



**Kasese Sacco Limited v Naekana Route 134 Sacco Society Limited (Civil Appeal E174 of 2023) [2024] KEHC 203 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 203 (KLR)

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

**CIVIL**

**CIVIL APPEAL E174 OF 2023**

**CW MEOLI, J**

**JANUARY 19, 2024**

**BETWEEN**

**KASESE SACCO LIMITED ..... APPLICANT**

**AND**

**NAEKANA ROUTE 134 SACCO SOCIETY LIMITED ..... RESPONDENT**

**RULING**

1. The motion dated 13.03.2023 by Kasese Sacco Limited (hereafter the Applicant/Appellant) seeks inter alia an order to stay execution of the orders issued in Nairobi MCCC No. E329 of 2023 via a ruling delivered on 06.03.2023, pending hearing and determination of the appeal; and an order to stay proceedings in Nairobi MCCC No. E329 of 2023 (hereafter lower court suit) pending hearing and determination of the appeal herein. The motion is expressed to be brought pursuant to Section 3, 3A & 75(1) of the *Civil Procedure Act* (CPA), Order 40 Rule 7, Order 42, 43 & 51 Rule 1 of the Civil Procedure Rules (CPR) among others. And is premised on the grounds on the face of the motion, as amplified in the supporting affidavit sworn by John Mungai Njoroge, a director of the Applicant.
2. To the effect that the Applicant is licensed to operate its transport, storage, and communications business by the Nairobi City County, with established parking slots along Temple Lane at the Junction between River Road and Ronald Ngala Road. He goes on to depose that on or about 2014, the parties herein were authorized by Nairobi City County to jointly operate their business along Temple Lane at the Junction between River Road and Ronald Ngala.
3. That on 03.02.2023, Naekana Route 134 Sacco Society Limited (hereafter the Respondent) moved the lower court seeking injunctive orders against the Applicant, seeking to bar the Applicant from parking and utilizing slots allocated along River Road between Ronald Ngala Street and Race Course Road. He asserts that the Applicant responded to the said motion and in turn filed its own application seeking stay of the interim orders issued to the Respondent, following which the lower court granted orders in



- favour of the Applicant on 13.02.2023. That despite service of the latter order upon the Respondent and their counsel, the Respondent did not comply therewith, necessitating the filing of a contempt application against the Respondent. He asserts that the lower court issued directions that all motions be canvassed concurrently and thus a ruling was delivered on 06.03.2023 in favour of the Respondent.
4. That being dissatisfied with the foregoing ruling the Applicant lodged the instant appeal which has a high chance of success and therefore, this court ought to issue an order to stay execution and the proceedings of the lower court decision. He avows that the instant motion was made without unreasonable delay and if the orders sought are not granted the appeal will be rendered nugatory. He further deposes that the court is clothed with inherent jurisdiction and wide power to entertain the motion. In conclusion he states that the Respondent will not suffer any prejudice if the motion is allowed as prayed.
  5. The Respondent opposes the motion by way of a replying affidavit sworn by Nancy Wangari Ngondi, a director of the Respondent. She disputes that both the Applicant and Respondent have joint authority and right to operate their transport business anywhere in Nairobi, asserting that the Respondent has the sole and exclusive right of usage of its allocated slots as confirmed by the letter from the licensing authority in Nairobi County. She states that the Applicant is licensed to operate along Temple Lane while the Respondent operates along River Road between Ronald Ngala Street and Racecourse Road.
  6. Further, the deponent points out that the Applicant's business permit/license to operate, relied on in support of the motion, lacks a specific allocated area of operation hence the Applicant's trespass into the Respondent's legally authorized area of business as allocated by the Nairobi County Government. In conclusion, she confirms that the lower court issued orders in favour of the Respondent and views the instant motion as a waste of judicial time, the lower court suit having since been scheduled for hearing.
  7. In a rejoinder by way of further affidavit, John Mungai Njoroge reiterates the averments in his supporting affidavit by asserting that the Respondent has not proffered any records to controvert the fact that the two entities were jointly issued with authority and have since been operating and co-existing for a very long time. That the Applicant's license has never been revoked and pursuant to its business permit it is not in any way trespassing into the Respondent's legally authorized area of business as allocated by the Nairobi City County. He asserts that the instant application is not a waste of judicial time and that the lower court suit has yet to be set down for hearing.
  8. The motion was canvassed by way of written submissions. Counsel for the Applicant began by rehashing the contents of the affidavit material in support of the motion and proceeded to address the court on two (2) issues. On whether the application has met the threshold for grant of an order of stay of execution, counsel relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the decisions in Kenya Shell Limited v Kibiru [1986] eKLR and Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR to submit that since delivery of the impugned ruling the Respondent has subsequently restrained the Applicant from parking its vehicles or utilizing in any way slots allocated to the parties along the streets in question thus occasioning the Applicant substantial loss. That if the orders of the lower court are not stayed the Applicant will continue to suffer loss as its operations have been ground to a halt as they do not have any other parking space despite being licensed to utilize the streets in contention.
  9. It was further submitted that the motion was filed expeditiously whereas if the Respondent continues to execute the lower court orders the appeal herein will be rendered nugatory. As to the question of security, counsel submitted that the Applicant is willing and able to give security as may be directed by the court.



