



REPUBLIC OF KENYA



**Masesi & Anor v Ndeti & Anor (Civil Appeal E303 of 2024)
[2025] KEHC 381 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E303 OF 2024
MW MUIGAI, J
JANUARY 23, 2025**

BETWEEN

COSMAS NGULA MASESI & ANOR APPELLANT

AND

ALBERT KIIO NDETI & ANOR RESPONDENT

RULING

Notice Of Motion

1. Vide Notice of Motion dated 18/10/2024 and filed in court on 18/11/2024 brought under Section 1A IB,3,3A, CPR order 10 rule 11, order 7rule1, order 22, rule 22, order 50 rule 5 & order 51 rule1cpr wherein the applicant sought orders that:
 1. Spent
 2. Spent
 3. Pending the hearing and determination of the Appeal inter-partes, stay any further proceedings in the suit and/or matter pending the hearing & determination of this Application.
 4. The Court to set aside the exparte judgment entered herein on 12/10/2021 and all consequential orders made thereon
 5. The defendants /Applicants Defense dated 14/10/2021 and filed on 15/10/2021 be deemed as properly filed & served.
 6. This Court granted interim stay of execution on 25/11/2024 pending the Application being served to the Respondent and file and serve response.

The Lower Court File with typed proceedings and Ruling/Judgment to be availed and Further Mention for Direction was on 3/2/2025.



7. The Respondent upon being served with the instant Application and Court orders filed Certificate of Urgency dated 27/11/2024 on 29/11/2024 and stated in part as follows;
 - a) That the orders for stay of execution pending Appeal being heard and determined were granted without according the Respondent a hearing as rules of natural justice require.
 - b) The orders were obtained by concealing from this Court material facts & circumstances including the fact that the Appellant failed to comply with conditions setting aside judgment and payment of thrown away costs.
 - c) In an attempt to balance the scales of justice between the Respondent who holds judgment that has been reinstated twice and the appellant's right of appeal it is only fair if the decretal sum is deposited in court or joint account within a specific period as condition for stay of execution.
 - d) The Appellant did not disclose that the proclamation had already been done before obtaining orders of stay of execution and service of the said Orders,
 - e) The Respondent deposed that the Court order seeking the Respondent to file Replying Affidavit is of no consequence, if the order of stay is not varied because there is nothing to respond to and substantive orders were issued thus shutting the Respondent from making any response.
 - f) The Applicant would suffer great injustice and prejudice as he will be denied a chance to be heard and the proclaimed items will be sold out and ownership changed without any security for due performance or the decree of the Court below.
2. This Court granted orders on 1/12/2024 upon the above application being filed granted the following orders;
3. That it was brought to the Court's attention the Respondent, Appellant in Certificate of Urgency of 18/11/2024, this was the 2nd application after he failed to set aside judgment and comply with conditions set, the respondent failed to pay throw away costs and file Defense and to scuttle execution failed to disclose warrants of attachment were issued Proclamation done and impending sale was to take place.
4. The Applicant was not heard by this court before order for stay was granted and the Application by Appellant was an abuse of Court process due to material non-disclosure and therefore stay of execution granted on 25/11/2024 was vacated.
5. By Certificate of Urgency Application filed by Appellant on 6/12/2024 and sought this Court review its orders of 1/12/2024 on grounds;
 - a) The Respondent did not file Replying Affidavit as per order of the Court of 25/11/2024.
 - b) The Appellant attached evidence of payment of throw away costs annexed as CNM-4
 - c) The Court vacated the orders of 25/11/2024 exposing the Appellant for execution
 - d) The Respondent moved with speed and engaged 3rd Party who took possession of Appellant's vehicle Reg KDB 951U in execution of the decree the subject of Appeal herein.
 - e) The Appellant is prejudiced as the PSV matatu vehicle is the only source of Income and high chance of Appeal being rendered nugatory.



