



**Maina v Kangi (DCD Suing Through Joyce Gakenia & Daniel Kiarie) (Civil Appeal E268 of 2023) [2024] KEHC 1604 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1604 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E268 OF 2023  
HM NYAGA, J  
FEBRUARY 14, 2024**

**BETWEEN**

**GERALD KARIUKI MAINA ..... APPELLANT**

**AND**

**JAMES KIARIE KANGI ..... RESPONDENT**

**DCD SUING THROUGH JOYCE GAKENIA & DANIEL KIARIE**

**RULING**

1. Vide a Notice of Motion dated 12<sup>th</sup> October, 2023 the Applicant sought several orders. The prayers that are pending are;
  - a. That the court be pleased to grant a stay of the execution of the judgment and/or decree delivered on 30<sup>th</sup> August, 2023 pending the hearing and determination of this appeal.
  - b. That the court be pleased to issue an order for provision for a Bank Guarantee of the entire decretal sum awarded by the trial court in the sum of Ksh.1,674,338/- only as security pending hearing and determination of this appeal.
  - c. That the court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
  - d. That costs of the Application be provided for.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by the Applicant on 12<sup>th</sup> October, 2023.
3. The Applicant averred that judgement was delivered on 30<sup>th</sup> August, 2023 in favour of the Respondent wherein Liability was apportioned at 50-50% against the Applicant and the deceased herein. That damages for loss of dependency were assessed at Ksh. 3,000,000/-, loss of expectation of life at Ksh.



150,000/-, pain and suffering at Ksh. 50,000/- and special damages at Ksh. 37,750/-. That costs and interest were also awarded to the Respondent.

4. The Applicant avers that he has lodged an appeal against the judgement, as exhibited in the filed memorandum of appeal. He is apprehensive that the Respondent will commence execution thus rendering the Appeal lodged nugatory.
5. The Applicant further deposed that through his insurer, he is ready, willing and able to furnish a bank guarantee from Family Bank of the entire principal amount in court as security for the due performance of the judgement/decreed or order as shall be directed by this Honourable court pending the hearing and final determination of the Appeal.
6. The Applicant further deposed that the Respondents' means are unknown and he is reasonably apprehensive that if the decretal amount is paid to the Respondents they may not be in a position to refund the same in the event the appeal succeeds.
7. The Applicant urged this court to exercise its discretion and allow the Application.
8. In response to the application, the Respondents through a joint replying affidavit sworn on 27<sup>th</sup> October, 2023, averred that the Application lacks merit and aimed at denying them the fruits of the judgement. That the Applicant has not demonstrated that he will suffer substantial loss.
9. They further deposed that in the interest of justice, half of the decretal sum be released to them and the balance be paid into court.
10. The Respondents contended that the Applicant's Appeal raises no triable issues and lacks chances of success. They prayed that the application be dismissed with costs.
11. The Application was canvassed through written submissions.

### **Applicant's Submissions**

12. Although addressing the present application, the applicant's submissions referred to a prayer for leave to appeal out of time.
13. In this particular application, there is no prayer for such leave. The appeal herein was filed on 29<sup>th</sup> September 2023, on the last day of the time set to file an appeal. Therefore the submissions in that respect were misplaced. I suspect this is a 'copy and paste syndrome', where unnecessary copy pasted parts of a previous application were not deleted. This is a common occurrence nowadays.
14. Therefore all the submissions in respect to that issue are irrelevant and I will not address them.

### **Respondents' Submissions**

15. The Respondents reiterated the principles to be considered in granting a stay of execution. They referred me to *Butt vs Rent Restriction Tribunal* (1982) KLR 417.
16. The Respondents submitted that the Applicant has not demonstrated the substantial loss he will suffer if the application is disallowed.
17. They also submitted that the application ought not to deny him the fruits of his judgement. Advocate for the Respondents referred this court to the cases of:
  - a. *Anthony Musyimi vs Peninah Mweku Ndete* (Machakos High Court Misc. Application No. 13 of 2017 where the court held *inter alia* that the respondent having waited for a long time for determination of the suit he was to be paid half the decretal sum.



- b. *Kenya Shell Ltd vs Kibiru* and another for the proposition that the ordinary principle is that money decrees are never rendered nugatory and must show substantial loss.
18. The respondent urged the court to find the application lacks merit and to dismiss it with costs to him.

### **Analysis & Determination**

19. Having considered the application, affidavits and the submissions on record, it is my considered view that the following issues fall for determination: -
- a. Whether the Applicants have met the threshold for grant of stay pending appeal.
- b. What would be the most appropriate security to grant under the circumstance?

### **Whether the Applicants Have Met the Threshold for Grant of Stay Pending Appeal**

20. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:

“(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.”

21. In the case of *Butt vs Rent Restriction Tribunal* [supra] the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

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.

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.

