



Panu Automobiles (K) Ltd & 2 others v Ogutu aka Duncan Ouma (Civil Appeal 233 of 2023) [2024] KEHC 970 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 233 OF 2023
HM NYAGA, J
FEBRUARY 7, 2024**

BETWEEN

**PANU AUTOMOBILES (K) LTD 1ST APPELLANT
JOSEPH MUCHIRI 2ND APPELLANT
BRERNARD KINYANJUI NJUGUNA 3RD APPELLANT**

AND

DUNCAN OUMA OGUTU AKA DUNCAN OUMA RESPONDENT

RULING

1. Vide a Notice of Motion dated 30th August 2023, the Applicants seek stay of the execution of the judgment and/or decree delivered in Nakuru CMCC No. 487 of 2020 on 27th July, 2023 pending the hearing and determination of this appeal. The Applicants also seek an order for the provision of a Bank Guarantee of the entire decretal as security. They also pray for costs of the Application.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by the 3rd Applicant herein, on the even date.
3. The Applicant averred that judgment in Nakuru CMCC NO. 487 of 2020 was delivered on 27th July, 2023 in favour of the respondent wherein Liability was entered at 100% against him and General damages of Ksh. 400,000/=; future medical expenses of Ksh. 20,000/- lost earnings of Ksh. 50,721/- plus costs and interest was awarded to the Respondent.
4. He deponed he has lodged an appeal against the judgment and he is apprehensive that the Respondent will commence execution against him thus rendering the Appeal herein nugatory.
5. He deposed that 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 judgment/decree or order



as shall be directed by this Honourable Court pending the hearing and final determination of the Appeal.

6. He is apprehensive that in the event the amount is paid to the Respondent and the appeal succeeds he may never recover the amount which is very high.
7. He averred that he stands to suffer substantial loss and damage if the orders sought are not granted and the Appeal will be rendered an academic exercise.
8. In response to the application, the Respondent through his replying affidavit sworn on 8th September, 2023. He averred that he is not opposed to stay pending appeal but it be on condition that the Applicants pay 50% of the decretal sum to him and that the balance be deposited in Court or in a joint interest-earning account in the name of the advocates for the parties herein.
9. He is opposed the facility of Bank Guarantee proposed by the Applicant for grounds that the bank in question is not a party to this proceedings and it would be tedious exercise to follow up payment with it; the bank guarantee is only for a period of one year and in the event it is not extended after its expiry he will be left in a limbo in following up for payment; and bank guarantee is a general form with a specific limit amount of money and the insurance company in issue is utilizing the said document in numerous Court cases country and as such there is a likelihood the said limit has exceeded.
10. The Respondent further deponed that the appeal itself is only on damages awarded by the trial Court and that the same was within the range of awards for similar cases, hence was not inordinately high.
11. The Application was canvassed through written submissions.

Applicant's Submissions

12. The Applicants referred the Court to the case of Elena D. Korir vs Kenyatta University (2012) eKLR on the discretion of the Court in granting a stay pending appeal. These are sufficient cause, substantial loss, and unreasonable delay in making the application. In addition, the Applicant is to demonstrate that that the appeal will be rendered nugatory if the stay orders are not granted.
13. On the Substantial Loss, the Applicants submitted that they will be prejudiced if the application is disallowed as their properties will be attached and sold thus rendering this appeal nugatory.
14. The Applicants further submitted that the judgement is of a substantial amount and if paid to the Respondent, they may not be able to recover the same in the event the appeal succeeds. To bolster their submissions, the Applicants placed reliance on the case of Jackline Tabitha Kinyua v Jacob Mugo Nyaga & another [2019] eKLR where the Court declined to release half of the decretal sum to the respondent on ground that the refund could not be guaranteed in the event of a successful appeal.
15. On security, the applicant submitted that he is ready and willing to furnish the Court with a bank guarantee which is reasonable. He relied on the case of Bernard Ontita Zebedeo v Julius Nyamwega Ontere [2022] eKLR where the Court allowed the provision of a bank guarantee from a reputable bank as a security for the decretal sum pending the hearing and determination of the Appeal.
16. The applicants also cited the case of Compliant International Security Ltd and another vs Nicodemus Muema Muli (2019) eKLR where the Court held that unless the applicants therein were given time to deposit the decretal sums, the appeal therein would have been rendered nugatory and would only be there for academic purposes.
17. On whether the application has been filed without inordinate delay, the Applicants submitted that the lower Court's judgment was delivered on 27th July 2023 and they filed the appeal on 8th August 2023,



and the instant application on 28th August 2023, and therefore this application was brought within reasonable time.

