



**Nation Media Group Limited v Yongo (Civil Case 92 of 2018)  
[2024] KEHC 2506 (KLR) (Civ) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2506 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 92 OF 2018**

**CW MEOLI, J**

**MARCH 8, 2024**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ..... APPLICANT**

**AND**

**BRYAN YONGO ..... RESPONDENT**

**RULING**

1. For determination are two applications, brought by Nation Media Group Limited (hereafter the Applicant). The application first filed to be is the Notice of Motion dated 27<sup>th</sup> March, 2023 (the first Motion) which is supported by the grounds set out on its body and the depositions in the affidavit of the Applicant's Head of Legal Training, Sekou Owino . The Motion seeks to stay execution of the judgment delivered in the suit on 24<sup>th</sup> March, 2023 and the resultant decree, pending the hearing and determination of an intended appeal to the Court of Appeal.
2. In his supporting affidavit, the deponent stated that in the aforesaid judgment the court awarded Bryan Yongo (hereafter the Respondent) damages in the aggregate sum of Kshs. 3,600,000/-, and which judgment the Applicant intends to challenge on appeal. The deponent also stated that the Applicant has filed a Notice of Appeal to that effect, and that the intended appeal is arguable, and that unless the stay order sought is granted, the Applicant will suffer substantial loss because the Respondent's financial means are unknown. Hence, if the Applicant were to pay over the decretal sums awarded and the appeal succeeds, the recovery of any sums paid over in satisfaction of the decree appears doubtful. Which eventuality would render the appeal nugatory. It was the deponent's further averment that the Applicant is a well-established company holding assets worth billions and is ready and willing to provide a bank guarantee from Standard Chartered Bank Kenya Limited, as security for the due performance of the decree.



3. The Respondent resisted the first Motion through Grounds of Opposition dated 6<sup>th</sup> April, 2023 essentially terming it a non-starter and incompetent. The Respondent further argued in his Grounds that no arguable appeal exists in the matter and that the Applicant has failed to support its averment on substantial loss. It was the Respondent's argument that contrary to the averments made in the first Motion, he is not a man of straw, incapable of refunding the decretal sum should the need arise. Overall, the Respondent argued that the conditions for granting a stay of execution have not been established by the Applicant.
4. The Respondent equally swore a replying affidavit reiterating the Grounds of Opposition, save to add that he is entitled to the fruits of his judgment and that should the court be inclined to grant a stay of execution, then the same be conditional on payment of half the decretal sum to him while the remaining half was deposited in a joint interest earning account.
5. The Notice of Motion dated 28<sup>th</sup> April, 2023 (the second Motion) is similarly supported by the grounds set out on its body and the facts stated in the affidavit of the aforementioned Sekou Owino. Therein, the Applicant sought to have the order made by this court on 28<sup>th</sup> March, 2023 requiring it to deposit the sum of Kshs. 1,000,000/- in court by 28<sup>th</sup> April, 2023 as a condition for issuance of a temporary stay of execution, be varied to enable it comply by depositing the aforesaid sum in a joint interest account in the name of the parties' advocates; and in the alternative, the court be pleased to extend the time for compliance of the order of 28<sup>th</sup> March, 2023 by a further 14 days. In his affidavit, the deponent stated inter alia, that it would be of mutual benefit to the parties if the sum deposited earned interest.
6. The deponent proceeded to state that upon seeking consent from the Respondent to have the condition on provision of security varied accordingly, the Respondent desired to have the deposit sum ordered paid directly to him and the balance of the decretal sum deposited in a joint interest earning account. On this subject, the deponent restated the Applicant's apprehension raised, that any sums paid to the Respondent may likely not be recovered in the event of a successful appeal. He therefore urged the court to consider and grant the second Motion as prayed.
7. As before, the Respondent opposed the second Motion by filing Grounds of Opposition dated 29<sup>th</sup> May, 2023 arguing inter alia, that the orders sought in the second Motion are spent and that no review has been sought. The Respondent argued that in the absence of proof of efforts by the Applicant in complying with the order made on 28<sup>th</sup> March, 2023, the court ought to decline to exercise its discretion in the Applicant's favour. In the Respondent's view, the Applicant is not entitled to the orders sought.
8. Similarly, the Respondent swore a replying affidavit on 30<sup>th</sup> May, 2023 averring that the second Motion has been brought in bad faith and is a mere afterthought. The Respondent further reiterated the content of his Grounds of Opposition regarding review of orders, adding that no grounds for review have been established by the Applicant.
9. The first and second Motions were canvassed through written submissions. Submitting the first Motion, the Applicant's counsel anchored his submissions on the decision in *Visbaram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365 and the proviso of Order 42, Rule 6 of the [Civil Procedure Rules](#) (CPR) on the principles for consideration in applications seeking to stay execution. Counsel submitted that the first Motion was timeously filed and that unless a stay is granted, the Applicant is likely to suffer substantial loss arising out of financial prejudice.
10. Citing in support several decisions, including those rendered in [Rhoda Mukuma v John Abuoga](#) [1988] eKLR, [Focin Motorcycle Co. Limited v Ann Wambui Wangui & another](#) [2018] eKLR and [Bonface Kariuki Wabome v Peter Nziki Nyamai & another](#) [2019] eKLR where the respective courts addressed



