Katiwa v Masinde (Civil Appeal E126 of 2025) [2025] KEHC 6817 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6817 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E126 OF 2025

G MUTAI, J

MAY 26, 2025

BETWEEN

MAURICE MWENDWA KATIWA ..... APPLICANT

AND

MARY NANJALA MASINDE ..... RESPONDENT

RULING

1. The application before me is dated 28th April 2025. Through the said application, the appellant/ applicant seeks a stay of execution pending the appeal and for costs to be provided for.

2. The respondent opposes the application and filed a replying affidavit.

3. I have considered the application and the response thereto, and considered the parties' submission. I note that the appeal concerns the quantum of damages, not liability.

4. This court can grant a stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. The conditions that the applicant must satisfy are as follows: -

    a. He must show that there would be a substantial loss unless a stay of execution is granted;

    b. The application has been made without undue or unreasonable delay; and

    c. He must give security for the due performance of the orders that may ultimately be binding.

5. I note that the said conditions are conjunctive, not disjunctive, in the sense that they all must exist, or else no stay will be given. In this case, the 2nd and 3rd conditions have been fulfilled as the application was filed without a delay and the applicant has proposed to deposit the entire decretal sum in court. That leaves the first condition, whether the applicant shall suffer substantial loss unless a stay is granted. Has it been satisfied in this case?

6. What amounts to "substantial loss", when considering whether to grant a stay pending appeal, has been settled in several court decisions. In the case of *James Wangalwa & another v Agnes Cheseto* [2012] KEHC 1094 (KLR). The court stated as follows: ---

> " 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the *CPR* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

> " ...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."
>
> With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory."

7. Kimaru, J, as then was, in *Century Oil Trading Company Ltd vs. Kenya Shell Limited*, Nairobi (Milimani) HCMCA No. 1561 of 2007 stated that:-

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent become an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

8. The appellant/applicant, though not appealing on liability, doubts whether the respondent can refund whatever sum paid to him. I agree with Ms Oile that once a doubt is expressed by the applicant, in an application for stay of execution, as to the respondent's ability to refund whatever has been paid to him, the burden shifts to the respondent to show ability to pay, as was determined by the Court of

Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] KECA 333 (KLR) where it was held that:--

> " 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 — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya."

9. A similar holding was made by Kimaru, J, in *Century Oil Trading Company Ltd vs. Kenya Shell Limited case* (*supra*).

10. That said, this is an appeal on quantum only. It is inconceivable that the respondent will walk away with nothing if the appeal is successful. I note that it has been stated that the respondent is unwell and requires money for treatment. Being a successful party, he should benefit from a judgment in his favour. While doing so, the Court must also bear in mind that an appeal exists that may seriously reduce whatever sums he was awarded in the court below.

11. In the circumstances, I order that half of the decretal sum, that is to say, Kes.579,000/-, be deposited in a joint interest-earning account in the name of both parties' counsels. The other half, that is to say, Kes.579,000/-, shall be paid to the respondent, through his counsels, so that he can take care of his medical bills. The payments shall be made within 30 days of the date hereof, failing which the respondent will be at liberty to execute. The costs of the application shall be costs in the cause.

12. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 26TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Oile, for the Appellant/Applicant;

Mr Nyabena, for the Respondent; and

Arthur - Court Assistant.