



Makau v Nthenge (Suing as the legal representative of the Estate of Simon Muli Manuali (Deceased) (Civil Appeal E117 of 2023) [2024] KEHC 1069 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E117 OF 2023
MW MUIGAI, J
FEBRUARY 5, 2024**

BETWEEN

ROBERT KINOTHYA MAKAU APPELLANT

AND

FAITH KANINI NTHENGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SIMON MULI MANUALI (DECEASED) RESPONDENT

RULING

Notice of Motion

1. Vide a notice of motion under Certificate of Urgency dated 8th June, 2023 and filed in court on 9th June, 2023, brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 Civil Procedure Rules 2010.
2. The Applicant seeks the following orders that:
 1. Spent.
 2. Spent.
 3. Spent.
 4. There be stay of execution of Kithimani CMCC NO. 100 of 2022 Faith Kanini Nthenge (suing as the legal representative of the estate of Simon Muli Manuali Deceased Vs Robert Kinothy Makau pending the hearing and determination appeal herein.
 5. This Honorable Court be pleased to grant any further and or other order which is just and fair in the circumstances.
 6. Cost to be in the cause.



3. The grounds upon which this Application is based are on the body of the said application.

Supporting Affidavit

4. The application was supported by an affidavit dated 8th June, 2023 and filed in court on 9th June, 2023 sworn by Frankline Nyaga, Senior legal officer at Old Mutual General Insurance Kenya Limited, wherein he deposed inter Alia that the suit in the magistrate court and the appeal are prosecuted on the underwriter's instructions pursuant to Cap 405 Laws of Kenya.
5. He deposed that the Appellant had an arguable appeal on the issues of liability and quantum as per the Memorandum of Appeal filed herein. Further that unless stay of execution is granted the Appellant is likely to suffer prejudice whilst exercising his right of Appeal.
6. Deposing that he is advised by his Advocate on record that the Respondent's Advocate has issued a judgment notice and tabulated their costs and the Appellant is apprehensive execution may take place before the conclusion of the Appeal herein (Annexed and marked copy of the letter requesting for a sum of Kshs. 4,305,263.00/=.
7. Lamenting that if the judgment sum is paid to the administrator, it will be distributed to the deceased's beneficiaries named in the plaint this rendering recovery and restitution thereof impossible and any successful appeal nugatory.
8. He further deposed that the underwriter and the Appellant are ready, able and willing to abide by any conditions the court might deem just to secure the decree including depositing the judgment sum in a joint interest earning account together with the Respondent's Advocates.

Replying Affidavit

9. The application was opposed vide an affidavit dated 21st June, 2023 and filed in court on 23rd June 2023, sworn by Faith Kanini Nthenge, the Respondent herein, wherein she deposed inter Alia that the Application herein is brought in bad faith and it meant to obstruct and delay the course of justice and more so to delay payment of the decretal sum to her as a successful litigant.
10. Deposing further that the deponent of the supporting affidavit is a stranger to this suit and such not competent to swear an affidavit in this suit. Lamenting that the affidavit as drawn is fatally defective for being in violation of the provisions of Order 19 Rule 3 (1) as it is sworn by a person who is not party to this suit and as such not able to prove the facts on his own personal knowledge.
11. She lamented that she is advised by her Advocate on record that this being a money decree the Applicant had not shown that he will suffer any substantial loss and also that the application would be rendered nugatory if the orders of stay of execution are not granted as the amount is defined and can be recovered without any substantial loss to the Applicant at all in the unlikely event that the Appeal was to succeed.
12. Deposing further that she is advised by her Advocate on record that in law the fact that the process of execution is likely to be set on motion by herself does not amount to substantial loss even if the properties attached have been sold which is not the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules.
13. She deposed that the Applicant has not provided the security for the due performance apart from claiming that to be able and willing to abide by any conditions and thus making the instant application and abuse of the court process.



14. Further that the instant application totally lacks merit as from the way it is crafted, it is well designed on conjectures especially since the deponent lacked capacity to swear the affidavit and as such the Application lacks material substance to support it hence should be dismissed, and, in the unlikely event that the same is allowed she prayed he should be compelled to pay her half of the decretal amount being Kshs. 2,047,055/=.

