



**Lyms Limited v Mutisya & another (Suing as a Legal Representatives of Michael Ndolo Itambo - Deceased) (Civil Appeal E160 of 2023) [2024] KEHC 640 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E160 OF 2023  
MW MUIGAI, J  
JANUARY 19, 2024**

**BETWEEN**

**LYMS LIMITED ..... APPELLANT**

**AND**

**SAFINA MUENI ITAMBO ..... 1<sup>ST</sup> RESPONDENT**

**MARY MUTHOKI MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS A LEGAL REPRESENTATIVES OF MICHAEL NDOLO ITAMBO - DECEASED**

**RULING**

**Pleadings**

1. By a Notice of Motion dated and filed on 27th April, 2023 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, and Order 22 Rule 22, Order 42 Rules 6 and 51 (1) of the *Civil Procedure Rules*, 2010 wherein the Applicants sought the following orders that:
  - a. Spent
  - b. That this Court be pleased to grant an interim stay of execution of the judgement and/or decree entered at Mavoko CMCC No.651 of 2019 of 7<sup>th</sup> June 2023 pending the hearing and determination of the appeal herein.
  - c. Costs of this application be in the cause.

**Supporting Affidavit**

2. The application was supported by Supporting Affidavit dated 10<sup>th</sup> July ,2023 sworn Judy Kibet, a Director of the Appellant Company where she deponed that the Appellant being aggrieved and



- dissatisfied with the decision of the Honourable Court, thereby instructed counsel to appeal against the said decision and that the appeal was meritorious with high probability of success..
3. The Appellant deponed that there being no order of stay of execution of judgement, the appeal shall be rendered nugatory and the Respondent may ultimately proceed to execute and thereby attach and sell the Appellant's property.
  4. It was deponed that the Respondent being a man of straw may not be in a position to make good any loss or damage incurred or suffered by the appellant if the decree is enforced and the appeal
  5. It was further deponed that they were willing and capable of furnishing security as the Court may order for due performance of the decree pending the hearing and determination of the appeal and that the appellants proposed to furnish security in terms of a bank guarantee. And there has been no delay in filing the application.
  6. It was deposed that should stay not be granted, the entire object of the appeal stands to be defeated and the appeal rendered nugatory thereby denying the appellant their right to appeal and the appeal raises cogent issues of law and fact and ought to be heard on merit.
  7. It was further deponed that the grant of stay will not occasion any prejudice to the Respondents whereas the Appellant stands to suffer great prejudice should it not be allowed to ventilate its appeal.

### **Replying Affidavit**

8. The application was opposed vide a replying affidavit dated 16<sup>th</sup> August 2023 and filed in court on 17<sup>th</sup> August ,2023, wherein the Respondent opposed the Application and appeal terming it as an abuse of the court process intended to have the matter litigated ad naseum.
9. It was deponed that the appeal filed was frivolous without a prima facie merits and had no chance of success and that its intention was to waste judicial time and deny the respondents the fruits of their judgement and that the court cannot interfere with the quantum awarded.
10. It was further deposed that the appellant's memorandum of appeal did not have any grounds/ disputing the Trial Court's decision on liability and only disputes on quantum and that it would only be fair that half of the decretal sum was released to the respondents as the successful parties in the suit.
11. It was deponed that the matter has been pending in court for the last 5 years a great injustice to the deceased minor children and a young widow and now that there was a judgement in their favour after a long wait, a release of the half of the decretal sum to the respondent and the rest deposited in an interest earning account for the benefit of the estate was the fair thing.
12. It was deponed that in the current economic uncertainty, a bank guarantee proposed by the appellant as security is risky and tantamount to no security at all and urged the court to order that half of the amount is deposited in a joint interest earning account.
13. The matter was canvassed by way of written submissions.

### **Submissions**

#### **Applicant's submissions**

14. The Applicant filed submissions dated 11<sup>th</sup> October 2023, and submitted that the respondent has not demonstrated that she will suffer if the orders of stay are granted.