10. Regarding whether the motion has met the threshold for grant of an order of stay of proceedings, counsel called to aid the decisions in *Re Global Tours & Travels Ltd HCWC No. 43 of 2000* and *David Omwenga v John Teleyio [2010] eKLR* to submit that the Applicant's appeal has a high chance of success and if stay of proceedings is not granted, the appeal will be rendered nugatory. That it is in the interest of justice that the instant motion is granted to avert defeating the objects of the appeal whereas it has since been settled that an arguable appeal is not necessarily an appeal that will succeed but one which raises arguable issues. Counsel thus urged the court to allow the motion as prayed.
11. In the part of the Respondent, counsel equally began his submissions by restating the affidavit material. As to whether there was a joint license in favour of both parties' counsel reiterated that the Applicant's license as evinced and relied on in support of the motion did not indicate a specific area of operation, buttressing the Respondent's claim to be the rightful operator on its legally allocated street. Concerning whether the conditions for issuance of stay orders have been met, it was summarily submitted that the Applicant has no authorized slots, and the dispute is pending before the lower court wherein the Nairobi County Government has now been enjoined to the proceedings to assist the court in finalizing the issues in contention. In conclusion, the court was urged to dismiss the motion with costs.
12. The court has considered the material canvassed in respect of the motion. The parties have canvassed issues relating to the appeal in their respective material. However, it is pertinent to state at this stage, the court is not concerned with the merits of the appeal. The Applicant's motion is seeking stay of execution of the orders issued in the lower court suit on 06.03.2023 and stay of subsequent proceedings therein. It is trite, 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 (1982) KLR 417*.
13. The Applicant's prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 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 key consideration in exercising discretion in respect of the aforecaptioned, 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 (supra). The principles enunciated therein have been applied in countless decisions of the superior courts. Holdings 2, 3 and 4 of the Kenya Shell Ltd 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 Kenya Shell Ltd Case, in my humble view sets out two (2) different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> 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 L J 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. The Applicant has reiterated in its affidavit material that it has an appeal which has a high chance of success and if the orders sought are not granted the appeal herein will be rendered nugatory. The Respondent has countered this position by summarily arguing that the instant motion is a waste of judicial time as the lower court suit has since been scheduled for hearing.
19. Execution in satisfaction of a decree is a lawful process, and the Applicant is duty bound to demonstrate specifically how substantial loss would arise. 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 away from the fruits of successful litigation. Save for the averments in its affidavit material, the Applicant has not precisely deposed the nature of substantial loss other than for the blanket argument that the appeal will be rendered nugatory. However, counsel belatedly purported to supplement the Applicant’s material through submissions. Here asserting that since delivery of the impugned ruling the Respondent has restrained the Applicant from parking its vehicles or utilizing in any way slots allocated to the parties along the streets in question thus occasioning the Applicant substantial loss meanwhile the Respondents other than challenging the merits of the motion have not tendered material in rebuttal.
20. Ideally, where a decree appealed against is a money decree, substantial loss would occur either on account of settling the decree would cause difficulty to the Applicant or loss of money due to inability of the decree holder to repay the decretal sum, if payment was made. However, in the instant matter the decree/order herein is not expressly a money decree. This court has taken the liberty of perusing the impugned ruling (Annexure JMN-9) which forms the subject of the Applicant’s appeal. The ruling essentially restrained the Applicant either by itself, its assigns, agents or employees from parking its vehicle or utilizing in any way slots allocated to the Respondent “situated on Plot No. 209/5984 Door/ Stall No. 1” and further dismissed both the Applicant’s motions and proceeded to direct that for clarity and avoidance of doubt, the Applicant is at liberty to seek clarification for the Nairobi City County with regard to its actual parking space as allocated on Plot No. 209/5984.
21. From a review of the evidentiary material relied on by the respective parties before this court (Annexure JMN1 & JMN 2) & (Annexure NWN 1 & NWN 2), the dispute revolves around allocated parking slots at Temple Lane and River Road between Ronald Ngala Street and Race Course Road which the Applicant purports, was jointly allocated to the parties herein, while the Respondent argues that it was exclusively allocated the latter. It is also quite evident from the material relied on by the respective parties that the parking slots/allocating are located around Plot No. 209/5984. The onus was on the Applicant to demonstrate by way of affidavit material how execution of the lower court order would occasion it substantial loss. It was not open to the Applicant’s counsel to fill the gaps in the Applicant’s affidavit material as he has sought to do by his submissions.



