



REPUBLIC OF KENYA



**Bahati Agro Proccsors Limited & 2 others v Kahuro (Miscellaneous Application E252 of 2023) [2024] KEHC 1611 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1611 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E252 OF 2023  
HM NYAGA, J  
FEBRUARY 14, 2024**

**BETWEEN**

**BAHATI AGRO PROCCSORS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**BAHATI MILK AGRO PROCESSORS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**JOEL KIPCHUMBA TANUI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**WILSON THUKU KAHURO ..... RESPONDENT**

**RULING**

1. Before me is an Application dated 25<sup>th</sup> July, 2023 brought under Sections 3A, 79G and 95 of the [Civil Procedure Act](#), Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the [Civil Procedure Rules](#). The applicants seek the following prayers;
  - a. Spent
  - b. Spent
  - c. This Honourable Court be pleased to stay execution of the judgment/decree in Nakuru CMCC No. 666 of 2018 pending the hearing and determination of the intended Appeal herein;
  - d. Leave be granted to file a memorandum of appeal out of time against the whole judgment in Nakuru CMCC No. 666 of 2018 delivered on 15<sup>th</sup> June 2023.
  - e. The Memorandum of Appeal annexed to the application be deemed as duly filed upon payment of the requisite court fees.
  - f. Costs of this Application be awarded to the Appellant/Applicant.



2. The Application is supported by grounds set out on the face of it and the Supporting Affidavit of Kenneth Murithi Mwiti on behalf of the Applicants.
3. In a nutshell, the Applicants state that the insurer to the applicants was dissatisfied with the judgment and decree of the subordinate court and intend to appeal against it. That the time for filing that appeal has since lapsed, hence the need for leave. That the delay in filing the appeal on time was due to inadvertence or honest mistake on the part of the Applicants' insurer, who was unable to give instructions within the time set by law for filing of appeals.
4. It is further averred that the intended appeal, evidenced by the annexed Memorandum of Appeal raises serious points of law, has overwhelming chances of success, is meritorious and arguable and unless stay of execution sought is granted, the intended appeal shall be rendered nugatory.
5. It is further deposed that unless stay is granted the respondent will proceed with execution despite their willingness to appeal and have a just determination of the issues in question.
6. The applicant states that they are amenable to comply with any orders that the court may issue.
7. The Application was not really opposed. The Respondent, swore a replying affidavit on 25<sup>th</sup> August, 2023. He prays that pending the intended appeal, the Applicants ought to be ordered to pay 50% of the decretal sum to him and the balance to be deposited in court or a joint interest earning account in the name of the advocates herein.
8. The application was disposed of by way of written submissions.

#### **Appellant/Applicant Submissions**

9. The Applicant submitted that with there being no opposition to the application to appeal out of time the only issue for the court to determine is the manner of security to be ordered by the court.
10. The Applicant states that it is amenable to depositing the decretal sum in a joint interest earning account within 60 days. That the said order will not only secure the Respondent's fruits of the judgment but also ensure that the court is even handed in delivering justice to the parties.
11. To buttress the above submissions, the Applicants cited the decision in;
  - a. *Vista Holdings International Limited v Span Image (K) limited* [2014] eKLR.
  - b. *Nduhiu Gitabi v Warugongo* [1988] KLR 621 and [1988-92] 2 KAR 200.
12. The Applicants submit further that amount involved is substantial and the Respondent has not demonstrated that he is in a position to refund the 50% decretal sum he wants paid to him, if the appeal is successful. That in the circumstances the Applicants stand to suffer substantial loss. That substantial loss does not have to be a substantial sum of money and can be deduced from the hardship the Applicants may have to undergo in trying to recover the money. To support these submissions, the Applicants cited the following cases;
  - a. *Mukuma v Abuaga* [1988] KLR 645.
  - b. *Tropical Commodities Suppliers Ltd and others v International Credit Bank Limited* (Misc. Application No. 379 of 2003) cited in the case of *Antony Ndiaye v African Virtual University*[2015] eKLR
  - c. *G.N. Mueni T/A Mt. Viezo Maternity and Nursing Home v Miriam Maalim Bishai and another* [2018] eKLR.



- d. [\*Alhyder Trading Co. Limited v Lucy Jepngetich Mibei\*](#) (2016) eKLR.

### Respondent's Submissions

13. The Respondent reiterated that he did not oppose the grant of leave to appeal out of time. The only issue, to him, was the grant of security by the Applicants.
14. The Respondent invited the court to look at the judgment of the lower court which clearly indicated that the Applicants did not tender any evidence to challenge the Respondent's version of the occurrence of the accident in question. As such there is no way the court would have found the Respondent to be culpable for the accident, hence the finding that the Respondents were 100% liable.
15. On the security to be offered pending Appeal, the Respondent submitted that appropriateness of security pending appeal is purely a matter at the discretion of court. To support this position reliance was placed on the case of [\*Nyamwaya v Ondera\*](#) (Civil Appeal E071 of 2021) [2022] KEHC 619 (KLR).
16. The Respondent further submitted that the court's discretion has to be exercised within the requisite parameters while taking into consideration the overriding objective litigation as was held in [\*Samuel Ndungu Mukunya v Nation Media Group Limited & another\*](#) [2016] eKLR.
17. The Respondent thus argued that security ordered by the court must accord with the principle of proportionality and the need to create a level playing ground for all the parties by reconciling and striking to balance between their respective and compelling interest and rights. In support of this proposition reliance was placed on the case of:
- [\*Mutiso & another v Ngoma\*](#) (Civil Appeal E109 of 2021) [2021] KEHC 344 (KLR)
  - [\*Silpak Industries Limited v Nicholas Muthoka Musyoka\*](#) [2017] eKLR;
  - [\*Amal Hauliers Limited v Abdulnasir Abukar Hassan\*](#) [2017] eKLR;

