



REPUBLIC OF KENYA



**Karuri & 5 others v Njoki (Civil Appeal E089 of 2023)  
[2024] KEHC 1154 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E089 OF 2023  
SM MOHOCHI, J  
FEBRUARY 9, 2024**

**BETWEEN**

**CHARLES NDUNGU KARURI ..... 1<sup>ST</sup> APPLICANT  
ROSE WANGUI T/A MOTHER OF MERCY SECONDARY  
SCHOOL ..... 2<sup>ND</sup> APPLICANT  
SISTER ROSE WANGUI, VHM ..... 3<sup>RD</sup> APPLICANT  
JOHN NJOROGE ..... 4<sup>TH</sup> APPLICANT  
DAVID METHU ..... 5<sup>TH</sup> APPLICANT  
SISTER ESTHER WAIRIM, LSOSF ..... 6<sup>TH</sup> APPLICANT**

**AND**

**MARGARET NJOKI ..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion Application dated 29<sup>th</sup> May 2023, filed pursuant to Sections 1A, 3A, and 63 (e) of the *Civil Procedure Act* and Order 42 Rule 6 (1) of the *Civil Procedure Rules 2010*, seeking the following orders: -
  - i. Spent
  - ii. Spent
  - iii. That, there be a stay of execution of decree emanating from the judgment that was delivered on 26<sup>th</sup> April, 2023 in Nakuru C.M.C.C No. 1041 of 2018 Ruth Wanjiru Karuga -Vs- Charles Ndungu Karuri& 5 Others pending the hearing and determination of the Appeal herein.



- iv. That this Honorable Court does issue such further orders or directions that it may deem fit to grant in the interest of justice.
  - v. That, the costs of this application be in the cause.
2. The Application is supported by the Sworn Affidavit of Sister Maria Grace dated 29<sup>th</sup> May 2023, and is based on the following grounds:
- a. There is already judgment in favour of the Respondent.
  - b. The Appellants being dissatisfied have lodged an appeal herein against the said judgment.
  - c. The Appellants therefore make this application seeking stay of execution of the judgment pending the hearing of this application inter-parties and subsequently pending the hearing and determination of the appeal herein.
  - d. If execution of the judgment is not stayed, the Respondent will move and execute the judgement thus exposing the Appellants to substantial loss and the action will render the appeal herein nugatory.
  - e. The Respondent is a person of unknown means and will not be in a position to refund the decretal amount in the event that the appeal succeeds.
  - f. The Appellants are ready to provide security for due performance as may be ordered by the Court.
  - g. The proposed security guarantees payment and as such the Respondent stands to suffer no prejudice if this application is allowed.
  - h. There are sufficient reasons for this Court to grant the proposed orders in the interest of justice.
3. The Court had issued directions on hearing and disposal of the Application of which both parties complied to.
4. I have carefully considered the Appellant’s Application for stay of execution of judgment pending the hearing and determination of the Appeal. This Court is alive to the serious injuries occasioned upon the Respondent requiring further future medical treatment that cannot wait for the determination of an Appeal that is to be weighed against the Applicant’s right to Appeal.
5. An application under Order 42 Rule 6 of the [Civil Procedure Rules](#) stands or falls on the key considerations of substantial loss and security. Substantial loss is the cornerstone of the jurisdiction under Order 42 Rule 6 of the [Civil Procedure Rules](#) and the decree holder should not be kept away from the fruits of his judgment without just cause. In the [National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another \[2006\]](#) eKLR the Court of Appeal stated that:

“This Court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. 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 – see for example Section 112 of the [Evidence Act](#), Chapter 80 Laws of Kenya.”



6. This Court associates itself with the views expressed by Nagillah, J in Civil Appeal No. 5 of 2016 - Patrick Mwenda –vs- Evans Omari Mwita [2016] eKLR that:

“...In my view this rule gives the Court unfettered discretion to issue any orders pending the hearing of the appeal. I have no doubt therefore that I have power to order such security for the due performance of decree or order and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event where the Court orders for security deposit and there is default then the orders for stay are rendered useless for a defaulting party...”

7. Order 42 and 6(1) and (2) of the *Civil Procedure Rules* is required to satisfy three conditions. He must: -

- i. approach the Court without unreasonable delay.
- ii. satisfy the Court that substantial loss may result unless the order sought is granted.
- iii. furnish security for the due performance of the decree appealed from.

### **Whether this Court should grant stay of execution**

8. This Court has established that, the Application has been filed in a timely manner without any delay, but is unpersuaded on the satisfaction of substantial loss test as the Appellant only states that the sum of kshs 12,317,797/- is a colossal sum and if the same is paid to the Appellant she might be unable to refund if the Appeal is allowed and the same cannot be evidence of suffering substantial loss. Further evidence of inability to refund by the Respondent would be required to show how the same would occasion or lead to occasioning of substantial loss.

9. This principle was enunciated in the decision of the Court of Appeal in Absalom Dova vs. Tarbo Transporters [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation...”

10. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail and where a party seeks stay, such an application must still be weighed against the parameters under Order 46 Rule (2).

11. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately



be binding on the applicants. I presume the security must be one which can serve that purpose.”

12. It is my finding that the Applicants herein, though they brought this Application with undue delay and never adequately demonstrated the substantial loss that they would suffer and they made an offer to furnish security of Kenya shillings Three Million kshs 3,000,000/ as stipulated by sub-rule (b), this Court notes the huge financial obligation for future treatment plus special damages awarded I shall be thus more included towards a security larger than that on offer.
13. In the result, I shall exercise my discretion in allowing the notice of motion dated 29<sup>th</sup> May 2023 on the following terms;
  - i. I grant An Order of Stay of Execution of Judgment/Decree in Nakuru Chief Magistrates Court Civil Case No 1041 of 2018 delivered on the 26<sup>th</sup> April 2023, pending hearing and determination of the Appeal, on condition that the Applicants shall Pay to the Respondent 50% of the entire decretal amount a sum of Kenya Shillings Seven Million Two Hundred and Twelve Thousand two hundred and eighty-six shillings and fifty cents Kshs 7, 212, 286.50/- Within the next Thirty (30) Days from the date hereof.
  - ii. The Applicants shall furnish a Bank guarantee from a reputable Bank of 50% of the entire decretal amount a sum of Kenya Shillings Seven Million Two Hundred and Twelve Thousand two hundred and eighty-six shillings and fifty cents Kshs 7, 212, 286.50/- Within the next Thirty (30) Days from the date hereof.
  - iii. The Applicants shall cause the Appeal to be listed for directions, admission and hearing within the next Sixty (60) days from the date hereof.
  - iv. The Order of stay against execution of judgment/decree as granted shall automatically lapse upon default of any condition set by this Court.
  - v. The Costs shall be in the cause

It is so Ordered

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

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**S. MOHOCHI**

**JUDGE**