6. This Court granted following orders on 10/12/2024 that the matter had been a series of Certificates of Urgency Applications by parties pleading competing and parallel claims resulting in myriad orders. The matter could not continue being litigated online especially where facts were contested. The matter was to be mentioned inter partes on 17/12/2024 and status quo was maintained upto 17/12/2024.
7. The Court heard both parties represented by respective Counsel .It emerged at the time stay of execution order was sought, the execution process had begun and was not disclosed. On vacating stay of execution orders, the period for Proclamation was over and the PSV vehicle was attached.
8. The Appellant filed Memorandum of Appeal on 19/11/2024, the appeal was admitted to heard & determined by the High Court.
9. This Court granted interim /temporary stay of execution upto 23/1/2025 pending this Ruling on Stay of execution terms on security to be furnished for stay pending appeal. Parties /Counsel were at liberty to negotiate terms/conditions of stay of execution or file skeletal submissions on stay of execution for Ruling on 23/1/2025. The motor vehicle was to be released upon payment of Auctioneers Fees.

Determination/analysis

10. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules,2010 provides that:-

“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.
11. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

12. On the first condition, the court in Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331, defined substantial loss as follows;

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”



13. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...

14. The decretal sum awarded to the Respondent was Ksh 12,000,644 a colossal amount emanating from Interlocutory judgment entered on 12/10/2022 which is the bone of contention in this Appeal. The Appellant was found vicariously liable and was not aware of the claim until he was notified of Interlocutory judgment and contested service.

15. The Respondent’s financial means remain wholly unknown and, in those circumstances, the Applicant’s intended appeal were to succeed, that success would be rendered nugatory.

16. The Applicant’s application for stay is if the Respondent initiated the process of execution and proceeded to execute as shown by the above facts unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.

17. Odunga J. in *George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa* (suing as legal representatives of the estate of Judy Kioo Wanza – deceased) stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in *Bungoma High Court Misc. Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto and James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR.

18. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at 417 held:

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

19. The Applicant/Appellant demonstrated the imminent loss he would suffer if the decretal sum is paid to the Respondent. The amount is a colossal amount

20. On the other hand, the Respondent contests stay of execution being granted as the Interlocutory judgment was set aside twice and if stay is granted the decretal amount to be deposited in Court of joint Account.

Arguable Appeal

21. The Appellant appeal is in Kangundo CMCC E097 of 2021 Ruling of 7/11/2024. The Applicant’s pleadings depose a strong arguable appeal which has high chances of success that will be rendered nugatory if the orders sought are not granted.



Unreasonable Delay

22. On the second condition, the Applicant stated that the application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgment of the Trial Court was entered on 5th April 2023. The Memorandum of Appeal was filed on 19/11/2024 and Notice of Motion seeking grant of stay of execution was filed on 18/10/2024. The pleadings disclose that Applications were made heard and determined on setting aside the Interlocutory judgment that gave rise to *ex parte* proceedings and judgment that are the subject of the instant Appeal. For these reasons right to appeal upheld and Appeal admitted *vide* Memorandum of Appeal. The Court finds that there is no undue delay in filing the application herein.

Furnish Security

23. The Applicant/Appellant did not make proposals on the security for stay of execution pending Appeal. This is a mandatory requirement under Order 42 of CPR. The Respondent proposed that the entire decretal amount be placed in Court or joint Account pending hearing and determination of the application and intended Appeal.
24. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

It follows therefore that it is the discretion of the court to determine the security.

The Appellant’s application to stay proceedings from the pleadings, judgment was delivered the rest of the proceedings relate to execution process which the appellant’s Application is to seek stay of execution. *C. Githua LJ in Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi* [2014] eKLR stated;

“.....the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principle;

- a) Whether the applicant has established that he/she has a *prima facie* arguable case;
- b) Whether the application was filed expeditiously; and
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

Disposition

25. In the premises: -



- a. There will be a stay of execution pending the said appeal on condition that the Applicant deposits Ksh 1,000,000/- in a Joint Account of Advocates for both parties on record within 90 days from date of reading Ruling, and in default, the application for stay of execution shall stand dismissed.
- b. Upon compliance with the terms, LCF is retrieved and Record of Appeal to be availed. Parties/ Counsel to take directions on the Appeal on 3/2/2025 in Ct No 1 Machakos High Court
- c. The costs of this application abide the outcome of the Appeal.

It so ordered.

**RULING DELIVERED DATED SIGNED IN OPEN COURT IN NAIROBI ON 23/1/2025.
(VIRTUAL/ PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

