



REPUBLIC OF KENYA



KENYA LAW
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**Munyao v Ntheketha (Civil Appeal E209 of 2023)
[2024] KEHC 3099 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E209 OF 2023**

MW MUIGAI, J

MARCH 8, 2024

BETWEEN

JOSEPH GRIFFITHS MUNYAO APPELLANT

AND

**JAMES NDUMA NTHEKETHA ALIAS JAMES NTHUMA
NTHEKETHA RESPONDENT**

RULING

1. Vide a Notice of Motion application under Certificate of Urgency dated 18th September, 2023 and filed in Court on 20th September, 2023, brought under Sections 3A and 79G & 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rules 4, 6, and 7, and Order 50 Rules 1 and 3 of [Civil Procedure Rules](#), 2010. the Applicant sought Orders that:
 1. Spent.
 2. Spent
 3. This Honorable Court be pleased to order a stay of execution of the Judgment in Machakos SCCC No. E72 of 2023 delivered by the Honorable M Thibaru, adjudicator, on 31st of July, 2023 pending the hearing and determination of this appeal.
 4. The Appellant/Applicant be allowed to furnish the court with a specific bank guarantee as security from a reputable bank pending the hearing and determination of the appeal and the instant application.
 5. The costs of this Application abide the outcome of the Appeal.
2. The grounds upon which the application is premised are in the body of the said application.



Supporting Affidavit

3. The application was supported by the affidavit dated 18th September,2023 and filed in court 20th September,2023, sworn by Joseph Griffiths Munyao, the Applicant herein, wherein, he deposed that he is informed by his advocates on record that on 17/5/2023 judgment was delivered as against the Applicant herein as follows; liability 100%, General Damages 220,000/=, Special Damages 7,100/= plus costs and interest (annexed and marked copy of the judgment). Deposing that he is informed by their advocates on record that the appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chances of success. Contending that the Respondent has embarked on execution and extracted a decree, thus requiring timely intervention of this Honorable Court for stay (annexed and marked copy of the draft decree). Lamenting that he is informed by their advocates on record that the Respondent may levy execution against him and the same will render his appeal nugatory and same will cause him to suffer irreparable loss and damage. He deposed further that he informed by their advocates on record that if the decretal amount is paid over to the Respondent, the said Respondent would be in no position to refund the same if the Appeal is successful. He opined that they are ready and willing 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 bank guarantee forms). He deposed that it is in the interest of justice that the entire decretal sum be fully secured through a Bank Guarantee, without any partial payments/settlements being made, as the Appellants 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.

Replying Affidavit

4. The application was opposed by a replying affidavit dated 4th October,2023 and filed in court on 5th October,2023, sworn by James Nduma Ntheketha alias James Nthuma Ntheketha, the Respondent herein, wherein he deposed that he is advised by his advocate on record that the application is fatally and irretrievably defective and an objection shall be raised to have the same struck out. Deposing that the application does not satisfy the conditions laid down in order 42 Rule 6 (2) of the Civil Procedure Rules. Lamenting that on 31/7/2023 judgment on liability was entered against the Appellant/Applicant to the extent of 100% and the amount of general damages award of Kenya Shillings 227,100/= was not excessive and therefore the Appellants appeal has no chance of success whatsoever. He deposed that this application has been brought with the sole intention of denying him from enjoying the fruits of his lawfully obtained judgment. It was deposed further that no cogent and sufficient reasons have been advanced to warrant granting the orders sought and the application should be dismissed. Further it was lamented that the Applicant has not demonstrated what substantial loss he will suffer if stay of execution pending appeal is not granted. He further deposed that the decretal amount so far is Kenya shillings 227,100/= the costs of the suit are Kenya Shillings 102,200/= making a total of Kenya Shillings 329,300/= (annexed and marked copy of the decree). It was deposed that he is opposed to the Appellant/Applicant providing Bank Guarantee as security because;
 - a. The same is only valid for only one (1) year and the appeal may take more than one year to conclude hence the same shall have become obsolete.
 - b. A Bank Guarantee should be for specific amount claimed herein Kenya Shillings 329,300/= so that in case of default the Respondent can enforce it.
 - c. The Bank Guarantee should be addressed to the court and not to the directors of Directline Assurance Company Limited.



- d. The General Bank Guarantee annexed by the Applicant/Appellants herein is being used in all applications for stay of execution pending appeal all over the country and this is untenable.
 - e. The Bank Guarantee is not prove of availability of funds and is subject to approval of Applicant's title securities with the bank.
5. It was lamented should the court be inclined to grant the application. He urged it to order the Appellant/Applicant to pay him half of the decretal sum of Kenya Shillings 164,650/= and the balance be deposited in court or joint account in the names of both advocates.
 6. The matter was canvassed by written submissions.

