



**NCBA Bank Limited v WYSS Logistics Limited (Civil Appeal
E277 of 2023) [2024] KEHC 1613 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E277 OF 2023
HM NYAGA, J
FEBRUARY 14, 2024**

BETWEEN

NCBA BANK LIMITED APPELLANT

AND

WYSS LOGISTICS LIMITED RESPONDENT

RULING

1. Vide a Notice of Motion dated 3rd 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 ex parte judgment and/or decree delivered on 21st April, 2023, the decree dated 22nd May 2023 and the subsequent orders pending the hearing and determination of this appeal.
 - b. That the costs of the Application be provided for.
2. The application is propped by the grounds set out on the face of it and is supported by the affidavit of Christine Wahome sworn on even date.
3. In a nutshell, the Applicant states that it is aggrieved by the decision of the lower court delivered on 22nd September 2023 and has preferred this appeal. That the Applicant is threatened with execution of the decree in the lower court as evidenced by the annexed warrants of attachment issued by Kolato Auctioneers.
4. The Applicant avers that the appeal filed has high chances of success and if the execution proceeds it will suffer substantial loss and its appeal will be rendered nugatory. That the Respondent may not be able to refund any funds paid to it should the appeal be successful.



5. The Applicant further avers the Respondent will not suffer any prejudice as it is ready to furnish security in the form of a bank guarantee to fulfil the conditions of stay of execution or adhere to any conditions that the court may set.
6. The Applicant states that the application has been brought without any delay and within time as stipulated by law.
7. The application was opposed by the Respondent, who sought reliance on the replying affidavit sworn by Herodion Machoka, a director of the Respondent on 9th October 2023.
8. In a nutshell the Respondent avers that the Applicant was duly notified of the proceedings in the lower court. That in their application leading to the decision which is appealed against, the Applicant admitted that they were duly served with the court process but their advocates failed to enter appearance or file a defence.
9. The Respondent also avers that what the Applicant had sought in the lower court was an exercise of judicial discretion. That the memorandum of appeal does not allege that the trial magistrate wrongly exercised that discretion.
10. The Respondent further avers that the appeal herein in so far as it is against the exercise of the lower court's discretion, is not arguable at all.
11. It is further averred that the Applicant has not demonstrated any prejudice it will suffer if the application is not allowed. That the Respondent is a reputable company capable of refunding the decretal sum if the appeal is successful.
12. The Respondent avers that the Applicant's right of appeal should not override the Respondent's right to enjoy the fruits of the judgment in the lower court and if any stay is granted then the same ought to be on condition that the Applicant deposits the entire decretal sum plus costs in a joint interest earning account in the names of the advocates for the parties.
13. The Respondent urged the court to dismiss the application with costs.
14. The application was argued through e-written submissions, which I will summarise as hereunder.
15. For the Applicant, it is argued that an application for stay of execution ought to satisfy the test set out in *Butt vs Rent Restriction Tribunal*(1987) KLR 417 and in *Masisi Mwita vs Damaris Wanjiku Njeri* (2016) eKLR.
16. The Applicant submits that should the application be disallowed, then it stands to be condemned to pay a sum of Ksh. 2,000,000/- to the Respondent, a company of unknown means as it has not explained its source of its income. Thus, the appeal will be rendered nugatory in the sense that if it is successful, the Respondent may be unable to refund the money paid to it.
17. The Applicant further submits that it is amenable to furnish security in the form of a bank guarantee. On this point I was referred to the decision in *Equity Bank Limited vs Taiga Adams Company Limited* (2006) eKLR.
18. The Applicant submits that it has shown that substantial loss may result unless the orders sought are granted. To buttress this point, I was referred to the decision in *Sentrim Contracts Ltd vs Joseph Mutinda Menya*(2016) eKLR.
19. The Applicant submits that it has made this application without unreasonable delay.



20. It is further submitted that the appeal filed raised substantial issues and so it is in no way frivolous. On what constitutes an arguable appeal the Applicant relied on [Kenya Power and Lighting Co. Ltd vs Esther Wanjiru Wokabi](#) (2014) eKLR.
21. For the Respondent, it was submitted that the only issue was whether the court ought to stay the execution of the lower courts decree. Counsel referred me to the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) (CPR) and the decisions in [Jamii Bora Bank Ltd and another vs Samuel Wambugu Ndirangu](#) and [Butt vs Rent Restriction Tribunal](#) (supra).
22. On substantial loss it is submitted that the Applicant must state with clarity how it will suffer. Cited was the case of [Shell Kenya Ltd vs Kibiru and another](#) (1986) KLR 410 and [Jessikay Enterprises Ltd vs George Kaboto Muiruri](#)(2022) eKLR.
23. The Respondent submitted further that such substantial loss must be averred by way of affidavit and not be alluded to through submissions. On this point, the Respondent cited the decision in [NIC Bank Ltd vs Aquinas Francis Wasike](#) (2006) eKLR.
24. The Respondent also submitted that no security has been furnished by the Applicant in the supporting affidavit. That the averment that it is amenable to furnish security is only on the application hence not sufficient. Cited was [John Kamau Waweru vs Joseph Muiru Waitbaka](#) (2017) eKLR.
25. The Respondent's position is that the Applicant has failed to surmount the test for the grant of the orders sought.
26. The Respondent concludes by submitting that in the unlikely event that the application is allowed, then it ought to be on condition that the Applicant to be ordered to deposit the decretal sum in a joint account.
27. Having considered the application, affidavits in support thereof and in opposition, together with the submissions on record, it is my considered view that the following issues fall for determination: -
 - a. Whether the Applicant has met the threshold for grant of stay pending appeal.
 - b. What would be the most appropriate security to grant under the circumstance?

