



REPUBLIC OF KENYA



**Mwanzia v Musyoka (Civil Appeal E148 of 2023)
[2024] KEHC 632 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E148 OF 2023
MW MUIGAI, J
JANUARY 19, 2024**

BETWEEN

SYLVIA MUNEE MWANZIA APPELLANT

AND

CYRUS MUSYOKA RESPONDENT

RULING

1. Vide a Notice of Motion dated 27th June, 2023 brought under Sections 1A (2) 3A, 38A and 51 of the [Civil Procedure Act](#) and Order 42 rule 6 (2) of the [Civil Procedure Rules](#) wherein, the Applicants sought the following orders that:
 1. Spent
 2. This Honorable Court be pleased to grant stay of execution of the judgement delivered on 24th May, 2023 pending the hearing and determination of the appeal.
 3. That the appellant be allowed to furnish the court with bank guarantee as security pending the hearing and determination of the intended appeal.
 4. That the cost of this application abide the outcome of the appeal.

Supporting Affidavit

2. The application was Supported by Supporting Affidavit dated 27th June 2023 sworn by Sylvia Muneo Mwanzia, she deposed that judgement was delivered on 24th may 2023 and the Respondent was awarded general damages of Kshs 400,000 plus costs and interests and that the quantum was excessive and had a high chance of success if the appeal was upheld..
3. She deposed that there was imminent threat of execution by the respondent, a step which will render the application nugatory and the intended appeal useless;



4. She stated that they have since proceeded and lodged a memorandum of appeal which was duly filed on 23rd June 2023.
5. It was further deposed that the application was presented without inordinate delay and the underwriter was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal.
6. The applicant lamented that the respondent was a person of unknown means hence she was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise and that the appeal raises pertinent issues and has high chance of success and that unless stay of execution is granted, she stands to suffer irreparable loss and damage.

Replying Affidavit

7. By a Replying Affidavit dated 13th July,2023, sworn by Munyoki Muthangya , an Advocate of the High Court wherein he deposed that the respondent shall not oppose the application on condition that the Court may order pending the determination of the appeal that the appellants pay a half of the decretal sum together with costs of the suit to the respondent being kshs 264,516 within 30 days from the date of the order and that the balance of kshs 264, 516 be deposited in a joint interest earning account in the name of both advocates within 30 days from the date of the order and in default of compliance with either of the above orders, the stay of execution to lapse forthwith and execution to issue without reference to court.
8. He stated that the appellant was served with a draft decree for comments but has not raised any objections to the same and was filed in court for endorsement.
9. He deposed that the respondent was opposed to the issuance of a bank guarantee as security since the guarantee does not provide security of interests which was part of the decree and thus the guarantee is insufficient security to the decretal sum meant to prejudice the respondent's award.
10. The matter was canvassed by way of written submissions.

Submissions

The Appellant/Applicant's Submissions

11. The Appellant/Applicant filed his written submissions dated 13th October,2023 and submitted that the respondent in his replying affidavit stated that he was not opposed to the application for stay save for the conditions. That they had proposed to supply the court with a bank guarantee as a security for the entire amount pending hearing and determination of the intended appeal.
12. It was submitted that the respondent did propose part payment of kshs 264,516 and a similar sum to be deposited in a joint interest earning account.
13. It was submitted that the respondent was awarded general damages Kshs 400,000 and special damages Kshs 5170 a total of Kshs 405,170, that the cost should await the outcome of the appeal and the applicant prayed that the court grants a fair determination for stay conditions.

Determination

14. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.



15. 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.

16. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

17. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

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

Substantial Loss

19. 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 in the sense of Order 42 rule 6 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...”



20. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

21. 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...

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory.

22. The Applicant's contention is that there was an imminent threat of execution by the Respondent, a step which will render the application nugatory and the intended appeal useless

23. 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.

24. 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.”

25. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.



26. The Court notes that despite the Respondent not stating in his affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss she will suffer. The Applicant has simply stated that the respondent is a person of unknown means and was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
27. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground has not been met satisfactorily.

Unreasonable Delay

28. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 24.05.23 and the application was filed on 30.06.23. A month and some few days later is not unreasonable delay.
29. The court finds that there is no undue delay in filing the application herein.

Furnish Security

30. The Applicant stated that her underwriter was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal, the Respondent in his replying affidavit that she was opposed to issuance of a bank guarantee as security as it was insufficient security to the decretal sum meant to prejudice the respondent's award
31. 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.”

32. It follows therefore that it is the discretion of the court to determine the security. It is not disputable that the Applicant has shown some step of good faith by willing to offer a bank guarantee as security however the Respondent's concerns on the bank guarantee as sufficient security are valid and cannot be ignored.

Disposition

33. In the premises: -
 - a. There will be a stay of execution pending the said appeal on condition that the Applicant deposits half of the decretal amount in a joint interest earning account of both Advocates on record and other half in a bank guarantee issued within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
 - b. The costs of this application abide the outcome of the appeal.
34. It so ordered.



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

M.W. MUIGAI

JUDGE