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case 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.

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.”

22. In *Visbram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas its power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules* is fettered



by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

23. With the above in mind, the Court must then determine what substantial loss the Appellant will suffer if stay of enforcement of the judgment of the subordinate court is not made in his favour.
24. On what would amount to “substantial loss” this was aptly discussed in *Century Oil Trading Company Ltd vs Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where the court stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...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 judgement.”

25. In the instant case the Applicant claim that in the event the Appeal is successful the Respondent will not be in a position to compensate him for the losses that may be incurred as they are not persons of means.
26. 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...”

27. In this case, the Applicant’s claim that the Respondents may be unable to refund the decretal amount if the appeal is successful has not been rebutted by any evidence.
28. It is worth noting that the respondents’ replying affidavit did not contain any averment regarding their respective financial standing. The amount in issue is quite substantial. I am not convinced that if the decretal sum is paid, the respondents are capable of refunding the decretal amount should the appeal succeed.
29. Thus, I am persuaded to find that the Applicant has demonstrated he is likely to suffer substantial loss as defined by Gikonyo J in *James Wangalwa & Another v Agnes Naliaka Chesoto*, [2012] eKLR if the stay orders sought are not granted.
30. Of course the court must not forget that the Respondents are successful litigants and are entitled to enjoy the fruits of their judgment. The court has to strike a balance between the competing interests.



31. In regards to whether this Application has been filed without unreasonable delay, I note the lower court judgement was delivered on 30<sup>th</sup> August, 2023. The appeal was filed on 29<sup>th</sup> November 2023, and this application was subsequently filed on 12<sup>th</sup> October, 2023. There was a delay of about two weeks which in my view is not ordinate. I therefore hold that the application herein was filed without inordinate delay.
32. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree. I will deal with this issue later on.

### **Whether the Appellants, Have an Arguable Appeal?**

33. Clearly this is a question to be answered by the appellate court. However, having perused the Memorandum of Appeal it is on both liability and on the quantum of damages awarded by the trial court. On the latter, the Applicant terms the same as manifestly excessive.
34. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before court; one which is not frivolous.
35. Having said the above, I would also reiterate that it is also not guaranteed that the appeal will succeed and to what extent.
36. The three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. In the case of *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 the court stated that:

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 it without merit.”
37. In the instant case the Applicant has satisfied the three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. Consequently, I am therefore inclined to grant stay of execution pending hearing and determination of the Appeal.

### **What Would be the Most Appropriate Security to Grant Under the Circumstance?**

38. The Applicant proposes a provision of a bank guarantee of the decretal sum while the Respondents propose that half of the decretal amount be released to them and the balance to be deposited in court.
39. As I have stated earlier, in determining the security to be accepted by the court, the court has to strike a balance on the interests of the Appellant and those of the Respondent. In doing so, the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.
40. In the case of *Henry Sakwa Maloba vs Bonface Papando Tsabuko* (2020) eKLR the High Court reiterated the finding in the case of *Century Oil Trading Company Limited vs 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”.

41. I have considered the security offered by the Applicant. In the case of *Kagiri & another v Ndula aka Felix Chigadi Ndula aka Felix Chikandi* (Miscellaneous Civil Application 181 of (2023)[2023] KEHC 22620 (KLR) I had a similar application. I held as follows;

“I have noted that Bank Guarantee exhibited by the applicants is a general guarantee between the Bank and Directline Assurance Company to the extent of Kshs. 100 million. There is no way of telling how many claims that guarantee is to cover and if the same is sufficient since it is well known that there are thousands of claims involving the said insurer. That being the case, that guarantee may not be of much assistance to the respondent herein. I think that each claim must be dealt with individually.

Having considered the matter, I am of the view that the nature of the security offered is not sufficient.”

42. The present application raises the same issues about the security offered by the applicant. For the same reason as those I cited in the above case, I find that the security offered to be inadequate. An alternative security is necessary herein.
43. Having considered the application dated 12<sup>th</sup> October, 2023 I find that it meets the threshold for the grant of stay of execution, but subject to conditions. I therefore order as follows;
- a. That execution of the judgment and the ensuing Decree in Nakuru CMCC No. 613 of 2022 be and is hereby stayed pending the hearing and determination of the appeal on condition that the Applicant pays to the Respondent 1/4 the decretal sum, being Ksh. 404,653/- within 45 days from the date hereof.
  - b. The balance of the decretal sum to await the determination of the appeal herein.
  - c. In default of payment of (a) above, the stay orders shall lapse automatically without further reference to the court.
  - d. The appellant to proceed to compile, file and serve the record of appeal within the next 45 days. The appeal shall be listed for directions on a date that shall be given after delivery of this ruling.
  - e. Costs of the subject application shall abide the appeal.

**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. Kairu for Respondent

Ms. Cherotich for Applicant