22. It is settled that substantial loss in its various forms is the cornerstone of the court's jurisdiction for granting stay and is what has to be prevented. 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 from enjoying the fruits of their successful litigation. Therefore, the court is not persuaded that the Applicant has established the likelihood of substantial loss and the appeal being rendered nugatory. Without this evidence, it is difficult to justify an order of stay of execution. Consequently, the prayer seeking stay of execution must fail.
23. Moving on to the issue of stay of proceedings pending hearing and determination of the appeal, the power of the court to stay proceedings pending appeal is donated by Order 42 Rule 6 (1) of the CPR as augmented by Section 3A of the CPA, also invoked by the Applicant. The latter provision reserves the inherent power of the court to make such orders as maybe deemed necessary to meet the ends of justice.
24. Order 42 Rule 6 (1) of the Civil Procedure Rules 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 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.
25. Section 3A of the [Civil Procedure Act](#) provides that; -
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
26. As to what constitutes inherent jurisdiction of the court, the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR rendered itself as follows; -
- “Also cited was Section 3A of the [Civil Procedure Act](#) which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that:
- “Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from [the Constitution](#) or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”
- The Supreme Court went further in Board of Governors, Moi High School Kabarak and another versus Malolm Bell [2013] eKLR, to add the following: -
- “Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are



functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

27. Ringera, J (as he then was) in *Re Global Tours & Travel Ltd Nairobi HCCC No. 43 of 2000 (UR)* spelt out the applicable considerations in determining an application for stay of proceedings pending appeal as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

28. Undoubtedly, the unnecessary proliferation of proceedings which needlessly dissipates the court’s limited time resource is also a key consideration in an application of this nature. The Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen [2021] eKLR* exhorted that; -

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....

“The learned authors of; *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

29. Essentially, the Applicant seeks to invoke this court’s inherent jurisdiction and judicial discretion to prevent another court from performing its duty, by hearing a dispute before it, thereby essentially



interrupting the adverse party's right to conduct the hearing, itself "a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case" per Halsbury's Laws of England.(supra).

30. While a review of the Applicant's memorandum of appeal (Annexure JMN 10) attached to the Applicant's affidavit material, reveals issues that could well merit the court's consideration on appeal or that are prima facie arguable, there are no exceptional circumstances demonstrated here to justify the exercise of the court's discretion to stay proceedings which is to be sparingly invoked. It is not enough for the Applicant to claim that the objects of the appeal will be defeated if the stay is not granted. The onus was on the Applicant to demonstrate how the appeal will be defeated if the lower court suit proceeds. Or failing that, to demonstrate that the Respondent's case in the lower court is vexatious or so frivolous or hopeless "that they could not possibly succeed on the basis of the pleading and the facts of the case." See Raymond Ruto's case (supra).
31. In so saying, the court is alive to the decision of the Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR where it was held that an arguable appeal need not be one that will succeed so long as it raises a bona fide issue for determination by the court. In that case, the court emphasized the right of appeal. Nevertheless, as exhorted by the same Court in Raymond Ruto's case, an order to stay proceedings, unlike an order staying execution, is a grave matter and should not be granted willy nilly; some exceptional circumstances must be demonstrated. This is not the case here.
32. Moreover, as observed by Onyango Otieno, J (as he then was) in *Niazsons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd*. Nairobi HCCC No. 126 of 1999:

"Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay (stay of proceedings) should be granted."
33. The Court of Appeal in the case of *Wachira Waruru & Anor. v Francis Oyatsi* [2002] 2 EA 664 rendered itself thus:

"In an application for stay of proceedings pending appeal where the judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility."
34. In this case, the court has already found, regarding the prayer for stay of execution that the Applicant has failed to demonstrate substantial loss and that the appeal will be rendered nugatory if stay is not granted. The Applicants were obligated to demonstrate that their appeal will be rendered nugatory if the proceedings are not stayed; the mere existence of their appeal is not enough. In the court's view, in the circumstances of this case, it may well be that allowing the parties to ventilate their respective cases fully in the lower court will best serve the interests of justice and the overriding objective.
35. In *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR the Court of Appeal stated that the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:

"1A(1) the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;



- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

36. Consequently, the court declines to grant stay of proceedings in the lower court. In the result, the entire motion has failed and is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JANUARY 2024.**

**C.MEOLI**

**JUDGE**

**In the presence of**

**For the Applicant: Ms. Odhiambo h/b for Mr Kinyanjui**

**For the Respondent: Ms. Awino**

**C/A: Carol**

