



REPUBLIC OF KENYA



KENYA LAW
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Peter v Obare (Civil Appeal E096 of 2023) [2024] KEHC 1068 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E096 OF 2023

MW MUIGAI, J

FEBRUARY 5, 2024

BETWEEN

MUTEVU NDINDI PETER APPLICANT

AND

JOSPHAT MOGAKA OBARE RESPONDENT

RULING

Notice of Motion

1. Vide a Notice of Motion under Certificate of Urgency dated and filed in court on 15th May,2023 brought under Sections 3A, 79G and 95 of the *Civil Procedure Act* and Order 22 Rule 22, Order 42 Rule 4,6 and 7, Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010
2. The Applicant seek the following orders that:
 1. Spent.
 2. Spent.
 3. This Honorable Court be pleased to order a stay of the execution of the Judgment by the Honorable, Ole Keiwua K.D Chief Magistrate in Kangundo SPMC No. E174 of 2021 dated and delivered on 20th April,2023 pending the hearing and determination of this Appeal.
 4. The Application be heard inter partes on such date and time as this Honorable Court may direct.
 5. As condition of stay of execution pending the hearing and determination of this Appeal, the Applicant/Appellants be and is hereby ordered to provide/issue for the entire decretal/amount in form of a Bank Guarantee to be issued by Family Bank Limited.
 6. The costs of this Application abide the outcome of the Appeal.



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

Supporting Affidavit

4. The application was Supported by Supporting Affidavit dated and filed in court on 15th May,2023, sworn by Mutevu Ndindi Peter, the Applicant herein, wherein, he deposed that he is advised by his advocate on record that on 20/4/2023 judgment was delivered as against the Applicant herein in as follows; Liability 100%, General Damages 1,000,000/=, Special Damages 5,550/= plus costs and interest. (annexed and marked copy of the judgment).
5. Depositing further that that he is advised by his Advocate on record that the appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chances of success and further that he is informed by his Advocate on record that the Respondent has threatened execution and its eminent, thus requiring timely intervention of this Honorable court for stay. (annexed and marked copy of the letter threatening execution).
6. Lamenting that he is reasonably apprehensive that the Respondent may levy execution against the Appellant/Applicant and the same will render the Appellant/Applicant's appeal nugatory and the same will cause the Appellant to suffer irreparable loss and damage.
7. He deposed that his insurer is willing and ready to furnish the court with Bank Guarantee as security, pending the hearing and determination of the appeal and instant application herein. (annexed and marked copy of the bank guarantee forms).

Replying Affidavit

8. The application was opposed vide a Replying Affidavit dated 2nd June, 2023 and filed in court on 6th June, 2023, sworn by Josphat Mogaka Obare, the Respondent herein, wherein, he deposed inter alia that he is advised by his Advocate on record that said application is seeking stay of execution pending appeal hence the applicant is required under the relevant laws to furnish security for the performance of the decree among other conditions.
9. Depositing that he advised by his Advocate on record that the appeal herein is only on the issue of quantum hence he does not oppose the appellant's application save for the issue of security.
10. Lamenting that he sustained very serious injuries following an accident which injuries included a fracture of the skull (left Zygomatic process with inward angulation), fractured mid shaft left tibia, head injury and soft tissue injuries on his lower limb and the Trial Court awarded him Kshs. 1,000,000 as general damages which award is the subject of the instant appeal.
11. He urged this honorable court to order the Appellant herein to pay him $\frac{3}{4}$ of the judgment award being Kshs. 750,000 plus costs of the suit in the Trial Court and deposit the balance thereof in a joint interest earning account to be opened in the names of the Parties' advocates on record as a condition for stay of execution pending appeal.
12. Depositing that he strongly opposes the Applicant's offer of a bank guarantee as a form of security since the said bank guarantee does not even indicate in whose favour the same was made and the same cannot be verified.
13. The matter was canvassed by written submissions.



Submissions

Applicant's Submissions

14. The Appellant/Applicant vide his written submissions dated 8th September,2023 and filed in court on 11th September,2023, wherein counsel for the Appellant/Applicant raised the following issues which he submitted on sequentially.
15. On whether the has an arguable appeal, counsel submitted the Memorandum of Appeal sets out precisely the grounds upon which the Applicants intend to appeal the decision of the lower court. contending that the applicant is appealing on quantum as an excessive award was made by the lower court which is not proportionate to the injuries suffered and the evidence that was tabled before Court.
16. Contending that the applications for stay pending appeal in the subordinate courts it is not a requirement to show that the Appeal has high chances of success, the Applicant only needs to show he has an arguable appeal. To buttress this point, reliance was placed on the case of Appeal in Kenya Revenue Authority Vs Sidney Keitany Changole & 3 Others [2015] eKLR.
17. On whether Substantial loss will occur from refusal to grant stay, counsel submitted that the deponent herein in his affidavit specifically sated that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants Appeal succeeds since the Respondent has not disclosed nor furnished the court with documentary evidence to prove his financial standing. Reliance was placed on the case of Edward Kamau & Another Vs Hannah Mukui Gichuki & Another [2015] eKLR.
18. Submitting that in the absence of an affidavit of means the Respondent's financial status is still unknown and has not been proven hence there is likelihood that the Respondent has no means to refund the decretal amount.
19. As to unreasonable delay, it was submitted that the Applicant filed the instant application herein within the required time after the delivery of the judgment noting that the appeal was filed on 4th of May,2023 soon after the delivery of the judgment thus signaling the Applicant's interest in pursuing the appeal.
20. On security, it was averred that the Applicant is ready and willing to provide security in the form of a bank Guarantee pending the hearing and determination of the appeal as an acceptable mode of furnishing security. To buttress this point, Credence was placed on the case of Gianfranco Manenthi & Another Vs Africa Merchant Assurance Company Ltd [2019] eKLR. Submitting that having satisfied all the conditions set out in Order 42 Rule 6, it was prayed that they be granted an order of stay of execution pending hearing and determination of the appeal.