18. They prayed that the application be allowed in the interests of justice.

Respondent's submissions

19. The Respondent points out that on the issue of the appropriate security this is a matter within the discretion of the Court. Counsel referred me to *Nyamwaya vs Ondera Civil Appeal No. E071 of 2021 (2022) (KEHC 619 KLR)*.
20. The Respondent further argues that the Court's discretion is to be exercised within the requisite parameters while taking into account the overriding objective in civil litigation. On this point, I was referred to the case of *Samuel Ndungu Mukunya Vs Nation Media Limited and another (2016) eKLR*.
21. The Respondent also argues that the Court must accord to the principle of proportionality and the need to create a level playing ground for all the parties by striking a balance between the competing interests and rights. On this point, I was referred to *Mutiso and another vs Ngoma (Civil Appeal E019 of 2021(2021) (2021) KEHC 344 KLR and Machira T/A Machira & Co. Advocates vs East African Standard (2002) eKLR*. Also cited was *Peter Osoro Omagwa and another vs Bathseba Mwangi Makini (2021) eKLR*.
22. It is also argued that when considering the appropriate security to be offered, the Court must look at the special circumstances obtained in the matter before it. To buttress this point, the Respondent referred to *Amal Hauliers Limited vs Abdunnassir Abkar Hassan (2017) eKLR*. *Harrison Mbaabu Marete vs Janet Nkirote Muthomi (2021) eKLR* and *Silpak Industries Ltd vs Nicholas Muthoka Musyoka (2017) eKLR*.
23. On adequacy of the security offered by the applicants, the respondent was of the view that the same was not, for the reason that first, the guarantee in issue is dated 14th June, 2023 and was to last for one year. That the same does not suffice as adequate since it may take more than year to have the appeal determined. That for this reason the Court cannot be called to act on the said guarantee. The Respondent cited *Mutiso and another vs Ngoma (supra)* to support this their submissions.
24. It is also pointed out that the said bank guarantee stands to be cancelled by the bank without any consultation with the beneficiary or the respondent herein.
25. The Respondent further argues that the bank guarantee is a general one and does not specify that the respondent is covered. The Respondent referred me to my own decision in *Miscellaneous Civil Application Number 181 Of 2023(U/R)*.

Analysis & Determination

26. 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 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

27. 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.”

28. In the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417 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.”

29. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s 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. This was the same holding in *Elena D. Korir vs Kenyatta University* (supra).

30. With the above in mind, the Court must then determine what substantial loss the applicant will suffer if stay of enforcement of the judgment of the Subordinate Court is not made in his favour.



31. On whether the Applicant will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in *Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007 where he 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.”

32. The above principles were also discussed in *Machira case (supra)* and *Peter Osoro Omagwa case (supra)*.

33. In the instant case the Applicants claim that in the event the Appeal is successful the Respondent will not be in a position to compensate them for the losses that may be incurred as he is not a person of means.

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 Applicants’ claim that the Respondent is not a man of means and he may be unable to refund the decretal amount if the appeal is successful has not been supported by any evidence.

36. It is worth noting that the Respondent’s replying affidavit did contain an averment regarding his financial standing. He only states that he was working for gain hence the reason he was awarded damages for loss of income. He does not state his actual income.

37. The amount in question is not quite substantial by any standards. However little it is there is a likelihood that the Respondent may be incapable of refunding the entire decretal amount should the appeal succeed.

38. As a corollary, I am persuaded to find that the Applicant has demonstrated that 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.



39. In regards to whether this Application has been filed without unreasonable delay, I note the Lower Court judgment was indisputably delivered on 17th August 2023 and this application was subsequently filed on 13th September, 2023. The application herein therefore has been filed timeously.
40. With regards to security, the Applicant has shown willingness to offer security by way of a bank guarantee for due performance of the decree.

Whether the Applicant, has an arguable appeal? ** __

41. Clearly this is a question that can be answered by this Court as the appellate Court.
42. Without going to the merits of the appeal, I have perused the Memorandum of Appeal and the judgment of the lower Court which was annexed by the Respondent. The Applicants chose not to annex it. The reasons for the same appear to be clear. The judgment clearly shows that the applicants did not call any evidence to rebut the respondent's case in the lower Court. It is thus unlikely, nay, very unlikely, that this Court, even being as most accommodating as it could be, can reverse the finding on liability.
43. Clearly the gist of the appeal is really on the assessment of general damages by the lower Court. It is said that the same was manifestly excessive. The applicants also challenge the award made under the other head of loss of income.
44. Now, 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. An appeal on quantum is thus an arguable one.
45. 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."

46. In the instant case the Applicant has, in my view, satisfied the three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the Civil Procedure Rules, 2010.
47. Consequently, I am inclined to grant stay of execution pending hearing and determination of the Appeal, on conditions that I will consider next.

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

48. In determining the security, the Court has to strike a balance on the interests of the appellant and those of the respondent. In striking such a balance the Court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.
49. In the case of Henry Sakwa Maloba vs Bonface Papando Tsubuko (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”.

50. The Applicants propose a provision of a bank guarantee of the decretal sum while the Respondent in his affidavit proposes that 50% of the decretal amount to be released to him and the balance to be deposited in Court or a joint interest earning account.
51. The Respondent avers that the bank guarantee offered as security is unsafe. I have considered his averments and submissions in that regard.
52. 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, coincidentally, between the same advocates representing different parties. 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.”

53. The present application raises the same issues about the security offered by the applicants. 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.
54. In conclusion, I find that the application dated 24th July 2023 meets the threshold for the grant of stay of execution, but subject to conditions.
55. I therefore order as follows;
 - a. That execution of the judgment and the ensuing Decree in Nakuru CMCC No. 487 of 2020 be and is hereby stayed pending the hearing and determination of the appeal on condition that the half the sum awarded as general damages being Ksh. 200,000/- be paid to the Respondent within 30 days of the date hereof.
 - b. The balance of the amount and the other awards are 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. Costs of the application shall abide the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2024.

H. M. NYAGA



JUDGE

In the presence of;

C/A Jeniffer

Miss Kurere for Respondent

Miss Kigali for Applicant

