



**Wangulu v Mutisya alias Smith Mwololo alias Ali Salim (Civil Appeal E135 of 2023) [2024] KEHC 647 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E135 OF 2023  
MW MUIGAI, J  
JANUARY 19, 2024**

**BETWEEN**

**JAMES ALI WANGULU ..... APPELLANT**

**AND**

**SMITH MWOLOLO MUTISYA ALIAS SMITH MWOLOLO ALIAS ALI SALIM ..... RESPONDENT**

**RULING**

**Pleadings**

1. By a Notice of Motion dated and filed on 27<sup>th</sup> 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. There be stay of execution of the decree emanating from the judgement in Machakos SCC No. E671 of 2022 delivered by the Honourable M. Thibaru on 17<sup>th</sup> May 2023 pending the hearing and determination of the application herein.
  - c. That the Appellant / Applicant be allowed to furnish the court with a specific bank guarantee as security from a reputable bank pending the hearing and determination of the appeal and the instant application.
  - d. Costs of this application abide the outcome of the appeal.

**Supporting Affidavit**

2. The application was supported by Supporting Affidavit dated 29<sup>th</sup> June, 2023 sworn by James Ali Wangulu, who deponed that he was the registered owner of motor vehicle KDE802H and that on



17/5/2023, judgement was delivered against him in as liability 100%, General damages kshs 190,000, special damages kshs 3,400 plus costs and interest.

3. He deposed that being aggrieved and dissatisfied with the whole judgement, he instructed M/S Kimondo Gachoka to appeal the said judgement as he believed that the appeal is merited, arguable and raises pertinent points of law thus has overwhelming chances of success.
4. The applicant deposed that the respondent had threatened execution thus requiring timely intervention of the court for stay and that the execution will render the appeal nugatory and will cause him to suffer irreparable damage and loss.
5. He deposed that the small claims adjudicator did not consider the appellant's evidence and submission on quantum and liability.
6. He deposed that if the decretal sum was paid to the respondent, the said respondent would be in no position to refund the same if the appeal is successful.
7. He deposed that they were ready and willing to furnish the court with bank guarantee as security pending the hearing and determination of the appeal and instant application herein and that it was in the interest of justice that the entire decretal sum be fully secured through a bank guarantee, without any partial settlements/ payments being made, as the appellant's appeal was primarily on the trial court's determination on the issue of quantum which determination was vehemently disputed by the appellant.

### **Replying Affidavit**

8. A replying affidavit dated 10<sup>th</sup> July 2023 and filed in Court on 11<sup>th</sup> July 2023 was sworn by Smith Mwololo Mutisya who deposed that he was in strong opposition to the Applicant's application firstly that the applicant's alleged insurance was not party to the suit thus the appellant cannot be heard misleading the court to allow him used an alleged Bank Guarantee not issued to him.
9. The respondent contended that the bank guarantee was not a security as its enforcement can only be through a fresh suit not readily available for money judgments and that the alleged guarantee has been used by Direct Line in the entire Kenya without providing schedule of matters where the same has been used and the balance available thus the same has been exhausted by other judgments and finally that he was a man of means and the sums were very little, he was able to refund in the unlikely event that the appeal succeeds.
10. It was deposed that the bank guarantee was a draft as the same had not been executed by the directors of the guarantors nor witnessed by the guarantors' advocates and that the bank guarantee is expired as it was issued on 18.2.2022 to last for 12 months hence expired on 18.2.2023 way before the suit subject of the instant appeal was heard and determined rendering it unenforceable.
11. The respondent deposed that the signature of the applicant seemed like a forgery comparing the one on the supporting affidavit and the one used in the response to the statement of claim in the trial court. He sought that the DCI do a report as to whether the signature was the same and that he be allowed to cross examine in court.
12. It was deposed that the applicant had not met the threshold for grant of the orders sought and that the same be dismissed with costs.
13. The matter was canvassed by way of written submissions.



## Submissions

### Applicant's submissions

14. The Applicant filed submissions dated 23<sup>rd</sup> October 2023, where it was submitted that the respondents filed a notice of preliminary objection that the court lacked jurisdiction to entertain the appeal as the same was not founded in law. Reliance was made to the *Small Claims Court Act* No 2 of 2016 as to the appealing decisions of the small claims court.
15. Reliance was placed in the case of Samrir Trustee Limited V Guardian Bank Limited civil Appeal No. 235 of 1999[2000] KECA 356(KLR) to buttress the importance of the right of appeal.
16. It was submitted that an order of stay was a discretionary one and ought not to cause suffering to either of the parties and the right of appeal was a constitutional one and to deny that right would be denying access to justice guaranteed under Article 48 of *the constitution*. The court was urged to dismiss the preliminary objection.
17. It was submitted that the applicant had a viable and arguable appeal and that the application had been filed in good time and without any delay. Reference was made to Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides for stay in cases of appeal. The applicant averred that if stay of execution is not granted, he stands to suffer irreparable loss of the decretal sum involved, that they have an arguable appeal with high chances of success and if the stay is not granted the appeal will be rendered nugatory.
18. On the issue of whether the applicant has a arguable appeal, it was submitted that the appeal was mainly on liability and quantum and that the memorandum of appeal is arguable and raises serious points of law. Reliance was placed in the case of Kenya Revenue Authority vs Sidney Keitany Changole & 3 others (2015)e KLR to buttress the point that the applicant only needed to prove one arguable point.
19. It was submitted that the applicants appeal was based on strong grounds with high chances of success and that it was important for the applicants to be given a chance to ventilate their appeal.
20. On the issue of whether substantial loss will occur from refusal to grant stay it was submitted that despite the deponent stating that he was a man of means capable of refunding the decretal sum if the appeal was successful, he had not disclosed or furnished the court with any documentary evidence to prove financial standing. Reliance was made to the case of Edward Kamau and Another vs Hannah Mukui Gichuki & another (2015) eKLR. It was submitted that in the absence of an affidavit of means, the respondent's financial status is unknown and that the evidentiary burden shifts to the respondent to show that he was financial resources to satisfy the decretal amount since there was apprehension that he may be unable to refund the decretal sum.
21. On the issue of whether the application was done without undue delay it was submitted that the appeal was filed on 15.06.2023 and this application was filed after the respondent's advocate wrote as to the intention to execute and there was no inordinate delay on part of the applicant.
22. On whether the appellant were ready and willing to furnish security, it was submitted that the appellant was ready to furnish security in form of a bank guarantee as this was an acceptable mode of furnishing security. Reliance was made in the case of Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd [2019]eKLR on the point of the condition of payment of security for due performance.
23. It was submitted that the applicant having satisfied all the conditions set out under Order 42 Rule 6 prayed that the order of stay of execution be granted and cost of the application abide the appeal.



