



Matunda Fruits Bus Ltd & 2 others v NWO (Minor suing through next friend and aunt MAAO) (Civil Appeal 308 of 2023) [2024] KEHC 3069 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 308 OF 2023
SM MOHOCHI, J
MARCH 12, 2024**

BETWEEN

**MATUNDA FRUITS BUS LTD 1ST APPELLANT
NAIROBI BUS 2ND APPELLANT
GEORGE OTIENO 3RD APPELLANT**

AND

**NWO (MINOR SUING THROUGH NEXT FRIEND AND AUNT
MAAO) RESPONDENT**

RULING

1. The Applicant moved Court vide the Notice of Motion dated 19th February 2024 pursuant to Section 1,1A and 3A, of the *Civil Procedure Act* (Cap 21), Order 22 Rule 22, Order 42 Rule 4, 6 and 7, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 seeking the following Orders:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That as a condition for stay of execution pending the hearing and determination of this Appeal, the Applicants/ Appellants be and is hereby ordered to provide/ issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - v. That the costs of this Application abide the outcome of the Appeal.
2. The Application was supported by the sworn Affidavit of Moses Njuguna. He stated that the Applicant filed an application to stay execution of Judgment/Decree dated 19th February, 2024 on grounds inter alia that;



- i. That, Judgment herein was delivered on 12th October, 2023 and the Plaintiff/ Respondent was awarded Liability 100 % General damages at Kshs. 200,000/-, and Special Damages Kshs. 10,000/- plus costs and interest.
 - ii. That, the appellants/Applicants being aggrieved and dissatisfied with the said judgement has preferred an Appeal Nakuru HCCA E308 of 2023.
 - iii. That, the Applicant Appeal has high chances of success.
 - iv. That, the Court did not consider the Applicant's evidence and similar authorities with similar circumstances.
 - v. That, the Application has been presented without inordinate delay.
 - vi. That, the Respondent is a person of unknown means hence the Applicants are apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
 - vii. That, the Applicants have a strong arguable appeal which has high chance of success.
 - viii. That, the Applicants insurer is ready, able and willing to provide security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited which is a reputable bank in Kenya.
 - ix. That, to facilitate the issuance of the said Bank Guarantee as security, the Applicants insurer, M/s Directline Assurance Company, have a long-standing agreement with Family Bank Limited, a copy of which is annexed to the Supporting Affidavit hereto, in which the said Bank has agreed to provide such security pending the hearing and determination of this Appeal.
 - x. That, it is in the interests of justice that the entire decretal sum be fully secured through a Bank Guarantee, without any partial payments/ settlements being made, as the Applicant's appeal is primarily on trial Court's determination on the issue of quantum which determination is vehemently disputed by the Appellant as demonstrated on the Memorandum of Appeal annexed to the Supporting Affidavit hereto.
 - xi. That, the Applicants/ Appellants are reasonably and justifiably apprehensive that if any part payments are ordered to be made to the Respondent as a condition for stay of execution pending the hearing and determination of this appeal, then such payments will be utilized and alienated by the Respondent and recovery of the same will be arduous in the event that his/her appeal/intended appeal on the issue of quantum succeeds.
3. It was her contention that the terms imposed by the trial magistrate in allowing the said Application in the Ruling of 29th June, 2023 were tough unfair and unjust necessitating filing of an Appeal vide the Memorandum of Appeal dated 26th July, 2023. She stated that the timelines set were nigh and thus the urgent need for the Court to issue stay of execution of the Decree/Judgment as well as the orders and condition is in the impugned Ruling of 29th June, 2023.
 4. The Respondent in opposition filed a Replying Affidavit dated 9th August 2023 and filed on 16th August 2023 sworn by John Abuom. He stated that the Application lacked merit as the default judgment was set aside with conditions which have not been met and are thus should not be granted the orders sought. That the Application is a delay tactic and that the Applicant stands to suffer no loss and that the conditions required to issue the orders ought to have been met.
 5. The Court on 31st July, 2023 directed that the Application be disposed by way of written submissions.