Respondent's Submissions

21. The respondent in his submissions dated 7th September,2023 and filed in court on 12th September,2023 wherein counsel for the Respondent relied on Order 42 Rule 6 (2) of the Civil Procedure Rules and cases of Pamela Akinyi Opundo Vs Barclays Bank of Kenya Limited [2011] eKLR, Socfinac Company Limited Nelphat Kimotho Muturi [2013] eKLR and Kenya Shell Limited Vs Kibiru [1986] KLR
22. It was argued that the Respondent does not have any intentions of blocking the appellant from prosecuting his appeal before this Honorable Court. Contending that the Appellant has a right to prosecute his appeal but the Respondent also has a right to start enjoying the fruits of the judgment since the appeal is only on quantum of damages which means the Respondent will eventually be paid part of the judgment award even if he appeal succeeds. Contending that the in an application for stay



the court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined to place the parties on equal footing.

23. Contending that the Appellant is proposing to deposit a bank guarantee as a form for the performance of the decree. It was his position that this means that the Appellant does not want to pay the Respondent any money pending determination of the Appeal yet his appeal is only quantum. Submitting that the Respondent on his part opposed the security of a bank guarantee and proposed in his replying affidavit that for the serious injuries he sustained, the Appellant be ordered to pay him at least three quarters of the judgment sum amounting to Kshs. 750,000 plus costs of the suit incurred in the trial court and the balance of the judgment sum of Kshs. 255,550 can then be deposited in a joint interest earning account to be opened in the names of both advocates on record to await the outcome of the Appeal.
24. It was further contended the court cannot rely on a bank guarantee as form of security since it is not privy to the relationship between the Appellants' Insurer and its said banker hence cannot say with certainty that the bank guarantee will remain active until the appeal is determined. Credence was placed on the case of Paul Nderitu Mwangi & Another Vs Jacinter Mbete Mutisya & Another (suing as the legal Representatives of the Estate of William Mbithi Musonzo (Deceased) [2018] eKLR

Determination/Analysis

25. I have considered the Application, the Supporting affidavit, the Replying Affidavit, and the Submissions filed as well as the authorities relied upon by counsels for their respective clients.
26. The issue that commends itself for determination is whether the applicant has demonstrated that the orders for stay of execution pending appeal are merited.
27. 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) 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)
28. 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 overriding objective is applicable under *Civil Procedure Act* or in the interpretation of any of its Provisions.
29. 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)



30. 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)

31. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. The Court will ensure and 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. The Court will take into account circumstances and 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 lie to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always 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 to note 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, I am persuaded by the famous case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where it was observed thus

“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 present case, the Applicant submitted that in the absence of an Affidavit of Means the Respondent’s financial status is still unknown and has not been proved. Hence, there is likelihood that the Respondent has no means to refund the decretal amount, therefore there is reasonable apprehension that the Respondent will be unable to repay the decretal amount as the evidentiary burden shifted on him to show that he financial resources to satisfy the decretal sum. The Respondent on the other hand argued that in an application for stay the court must consider the overriding objective



and balance the interest of the parties to suit since the court is enjoined to place the parties on equal footing.

35. The Applicant has not if any allege that payment of the decretal 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 as the said Respondent has an equal right to enjoy the fruit of his judgment pending the determination of the Appeal.

36. 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)

37. 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)

38. 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).

39. 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. 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 this case before me, the allegation that the Respondent's financial status is still unknown and has not been proved, and that there is likelihood that the Respondent has no means to refund the decretal amount does not rob and/or deny the said Respondent from the enjoyment of the fruits of his judgment.

Security

41. 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.
42. 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)

43. Similarly, I associate myself with the holding 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)

44. 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).

45. In the instant case, the Applicant is ready and willing to provide security in the form of a bank guarantee for. The bank guarantee given is from Family bank to the Directline Assurance Company Limited. 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.
46. As to appeal being brought without unreasonable delay, I find no delay occasioned in bringing the appeal herein. Noting that judgment was delivered on 20th April, 2023 and the Memorandum of Appeal filed in court on 4th May, 2023.

Disposition

1. 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 through advocate on record half of the decretal sum and give a valid bankers guarantee to pay the remaining half.
 - 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. The Appeal is deemed as filed. Further mention for directions and compliance on 4/03/2024.
 - d. Costs of this Application to abide the outcome of the Appeal

It is so ordered.

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

M.W. MUIGAI

JUDGE