the burden of proof in respect of the element of substantial loss. Regarding the question of security for the due performance of the decree, counsel asserted that following filing of the second Motion, the Applicant complied with the order of 28<sup>th</sup> March, 2023 by depositing the sum of Kshs. 1,000,000/- into court on 4<sup>th</sup> May, 2023. Consequently, the Applicant is seeking the court's indulgence to allow it to provide security for the remaining balance of Kshs. 2,600,000/- by way of a bank guarantee, as earlier proposed. In closing, counsel for the Applicant urged the court to exercise its discretion by allowing the first Motion.

11. Regarding the second Motion, the Applicant's counsel stated that upon deposit of the ordered sums by the Applicant, the motion was spent.
12. The Respondent who was acting in person opened his submissions by contending that the Applicant has not satisfied the conditions for grant of a stay of execution in Order 42, Rule 6 of the *CPR*, and pronouncements thereon as found in *Victory Construction v BM (a minor suing through next friend one PMM)* [2019] eKLR and *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2015] eKLR.
13. The Respondent asserted that the Applicant has not demonstrated the manner in which it stands to suffer substantial loss as contemplated in *Kanyaa v Ndeto* (Civil Appeal E89 of 2021) [2022] KEHC 58 (KLR) (3 February 2022) and *Rhoda Mukuma v John Abuoga* [1988] eKLR, among others. The Respondent contending that in the first instance, the burden of proof lay with the Applicant to demonstrate the Respondent's inability to refund the decretal sum, citing the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR in that regard. Counsel termed the claim made by the Applicant regarding his doubtful means to refund as insufficient. Moreover, that the Applicant ought to satisfy the condition on provision of security, as held in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR. The court was therefore urged to dismiss the first Motion with costs.
14. In respect of the second Motion, it was the submission of the Respondent that the same is unfounded since the Applicant did not come under the provisions of Section 80 of the *Civil Procedure Act* (CPA) and Order 45 of the CPR, in seeking review. Citing here the applicable principles for review as laid out in the decision in *Sbanzu Investments Ltd v Commissioner of Lands* [1993] Eklr. That overall, there has been an inordinate delay on the part of the Applicant, in bringing the second Motion. That for all the above reasons, the same ought to be dismissed with costs.
15. The court has considered the grounds laid out on the body of the respective Motions, the rival affidavit material, and submissions.
16. Regarding the second Motion, it is apparent that subsequent to filing the Motion, the Applicant complied with the subject order by depositing the sum of Kshs. 1,000,000/- into court. This position was not refuted by the Respondent. In view of the foregoing, the court is satisfied that the prayers in the second Motion are now spent.
17. The court will therefore consider the first Motion, seeking to stay execution of the judgment delivered on 24<sup>th</sup> March, 2023 pending an intended appeal. That said, it is appropriate to state here that the question whether an arguable appeal exists, is the preserve of the Court of Appeal and cannot be raised before this court under the provisions invoked.
18. Moving on, it is trite law that courts have discretionary power to stay execution of a decree or order pending appeal. However, discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal* (*supra*). Order 42, Rule 6 of the *CPR* invoked in the Applicant's first Motion provides that:



- (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”.
19. Concerning the first condition, the record shows that the judgment which triggered the instant Motion was delivered on 24<sup>th</sup> March, 2023 whereas the instant Motion was brought three (3) days later on or about the 27<sup>th</sup> of March, 2023. The court is therefore satisfied that the first Motion was timeously filed.
20. On the second condition, the relevance of substantial loss in any application to stay execution was aptly addressed by the Court of Appeal in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 when it held that:
- “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
21. The Court proceeded to hold as follows:
1. ....
  2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
  3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
  4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
22. The decision of Platt Ag JA, in the Shell case, in my humble view spelt out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. Platt Ag JA (as he then was) stated inter alia that:
- “The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty



to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”

23. The learned Judge continued to observe that:

“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 cornerstone of both jurisdictions for granting 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.”

24. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory. This is shown by the following passage of Cotton LJ in *Wilson -v- Church* (No 2) (1879) 12ChD 454 at page 458 where he said:-‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.’”

25. The court has considered the positions taken by the Applicant and the Respondent regarding substantial loss. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. 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 – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

26. In the court’s view, the Applicant herein has reasonably expressed apprehension that the Respondent may be unable to refund any monies paid out in satisfaction of the decree, and hence its appeal if successful, may be rendered nugatory. That is all that is required of an applicant in this kind of application. While disputing the claim, the Respondent did not demonstrate the resources he possesses and are available to be utilized in repayment of the decretal sum, which, standing at Kshs. 3,600,000/- is no mean amount. Thus, the likelihood of a successful appeal by the Applicant being rendered nugatory and substantial loss being visited upon the Applicant does not seem farfetched.

27. The Applicant had already provided part security for the due performance of the decree by depositing part of the decretal sum into court (Kshs. 1,000,000/-) balance being Kshs. 2,600,000/- for which the Applicant proposes to provide a bank guarantee from Standard Chartered Bank Kenya Limited. For his part, the Respondent urges that half the decretal sum be paid to him while the remaining portion



be deposited in a joint interest earning account. The court is obligated to balance the rights of both the parties to an application of this nature. The words of the court in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in *Rosengrens - v- Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

28. Upon weighing the competing interests of the parties, the court is of the view that part payment of the decretal amount would be inappropriate in this case given earlier findings regarding the issue of substantial loss. The court also being persuaded that depositing the remaining decretal amount in a joint interest earning account would eventually prove to be of mutual financial benefit to both parties.
29. Consequently, the court allows the Motion dated 27<sup>th</sup> March, 2023 on condition that the Applicant deposits the balance of the decretal sum, i.e. Kshs. 2,600,000/- into an interest earning account in a reputable bank to be opened in the joint names of the Applicant’s advocates/firm of advocates and the Respondent within 45 days of today’s date. To ensure expedition in the opening of the joint interest earning account, the parties shall within five days of this ruling agree on the bank into which deposit is to be made. Within seven days thereafter, the Applicant’s advocate shall secure and submit the requisite account opening forms to the Respondent who shall complete, execute, and return the forms to the Applicant’s advocates within seven days of receipt. The costs of the Notice of Motion dated 27<sup>th</sup> March 2023 shall abide by the outcome of the appeal in the Court of Appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF MARCH 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicants: Mr. Ochieng

The Respondent in person

C/A: Carol