6. The Applicant in its submissions dated 6th August, 2023 through counsel submitted that the Court should stay the lower Court proceedings pending the hearing of the Appeal. It was their submission that the 45 days were lapsing on 12th August, 2023 failure to which the Respondent would be at liberty to execute. That the proceedings would automatically lapse by operation of the Court own order.
7. It was also submitted that the threshold for grant of such orders had been met and on the issue of stay pending Appeal he urged Court to exercise its discretion and relied on *Congress Rental South Africa vs Kenyatta International Convention Centre: Co-operative Bank of Kenya Limited & Another (Garnishee)* 2019 eKLR the Applicant and in urging Court to exercise its discretion in a way as to not prevent the Appeal and relied on *Amal Hauliers Limited v Abdulnasir Abubakar Hassan* (2017) eKLR.
8. The Applicant submitted that it was at a risk of substantial loss that the decretal amount was Kshs. 4,083,534, they were condemned unheard, that they were not the insurers of the subject vehicle that at the time of the accident the vehicle was insured by Monarch Insurance and that the vehicle was valued at Kshs. 1,400,000. He added that the Appeal had a high chance of succeeding placed reliance in the case of *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others* (2013) eKLR.
9. The Respondent on the other hand in his written submissions dated 23rd August, 2023 and filed on 14th September, 2023 submitted that the Application is not merited. That there has been no substantial loss that has been demonstrated and relied on *Siverstein vs Chesoni* (2002) 1 KLR 867. It was the Respondent's submission that the Application was a delay tactic.
10. He also submitted that deposit of security is a requirement under the law. That the Applicant has never deposited or offered an amount to hold as security. He urged the Court to dismiss the Application with costs and that if the Court was inclined to issue stay, then it should direct half of the decretal amount be paid to the Respondent and the other half to be deposited in an interest earning account in the names of the advocates for the parties.

Analysis and Determination

11. After carefully consideration of the evidence adduced, the parties' rival written submissions as well as the authorities relied on by the parties, what is for consideration is whether the Applicant has met the threshold to grant the orders sought.

Stay of Proceedings

12. Granting or declining to grant and order stay of proceedings is a discretionary power to this Court derived from of Order 42 rule 6 (1) of the Civil Procedure Rules.
13. In the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J* (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one,



the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

14. For this Court to grant the prayer for stay of proceedings, the Applicant ought to show that it has an arguable Appeal with high chances of success that if stay of proceedings is not granted the Appeal will be rendered nugatory. The Court has not had the advantage of going through the proceedings in the trial Court but has had cursory look at the Memorandum of Appeal which raised 12 grounds.
15. In the case of *Stanely Kinyanjui vs. Tony Ketter & 5 Others* (2013) eKLR, the Court of Appeal stated that: -

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised”.
16. Similarly, the Court of Appeal in the case of *University of Nairobi V Ricatti Business of East Africa* (2020) eKLR held that:

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”.
17. It would not be accurate in the instant case to say that the intended Appeal is not arguable. Courts have held that, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued to its logical conclusion. The Appeal in the instant case relates to the question of whether the Trial Court misinterpreted the law and considered irrelevant factors. The Court is of the opinion that the Appeal needs to be determined by weighing the Applicants contestation and the Trial Court’s reasoning. The Appeal therefore passes the agreeability test
18. From the orders sought, it appears that the Applicant desires this Court to exercise its discretion to stay execution of the judgment/decree of Court, stay of the Ruling while at the same time, staying the proceedings to allow time for appeal.
19. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. (emphasis mine) Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
20. The Trial Court set aside the judgment and decree of Court conditionally. The Applicant felt it was not supposed to have conditions set by Court if the decree was set aside. The Court is not convinced that the Appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given.
21. It is the Court’s considered opinion that it would not be in the interest of justice to exercise Court’s discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit Nakuru CMCC No E152 of 2022 having that the judgment was set aside to the detriment of the Respondent. In any event the Applicant will have an opportunity to ventilate its issues during trial to alleviate its grievance of being condemned unheard.
22. The Court is therefore not satisfied that the Applicant has demonstrated that the instant Application warrants issuance of the orders of stay of proceedings.