Whether the Applicant has met the threshold for grant of stay pending appeal

28. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides:

“(2) No order for stay of execution shall be made under sub rule (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.”



29. 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.”

30. 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.

31. With the above principles in mind, the Court must then determine, first, what substantial loss the Appellant will suffer if stay of enforcement of the judgment of the subordinate court is not made in its favour.

32. 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.”



33. In the instant case the Applicant claims 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 it 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 its affidavit. Although the Respondent describes itself as a reputable corporate entity capable of refunding the decretal sum, that averment is not backed by any evidence.
36. The amount in issue is quite substantial. On the material before me, I am not convinced that if the decretal sum is paid, the Respondent is capable of refunding the decretal amount should the appeal succeed.
37. Thus, I am persuaded to find that the Applicant has demonstrated that if the stay orders sought are not granted it is likely to suffer substantial loss as defined in *James Wangalwa & Another V Agnes Naliaka Chesoto*, [2012]eKLR.
38. Of course the court must not forget that the Respondents are successful litigants, albeit on an alleged ex parte judgment, and are entitled to enjoy the fruits of their judgment. The court has to strike a balance between the competing interests.
39. In regards to whether this Application has been filed without unreasonable delay, I note the lower court ruling was delivered on 22nd September, 2023. The appeal was filed on 3rd October, 2023, simultaneously with this application. There was a gap of just a few days. I therefore hold that the application herein was filed without inordinate delay.
40. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree. Contrary to the averment by the Respondent, that offer was made by the Applicant both in the application and in its supporting affidavit. To me that suffices to surmount the third condition for the grant of stay. I will deal with this issue later on.
41. It has been held that 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.”



42. 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 inclined to grant stay of execution pending hearing and determination of the Appeal, on conditions that I shall set out.

Whether the Appellant has an arguable appeal?

43. Clearly this is a question to be addressed by the appellate court when dealing with an application such as the one before me. In the event that the court finds that the appeal in question is on the face of it frivolous this may affect the orders to be granted by the court in regard to the application for stay.
44. I have perused the Memorandum of Appeal. The Applicant avers that the trial court condemned it unheard. That the trial magistrate erred in dismissing the application which sought to cure an injustice and finding that the defence did not raise any triable issues. That the trial magistrate erred in failing to rectify an inadvertence or excusable error that could have been put right by payment of costs. That the said ruling occasioned a miscarriage of justice.
45. 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.
46. The trial court described the proposed defence by the Applicant as a mere denial. That may be so but looking at the lower court record it is evident that the Applicant did also dispute the jurisdiction of the court to hear the matter in question. It did refer to two other subsisting suits allegedly between the same parties over the same subject matter. These were Nakuru CMCC E225 of 2022 and Nakuru CMCC E547 of 2022. In his ruling the trial magistrate did not consider the question of jurisdiction. These, I believe would be considered as triable issues which the Applicant was denied the opportunity to present.
47. Having looked at the grounds of appeal, and the lower court record I am unable to term the appeal as frivolous.
48. Even though the court was exercising a discretion, this court is entitled to examine the same and determine if it occasioned a miscarriage of justice.

What would be the most appropriate security to grant under the circumstance?

49. The Applicant proposes a provision of a bank guarantee of the decretal sum while the Respondent proposes that the decretal amount to be deposited in a joint account in the name of the advocates for the parties.
50. 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.
51. 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”.

52. I have considered the security offered by the Applicant. It is not in dispute that the Applicant is a reputable banking institution. From a perusal of the lower court record, the dispute between the parties arose within a customer and bank relationship. I do not think that the guarantee by the bank is any less effective than the amount being deposited in another bank account. I am prepared to accept the proposed bank guarantee.
53. Having considered the application dated 3rd 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. E626 of 2022 be and is hereby stayed pending the hearing and determination of the appeal.
 - b. The Applicant shall provide a bank guarantee for the decretal sum, less costs, within the next 30 days.
 - c. In default of the orders in (b) above then these stay orders shall lapse automatically without further reference to 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. The costs of this application shall abide by the outcome of the appeal.

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2024.

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H.M. NYAGA

JUDGE

In the presence of;

C/A Dickson

Mr. Bosire for Ratemo for Respondent

Mr. Ativa for Applicant