15. It was submitted that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudice to the applicant and the respondent had not demonstrated that he has the capacity to restore/ reconstitute the decree in the event that the court allows the appeal.
16. Reliance was made on Order 42 of the [Civil Procedure Rules](#) 2010 which spells out the conditions to be met before stay is granted.
17. Reliance was also made to the case of *Nduhiu Gitabi and Anor vs Anna Wambui Warugogo* (1988)2KAR and [Equity Bank Ltd vs Talga Adams Company Ltd](#) C.A 722/2000, it was submitted that in light of the above decisions, it was incumbent upon the respondent to disclose any source of income that would demonstrate his ability to refund the Applicant the decretal sum should the appeal succeed and urged the court to find that the applicant will suffer substantial loss if the intended execution is not stayed and ultimately render the appeal nugatory. Reference was made to the case of [Butt vs Rent Restriction Tribunal](#) (1982) KLR 417.
18. It was submitted that the applicant has offered to furnish a bank guarantee for due performance of the decree and the respondents on the other hand had not offered any reason why they don't want a bank guarantee as sufficient security and thus urged the court to find that the offer is reasonable and cost of the application abide the outcome of the appeal.

### **Respondent's submissions**

19. The Respondent filed his submissions dated 17<sup>th</sup> October, 2023, where it was submitted that the only issue for determination is what form of security is fair as a condition for stay and that the question should be balance justice and fairness for both parties. That justice will not be served if the respondents who were successful litigants are condemned to await the determination of the appeal to enjoy the fruits of their success or are condemned to the release of a very minimal amount making a mockery of the justice system.
20. Reliance was placed in the case of [Paul Nderitu Mwangi & Ano vs. Jacinter Mbete Mutisya & Aaron Wambua Musonzo suing as the legal representative of the Estate of William Musonzo\(deceased\)](#).
21. It was submitted that there be a stay of execution pending appeal on condition that the applicants remit to the respondent half of the decretal sum and deposits the other half in a joint interest earning account in KCB bank Machakos in the name of the advocates herein.

### **Determination**

22. The court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.
23. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 as follows;
  - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”
24. The three conditions to be fulfilled can therefore be summarized as follows;
- a. that substantial loss may result to the applicant unless the order is made
  - b. application has been made without unreasonable delay
  - c. security as the court orders for the due performance
25. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

### **Substantial Loss**

26. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 that:

“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.’

27. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“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 ... 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.”

28. The applicant contends that the appeal shall be rendered nugatory if the orders sought herein are not granted as the Respondent may proceed to execute the decree and thereby attach and sell the Appellant’s property and this is a reasonable ground to demonstrate substantial loss .

### **Arguable Appeal**

29. The Applicant has submitted that it has a strong arguable appeal which has high chances of success that will be rendered nugatory if the orders sought are not granted. Further, that the Respondent will be unable to refund the decretal sum if the appeal is successful as the respondent has failed to demonstrate that he is engaged in any income generating activity, his means of income are unknown and presumably insufficient.

30. This was emphasized in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

31. The Respondent in this case has not provided any evidence to show that he is capable of refunding the decretal sum. This was the position in the case of *Stanley Karanja Wainaina & Another vs. Ridon Ayanju Mutubwa* Nairobi H.C.C.A. 427/2015 where it was stated that:

“...It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge.

### **Undue Delay**

32. As to whether the Application has been filed without undue delay, judgment was entered on 07.06.2023 and this application was filed on 26.07.2023, almost a month and half later. The court finds that the Application has not been filed without undue delay.



## Security

33. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

34. The Applicant contended that it is willing and ready to abide by any reasonable condition set forth by the Court in due performance of the decree pending the hearing and determination of the appeal and proposed furnishing security in terms of a bank guarantee, a proposal which was vehemently opposed by the Respondent terming the bank Guarantee as risky and tantamount to no security at all.
35. This Court is persuaded that the Applicant has demonstrated that it has met the threshold for grant of stay of execution.

## Disposition

1. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
  - a. Stay of execution pending Appeal of Mavoko CMCC No. 651 of 2019 judgment of 7/06/2023 is granted on condition that the Appellant remit Kshs.800,000/- of the decretal sum to the Respondent through Advocates on record and the rest to be deposited in a joint interest earning account of parties’ advocates on record within 90 days of this Ruling.
  - b. The Appeal shall be deemed as filed as per Memorandum of appeal filed herein.
  - c. Appeal to be pursued within 90 days.
  - d. Costs will abide the Appeal.

**RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 19<sup>TH</sup> JANUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**



**M.W. MUIGAI**  
**JUDGE**