Submissions

Applicant's submissions

7. The Applicant in his submissions dated 17th November,2023 and filed in court on 13th December,2023, wherein counsel for the Applicant raised the following issues for determination and submitted on each sequentially.
8. As to whether the Applicant has an arguable appeal, it was submitted that the Memorandum of Appeal sets out precisely the grounds upon which the Applicants intended to appeal the decisions of the Trial Court. Contending that the Applicants are appealing mainly on quantum as an excessive award was made by the Trial Court which is not proportionate to the loss and damage suffered and the evidence that was tabled before court. averring that the Memorandum of Appeal herein is arguable and raised serious points of law and fact that warrant the Honorable Court's intervention on appeal.
9. It was submitted that in applications for stay pending appeal, in the Subordinate courts it is not a requirement to show that the Appeal has high chances of success. Averring that that the Applicant only needs to show he has an arguable appeal. To substantiate this, counsel relied on the case of *Kenya Revenue Authority Vs Sidney Keitany Changole & 3 others* (2015) eKLR, submitting that the Applicant's appeal herein is merited and is based on very strong grounds with high chances of success and it is therefore paramount and important that the Applicant's are given an opportunity to ventilate their Appeal on merit
10. On whether substantial loss will occur from refusal to grant stay, it was contended that in support of the present Application the deponent herein in his affidavit specifically stated 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 Applicant's Appeal succeeds since the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing. Arguing that the Respondent did not dispute this and/or show that he had means of paying the decretal amount in the event judgment was delivered in favour of the Applicant.
11. It was the case of the Applicant that it is only the Respondent herein who can specifically adduce evidence that he has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds. To bolster this point counsel relied on the case of *Edward Kamau & Another Vs Hannah Mukui Gichuki & Another* [2015] eKLR
12. On whether the Application was done without unreasonable delay, it was opined that the Applicant filed the instant application herein within the required time prescribed for under the law. That the application has been filed so quickly after the delivery of the judgment. Contending that it is noted



that the appeal was filed on 31st August,2023 soon after the delivery of judgment thus signaling the Applicant's interest in pursuing the appeal.

13. Regarding whether the Appellant are ready and willing to furnish security, it was averred that the Appellant is ready and willing to provide security in the form of a Bank Guarantee pending the hearing and determination of the appeal. Reliance was placed on the case of *Gianfranco Manenthi & Another Vs Africa Merchant Assurance Company Ltd* [2019], submitting that the Applicant's having satisfied all the conditions set out in Order 42 Rule 6, and prayed that they be granted an order of stay of execution pending hearing and determination of the Appeal.

Respondent's submissions

14. The Respondent in his submissions dated 24th November,2023 and filed in court on 27th November,2023, wherein counsel for the Respondent opined that under Order 42 Rule 6 (2) the Applicant must satisfy to the court that:
 - a. Substantial loss will result if stay is not granted.
 - b. Application has been brought without unreasonable delay.
 - c. Is prepared to furnish security as the court may order.
15. It was the submitted that the judgment was for Kenya Shillings 227,100/=. Contending that the decretal sum now inclusive of costs so far is Kenya Shillings 329,300/= and the amount continues to attract interest at court rates. Averring that the appellate court will therefore confirm or reduce the amount of damages awarded but the Respondent will be entitled to payment by the Appellant/Applicant.
16. Submitting that the Applicant herein has stated in paragraph 7 of his supporting affidavit it is apprehensive that if the decretal sum is paid to the Respondent he might not refund. Contending that the Respondent has rebutted that assertion by stating he is a man of means and able to refund the decretal sum should the appeal succeed. Counsel urged the court to find that the application does not satisfy the condition of Order 42 Rule 6 (2) of the *Civil Procedure Rules* and dismiss the same. To substantiate this argument, reliance was made on the case of *Godfrey Wainaina Kinyanjui & Another Vs Joseph Mwikya Musaa* Machakos HCCA No. 43 of 2020, urging the court to order that a sum of Kenya Shillings 164,650/= be paid to the Plaintiff/Respondent through his Advocate and the balance be deposited in court within reasonable time pending the hearing and determination of the appeal.

Determination/Analysis

17. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
18. The application is premised on Order 42 rule 6(2) of the *Civil Procedure Rules*,2010 provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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.

19. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

20. The Court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.”

21. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

22. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

23. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”



24. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory.

25. The Applicant's contention is that there was an imminent threat of execution by the respondent, a step which render the application nugatory and the intended appeal useless
26. In *George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* the Court stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business.” See in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto and James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.

27. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
28. The Court notes that despite the Respondent not stating in his replying affidavit whether he is capable of refunding the decretal mount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss she will suffer. The Applicant has simply stated that the respondent is a person of unknown means and was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise. 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 a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement.
29. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground is therefore not satisfactorily met



Unreasonable Delay

30. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 31.07.23 and the application was filed on 20.09.23. A month and some days later is not unreasonable delay.

31. The Court finds that there is no undue delay in filing the application herein.

Furnish Security

32. The Applicant stated that her underwriter was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal, the Respondent in his replying affidavit that she was opposed to issuance of a bank guarantee as security as it was insufficient security to the decretal sum meant to prejudice the respondent's award

33. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

34. It follows therefore that it is the discretion of the court to determine the security and whether the bank guarantee is sufficient security taking note of the Respondent's Concerns on the bank security as a guarantee.

Disposition

35. In the premises: -

- a. There will be a stay of execution pending the said appeal on condition that the Applicant remits to the Respondent through Advocate on record half of the decretal sum within 90 days from the date hereof and ½ in a Bank guarantee in default, the application for stay shall stand dismissed.
- b. The costs of this application abide the outcome of the appeal.

It is so ordered

RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 8TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