### Analysis & Determination

18. Should the court grant a stay of execution and on what conditions? That is the only question that this court has been asked to determine.
19. I have duly considered the submissions by the parties on the issue.
20. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#) stipulates:
- “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 orders set aside.”
21. Thus under Order 42 Rule 6(2) of the [\*Civil Procedure Rules\*](#), an applicant should satisfy the court that:
- Substantial loss may result to him/her unless the order is made;
  - That the application has been made without unreasonable delay; and



- c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
22. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where 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:-
- “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.
- 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.
- 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.
- 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.”
23. Under the head of substantial loss, an applicant must clearly state what loss, if any, he stands to suffer. This principle was expressed in the case of *Shell Ltd v Kibiru and Another* [1986] KLR 410. Platt, JA which set out two different circumstances when substantial loss could arise as follows:-
- “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 this 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..... ”
24. 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.
25. The Applicants’ case is that they stand to suffer substantial loss if the appeal is successful and the Respondent is unable to refund any amount paid to him. The Respondent has invited me to look at the judgement in the lower court file and hold that there is no likelihood of the judgment being set aside in its entirety since the respondent’s evidence on liability was not challenged by evidence in rebuttal.



26. I have perused the judgment of the lower court, as invited to do by the Respondent. It is true that the plaintiff's evidence therein on the occurrence of the accident was not rebutted by any evidence to the contrary. However, that does not mean that this court has to arrive at a similar finding on liability as the trial court did. The court has a duty to re-examine the evidence and arrive at its own independent conclusion.
27. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.
28. A cursory look at the Memorandum of Appeal shows that the appeal is on both liability and quantum. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court. On the face of it, I am of the view that the intended appeal raises triable issues. However, the finding of a triable issue does not of itself a guarantee the applicants of success at the appeal stage. In other words, the chances of success and failure on appeal are the equal.
29. The determination of what amounts to a suitable security is a matter of court's discretion. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the court 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....”
30. The Applicant proposes that the entire decretal amount be deposited in a joint account in the name of the advocates for the parties. The respondent proposes that 50% be paid to him and the balance be deposited in court or in the said joint account.
31. In determining the security to be accepted by the court, the court has to strike a balance on the interests of the Appellants who are exercising their right to appeal and those of the respondent, who seeks to enjoy the fruits of the judgment that was in favour. In doing so, the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.
32. In the case of *Henry Sakwa Maloba v Bonface Papando Tsabuko* [2020] eKLR the High Court reiterated the finding in the case of *Century Oil Trading Company Limited v Kenya Shell Limited* Nairobi [2008] eKLR, where the court stated:
- “Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”.



33. In the instant case the Applicants claim that in the event the Appeal is successful the respondent will not be in a position to compensate it for the losses that may be incurred as he has not shown its source of income.
34. The law is that once an applicant expresses apprehension about the respondent's ability to refund the decretal amount, the evidential burden of proof shifts to the respondent to rebut that apprehension. This proposition was re-iterated by the Court of Appeal in *ABN Amro Bank NK v Le Monde Foods Limited*, Civil Application No. 15 of 2002 [NRB] where it stated as follows:
- “ .....in those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on....”
35. In this case, the Applicant's claim that the Respondent may be unable to refund the decretal amount if the appeal is successful has been rebutted by an averment by the Respondent in his affidavit. He has averred that he is a man of means with property, as exhibited by a certificate of ownership, but it does not specify what it relates to. Nevertheless, it shows that the respondent is not a man of straw.
36. Of course the court must not forget that the Respondent is a successful litigant and is entitled to enjoy the fruits of his judgment. The court has to strike a balance between the competing interests.
37. Having considered the application, I am inclined to allow it on the following terms;
- a. The applicants' application to appeal out of time is allowed. The memorandum of appeal is to be filed and served within the next 14 days from the date of this ruling.
  - b. The applicants to pay to the respondent 50% of the sum awarded as general damages, being Ksh. 500,00/-, within the next 30 days from the date of this ruling.
  - c. The rest of the decretal sum to await the determination of the intended appeal.
  - d. There will be a stay of execution of the decree of the lower court pending the determination of the appeal, but subject to (b) above and in default thereof, these stay orders shall stand vacated without further reference to the court.
  - e. The applicants to file and serve the record of appeal within the next 45 days.
  - f. The applicants shall bear the costs of this application in any event.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

C/A Dickson

Mr. Ombeo for Karanja for Applicant

Mr. Njuguna for Respondent