Supplementary Affidavit

15. The Applicant in his supplementary affidavit dated 29th June,2023 and filed in court on 30th June,2023, sworn by Frankline Nyaga, Senior legal officer at Old Mutual General Insurance Kenya Limited, wherein he deposed inter Alia that he verily believes that he is suited to depone to matters herein as the Respondent's Advocate served his employer with a statutory notice dated 9.08.2021. (Annexed and marked copy of the statutory notice)
16. The matter was canvassed by written submissions.

Submissions

The Applicant's Submissions

17. The Applicant in the submissions dated 5th July,2023 and filed in court on 6th July,2023, wherein, counsel for the Applicant relied on the cases of Nairobi Deluxe Services Ltd Vs Erick Onyango Ndege (Civil Application No. 64 of 1992), Stanley Munga Gihunguri Vs Jimba Credit Corporation (Civil Application No. Nairobi 161 of 1988, Kenindia Assurance Company Limited Vs Patrick Muturi (unreported) and George Gikubu Mbutia Vs Kenya Power and Lighting Company Limited.
18. It was submitted by counsel that the Appeal raises arguable points of law and fact. Contending that should the decretal sum be paid over to the Respondent, the same shall be out of reach of the Appellant should the appeal succeed and thus be rendered nugatory. Opining that the Applicant is willing to abide by any directions this Honorable may issue.

Respondent's Submissions

19. The Respondent in her submissions dated 28th July,2023 and filed in Court on 10th August 2023, wherein counsel for the Respondent submitted that the principles guiding the grant of a stay of execution pending Appeal are well settled in Order 42 Rule 6 (2).
20. Contending that the Applicant herein has not demonstrated any substantial loss he may suffer if stay of execution is not granted as prayed. To buttress this limb, credence was placed on the cases Century Oil Trading Company Ltd Vs Kenya Shell Limited Nairobi (Milimani) HCMA No. 1561 of 2007, Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997, Kenya Shell Limited Vs Benjamin Karuga Kibiiru (1986) KLR 410 and Machira T/A Machira & Advocate; CO. Advocates Vs East African Standard (No.2) [2002] KLR 63.
21. On Security, counsel averred that the Applicant required to offer security for the performance of the decree. Opining that no such security had been offered in deciding this matter. In buttressing this limb reliance was on Order 42 Rule 6 and the case of Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & amp; 4 Others [2015] eKLR.
22. It was argued that the mere fact that an appeal had been filed does not necessarily mean that the successful litigant should be denied Access to the fruits of her judgment. Further it was the contention of the Respondent that the application herein is fatally defective as the same violates provisions of



Order 19 Rule 3 (1) and (2) as the person who swore the supporting affidavit was not party to the suit during trial and as such is not able to prove facts on his own knowledge. Submitting that the deponent is a Senior legal officer at Old Mutual General Insurance Kenya Limited and the said officer and his employer are not party herein and neither are these declaratory proceedings which allow an insurer to swear affidavits on behalf of the of its clients. Reliance was made on the case of Matuu High School Vs Kitema (Miscellaneous Application E105 of 2021) [2022] KEHC 194 (KLR), to cement his position.

23. It was submitted that in the unlikely event the instant application is allowed, the same should be allowed on the condition that the Appellant pays the Respondent half of the decretal amount being 2,152,631.50 within 30 days from the date of the ruling and the balance thereof be deposited in a joint account in the names of both counsels on record to await judgment on Appeal.

Determination/Analysis.

24. I have considered the application, the supporting affidavit, the Replying Affidavit, the Supplementary Affidavit and the Submissions filed as well as the authorities relied upon by counsels for their respective clients.
25. The issue that commends itself for determination is whether the applicant has demonstrated that the orders for stay of execution pending appeal are merited.
26. The guiding principles for grant of execution pending appeal are well established. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which is to the effect that:
- “No order for stay of execution shall be made under subrule (1) unless—
- (a) 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.” (Emphasis added)
27. Further to the forgoing, court in determining on whether to grant a stay or not is enjoined to have regard to the sufficient cause. The overriding objective espoused under Section 1A and 1B of the Civil Procedure Rules no longer limit the Court, the Court consider overriding objective in the exercise of its powers under Civil Procedure Act or in the interpretation of any of its Provisions.
28. According to Section 1A(2) of the Civil Procedure Act, “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B, some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.” (Emphasis added).
29. In the case Stephen Boro Gititha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that:
- “The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.” (Emphasis added)



30. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions in a manner that gives effect to the said objective. The Court shall take into account the likely effect of granting the stay on the proceedings in question.
31. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome and give effect to the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice. The Court shall opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
32. It is worth noting that an Applicant for stay of execution of Decree or any consequential orders thereto pending Appeal must demonstrate and/or satisfy the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules namely:
 - a. that substantial loss may result to the applicant unless the order is made;
 - b. that the application has been made without unreasonable delay; and
 - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (Emphasis added)

Substantial Loss

33. As to what substantial loss is, the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where it was observed that:

“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.” (Emphasis added)
34. In the case before this court, the Applicant deponed in his Supported Affidavit at paragraph 9 that the Respondent herein is an administrator of the deceased’s estate thus he verily believes that if the judgment sum is paid to her, it will be distributed to the deceased’s beneficiaries named in the plaint thus rendering recovery and restitution thereof impossible and any successful appeal nugatory. The Respondent on the other hand submitted that the mere allegation that the Respondent is not of means does not necessarily justify her being barred from benefiting from the fruits of her judgment. The Applicant has not if any allege that payment of the said sum may adversely affect his financial position or his insurer. Accordingly, it is my considered view that the Applicant will not suffer substantial loss in the event that the decretal sum is paid to the Respondent.



35. Platt, Ag. JA (as he then was) in case of Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416 wherein he expressed himself as follows:

“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 corner stone of both jurisdictions for granting a 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”. (Emphasis added)

36. Similarly, on the part of Gachuhi, Ag. JA (as he then was) at 417 held thus:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be” In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding” On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.” (Emphasis added)

37. Regarding the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.” (Emphasis added)

38. From the forgoing case, the three Judges of Court of Appeal (as they then were) carefully, ably and respectfully distilled the import of substantial loss noting that it is not sufficient to state the sum is a lot of money and the Applicant will suffer loss if the money is paid. The Applicant must establish what loss it would be.

39. Therefore, an allegation that a decree holder is a person of unknown means does not rob and/or deny the said decree holder from the enjoyment of the fruits of a judgement. The doctrine is and has been that courts are enjoined not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

40. In the instant case the allegation that the Respondent herein is an administrator of the deceased’s estate thus if the judgment sum is paid to her, it will be distributed to the deceased’s beneficiaries named in the plaint will render recovery and restitution thereof impossible and any successful appeal nugatory does not rob and/or deny the said Respondent from the enjoyment of the fruits of her judgment.



Security

41. The intended appeal relies on both liability and quantum. The decretal amount is Kshs.8,944,000/- a colossal amount. The Court shall ensure protection of rights of appeal and at the same time the fruit of judgment
42. On the issue of security, it is a requirement under Order 42 rule 6 aforesaid, that the Applicant is to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder.
43. In the case of Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.” (Emphasis added)

44. Further, in Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, where the court stated 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 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 fails.

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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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.” (emphasis added).

45. The Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, 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



guarantee 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 judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that 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 issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal 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. Nor will either 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” (Emphasis added)

46. In the instant case, the Applicant herein is ready, able and willing to abide by the conditions the court might deem just to secure the decree including depositing the judgment sum in a joint interest earning account together with Parties’ Advocates. From the forgoing, it is clear in my view that the Applicant has chosen the form under which the security is to be secured for the due performance of the decree. As it may, court has unfettered discretion to issue an order with regards to security as required by law.
47. As to appeal being brought without unreasonable delay, I find no delay was occasioned in bringing the appeal herein, noting that judgment was delivered on 11th May, 2023 and the Amended Memorandum of Appeal filed on 9th June, 2023.

Disposition

48. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff, I grant a stay of execution of the decree herein in the following terms:
 - a. The Applicant pay to the Respondent Kshs. 300,000/- of the decretal sum through Advocate on record and remaining amount through a Valid Bank Guarantee.
 - b. The said conditions (a) to be met within 90 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
 - c. Costs of this Application to abide the outcome of the Appeal.
 - d. The draft Memorandum of Appeal is deemed as Appeal filed.
 - e. Further Mention for directions and compliance on 4/03/2024.

It is so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI



JUDGE

