



**Manatwa Sacco Limited & another v Ndombi (Civil Appeal
159 of 2023) [2024] KEHC 118 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 159 OF 2023**

**FR OLEL, J
JANUARY 17, 2024**

BETWEEN

MANATWA SACCO LIMITED 1ST APPELLANT

SIMON MWALAVU 2ND APPELLANT

AND

SHARINE NDOMBI RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 16th August 2023 brought pursuant to provisions of Section 1A, 1(B), 3A and 79G of the *Civil Procedure Act*, Order 42 Rule 6(2), Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1, 2 and 3 of the said application are basically spent and the main prayer sought are prayer (4) and (5) that;
 - a. That this Honourable court be pleased to stay the execution of the judgment/decreed obtained herein pending the hearing and determination of the Appellants/Applicants Appeal filed at the High court of Kenya at Machakos as Civil Appeal No 159 of 2023.
 - b. That this Honourable court allow the Applicant to furnish the court with security in the form of a Bank guarantee from the DTB Bank.
 - c. That costs of this application abide the outcome of the Appeal
2. This application is supported by the grounds on the face of the said application and the affidavit of the appellants' advocate one Nancy Buluma dated 16th August 2023, while the respondent opposed this application through her replying affidavit filed in court on 25th August 2023.
3. The Appellants averred that they are wholly dissatisfied by the Judgment of Hon Stephen Jalango Senior Principal Magistrate dated 8th June 2023 and had preferred an appeal against the same basically challenging the quantum awarded as being on the higher side . They state that they have an arguable



appeal which has high chances of success and further that the said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.

4. The appellants further aver in their supporting affidavit that there is strong likelihood that the respondent will apply for warrants of execution consequent of which she is likely to attach their assets and if sold that would cause them substantial loss and render the appeal filed to be rendered nugatory. Finally, the Applicants stated that they are ready and willing to furnish a bank guarantee as security for due performance of the decree and that the Respondent will not be prejudiced if orders sought are granted.
5. The Respondent did oppose this application by her Replying Affidavit dated 24th August 2023 and filed in court on 25th August 2023. She stated that this appeal only relates to quantum of damages and it is for that reason she proposed that she be paid Ksh 500,961.09 made up of Kshs 300,000/= for General Damages, Kshs 100,000/= for future medical expenses and Kshs 100,961.09 for special damages proved by way of receipts, while the rest of the decretal sum being Kshs 500,000/= can be deposited in a joint interest earning account pending the determination of the Appeal filed.

Analysis & Determination

6. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
7. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.
8. As stated in the case of *Amal Hauliers Limited Vs Abdulnasi Abukar Hassan* (2017) eKLR which was quoted with approval *Butt Vs Rent Tribunal* (1982) KLR 417 the guiding principles which the court should consider while determining an application of this nature. These were;
 - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. 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 that appeal court reverse the judge's discretion.
 - c. A judge should not refuse 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. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.
 - e. 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 for costs as ordered will cause the order for stay of execution to lapse.



- f. The Appellants finally averred that this court is clothed with very wide discretion to grant the orders sought under Section 3A as read together with Section 63(c) of the [Civil Procedure Act](#).
9. The ruling appealed against was delivered on 8th June, 2023. The Appeal herein was filed on 6th July 2023. This was within the statutory period provided under Section 79 of the [civil procedure Act](#) and thus it can be said that this appeal and this application has been file timeously.
10. On the likelihood of suffering substantial loss, and security of the appeal, the respondent has stated that she is not opposed to the order sought being granted but points out that the appellants are only appealing against quantum and thus half the decretal sum should be paid and the other half deposited in a joint interest earning account.
11. The court has to balance the interest of the Appellants who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellants but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; [Kenya Shell Ltd Vs Kibiru & another](#) (Supreme); [Mukuma Vs Abuoga](#) (1988) KLR 645.
12. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
13. This issue of adequacy of security was dealt with in the Court of Appeal in [Ndubiu Gitabi Vs Warugongo](#) (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal or will any party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”



Disposition

14. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellants/Applicants do pay the Respondent a sum of Kshs 500,961.09/= being half the decretal sum and provide a bank guarantee for the other half of the decretal sum being Kshs 500,000/=. The said Bank Guarantee will be specific to this appeal and will hold until the determination of this Appeal.
 - b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
15. The costs of this Application are awarded to the Respondent.
16. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of:-

No appearance for appellant

Mr Burugo for Respondent

Court Assistant- Susan/am