Stay of execution pending appeal

23. The principles on granting orders of stay of execution pending appeal are well settled and provided for under Order 42 rule 6(2) of the Civil Procedure Rules, 2010 which provides:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
- (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.
- (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

24. The rationale behind granting orders of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties while still considering the circumstances of the case. On the same vein, the power of Court to grant or refuse stay of execution is discretionary as submitted and aptly emphasized by the Respondent. The discretion should however be must not be exercised whimsically but judiciously. It ought to be exercised so as not to prevent a party pursuing an Appeal does not suffer irreparably should the decision be overturned on Appeal. This position was echoed by the Court of Appeal in *RWW v EKW* [2019] as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

25. Therefore, the import of the above is that, for this Court to grant the orders sought the Applicant has to demonstrate;



- a. that it will suffer substantial loss unless the orders are not granted
- b. that the application has been made without unreasonable delay, and
- c. that such security as the Court orders for the due performance has been given.

Undue delay

26. The Applicant lodged an Appeal against the Judgment of 12th October 2023 within a month of delivery and that was within the statutory timeline. The instant Applications was also filed on 21st February, 2024 which was over 120 days after delivery of the decision. There has therefore apparent undue delay.

Substantial loss

27. The Court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, 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.”

28. The Applicants in this case has not stated that they stood to suffer substantial loss or any loss should the execution of judgment proceed.
29. The Respondent on his part has insisted the Application is a delay tactic and mere excuses and that no apprehension of substantial loss has been stated should the Court disallow the Application.
30. The Applicant did state that it was apprehensive that the Respondent may not be able to repay them should the Appeal go in its favour. The Respondent neither did not demonstrate that he had the means to refund the Applicant the decretal amount. The Court is not satisfied that the Applicant has demonstrated sufficiently that it sands to suffer substantial loss.

Security

31. The Applicant is required to furnish to the Court security for the performance of the judgment debt should the appeal fail. The Applicant urges that, it is in the interests of justice that the entire decretal sum be fully secured through a Bank Guarantee, without any partial payments/ settlements being made, as the Applicant's appeal is primarily on trial Court's determination on the issue of quantum which determination is vehemently disputed by the Appellant as demonstrated on the Memorandum of Appeal annexed to the Supporting Affidavit hereto.
32. In *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court while demonstrating the purpose of security stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the



respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

33. The Court has to be guided by the requirement set out in Order 42 Rule 6(b) which is pegged on mandatory terms. The Court is alive to the fact that the pending Appeal is on quantum only and the reluctance of the Applicant to deposit security in the nature of partial payment or cash deposit is noted of not being made in good faith in light of the fact that the judgment sum falls within the small claim’s realm.
34. The Court cannot at this stage delve on the grounds of appeal but will only limit itself to the requirements of granting stay of execution within the legal framework. The Applicant must satisfy the requirements set and furnish the security as envisaged.
35. The Respondent has opposed the suggestion of a bank guarantee acting as security on the grounds that the guarantor might collapse or refuse to pay! The Court is of the considered view that despite the fact that the Applicant has offered a bank guarantee as security, depositing half of the decretal sum into a joint interest-earning bank account in the names of the parties’ advocates in a reputable commercial Bank.
36. I exercise my discretion in furtherance of justice by Consequently finding that, the Application partially succeeds and direct that:
 - a. That pending the hearing and determination of this Appeal herein there be an Order of stay of execution of the judgment/Decree entered in Nakuru CMCC No. E152 of 2022
 - b. The Applicant shall deposit half of the decretal sum into an interest earning joint account in the names of the parties’ advocates in a reputable commercial Bank, within 60 days of this Ruling;
 - c. The Appellant shall cause the preparation and service of the record of appeal within thirty (60) days of this Ruling;
 - d. Costs shall be in the cause;

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 12TH DAY OF MARCH 2024.

MOHOCHI S. M.

JUDGE