## Respondent's submissions

24. The Respondent filed his submissions dated 19<sup>th</sup> October, 2023, where he submitted that the court lacked jurisdiction to entertain the appeal as the same contravenes the provisions of section 38(1) of the Small Claims Act. Reliance was placed in the case of Mukhisa Biscuit Manufacturing Company Limited vs West End Distributors (969) which stated that a preliminary objection raises pure point of law which is argued on the fact that all the facts that are pleaded by the other side are correct. That the preliminary objection had been raised at the earliest opportunity possible. Reliance was made to the case of Panfield Investment Limited v Sisibo Luxury Shuttle Limited(2018)eKLR.
25. On whether the Court has jurisdiction, reliance was made to the case of Owners of Motor vessel”Lilian S v Caltex Oil (Kenya)ltd [1989]eKLR and the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012]eKLR, Desai vs Warsama[1967].
26. It was submitted that section 38[1] of the small claims Act that an aggrieved person may appeal on matters of law and what constitutes matters of law was settled in the case of Peter Gichuki King'ara vs IEBC and 2 others.
27. It was submitted that the court lacks jurisdiction to determine the grounds of appeal as they are not premised on matters of law and the appeal raises matters of facts thus the appeal was null and void ab initio. Reliance was made in the case of Macfoy v United Africa Co Ltd [1961].
28. It was submitted that the court lacks jurisdiction to determine the appeal and the objection should be sustained and appeal dismissed with costs to the respondent.

## Determination

29. 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.
30. Before we delve into the issue of stay, a preliminary objection was raised as to the jurisdiction of the Court to hear and determine the appeal.
31. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1, Nyarangi, JA expressed himself as follows: “By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



32. Section 38 [1] of the Small Claims Act is clear that Appeals from decisions of the Small Claims Court to the High Court shall be on matters of law. From the look of the grounds raised in the memorandum of Appeal dated 15<sup>th</sup> June 2023, the issues that have been raised are issues of facts specifically on the ground of identity of the claimant being disputed.
33. The Preliminary Objection is premature. The matter regarding jurisdiction ought to be raised before the Small Claims Court on the issue of jurisdiction. It is the Ruling on Preliminary Objection that should be the subject of the Appeal in the High Court. For now this Court cannot pre-empt access to justice. The Preliminary Objection is dismissed. It is the hearing of the appeal that shall determine whether matters of law and/or facts are raised.
34. On the issue of Stay of Execution which forms the basis of this application, it 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.”
35. 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
36. 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**

37. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others v 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.’

38. In the case of *James Wangalwa & Another v 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.”

39. The Applicant contends that the Respondent had threatened execution thus the rush to file this application if stay is not granted it will render the appeal nugatory and thus will suffer irreparable loss and damage. It is not enough for the Applicant to state that he or she will suffer irreparable loss without further demonstration of how.

### **Arguable Appeal**

40. The Applicant has submitted that he 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.

41. This was emphasized in *Machira T/A Machira & Co Advocates v 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.”

42. The Respondent in this case simply stated that he was a man of means and that the sums were little and that in the unlikely event that the appeal succeeds, he will be able to refund the decretal sum. He 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 v Ridon Ayangu 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**

43. As to whether the Application has been filed without undue delay, judgment was entered on 17.05.2023 and this application was filed on 30.06.2023, a month and half later. The court finds that the Application has not been filed without undue delay.

### **Security**

44. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v 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.”

45. The Applicant contended that he be allowed to furnish the Court with a reasonable security in form of a Bank guarantee for Family Bank for the entire decretal sum pending the hearing and determination of the application and intended Appeal. The Respondent in his replying Affidavit raised valid concerns about the Bank guarantee as a security which the court takes note of.
46. 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 is granted on condition that the Appellant remit half of the decretal sum to the Respondent within 90 days and the remaining part of the decretal sum shall be secured by way of a bank guarantee executed by the Appellants with Reputable Bank within 90 days.
  - b. Costs will abide the Appeal.

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

**M.W. MUIGAI**

**JUDGE**

