case in the lower court a sum of Kshs. 200,000/-.
23. Accordingly, the application is determined as follows: -
- a. The respondent do deposit in an interest bearing account in the names of the advocates for the parties a sum of **Kshs. 126,222/-**.
  - b. Upon such deposit, the appellant to forthwith release to the respondent the vehicle unconditionally.
  - c. The costs to be in the appeal.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 20<sup>th</sup> day of December, 2022.

**A. MABEYA, FCIArb**

**JUDGE**

