



**Basweti & another v Mong'are (Civil Appeal E053 of 2023)
[2024] KEHC 4586 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E053 OF 2023
WA OKWANY, J
APRIL 11, 2024**

BETWEEN

HENRY MONG'ARE BASWETI 1ST APPLICANT

JOB OGETO ARISI 2ND APPLICANT

AND

CHARLES KIMORI MONG'ARE RESPONDENT

*(Being an appeal for the Judgment/Decree in Nyamira CMCC
No. E003 of 2022 at Nyamira Chief Magistrates' Court delivered
by Hon. B. Okong'o, Resident Magistrate on 12th October 2023)*

JUDGMENT

1. This ruling is in respect to the Application dated 30th October 2023 wherein the Applicants seek, inter alia, orders for stay of execution pending appeal. The Application is brought under Order 42 Rule 6, Order 51 Rule 1, Order 22 Rule 22 and is premised on the following grounds: -
 1. That judgment in Nyamira CMCC No. E003 of 2022 was issued on 12/10/2023 and a stay of execution granted.
 2. That the Applicants being aggrieved and dissatisfied with part of the judgment of the honourable trial court on liability and quantum of damages rendered in Nyamira CMCC No. E003 of 2022 on 12/10/2023 have lodged an appeal at Nyamira to wit, Nyamira High Court Civil Appeal No. E053 of 2023.
 3. That the Applicants have lodged an appeal that presents arguable issues of law and fact and stands high likelihood of success which may be rendered nugatory if stay of execution is not granted.



4. That if execution or any proceedings to enforce the said judgments is carried out and the intended appeal shall be rendered nugatory wherefore the Applicant shall suffer irreparable loss and damages in that, the Respondent's financial means is unknown and the Applicants may not be able to recover the decretal sum which is a substantial amount in the event that the same is paid to the Plaintiff and the Appeal succeeds.
 5. That the Applicants/Appellants are willing to abide by all reasonable conditions this Honourable Court may order for the due performance of the decree.
2. The Respondent opposed the Application through his Replying Affidavit in which he avers that the Application is a ploy to further compound his problems as he has waited for the judgment for a long time. He states that he should be allowed to enjoy the fruits of his judgment. He also avers that the Application lacks merit because the trial court had already granted the stay. He further states that the Application is Res Judicata and that should the Court be inclined to grant the prayers sought in the Application, it should order that the Applicants pay him half of the decretal sum and deposit the other half in a joint interest-earning account, in the names of the two Counsel on record, pending the hearing and determination of the Appeal.
 3. The Application was canvassed by way of written submissions which I have read and considered.
 4. The main issue for my determination is whether the application is merited.

Analysis and Determination

5. The principles governing the granting of orders for stay of execution are outlined under Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates as follows: -
 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 referred 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.
 4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
 5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.



6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
6. A party seeking stay of execution of a decree or order of a trial court must satisfy the conditions set out in Rule 6(2) which are: -
 - i. That substantial loss may result to the applicant unless the order is made;
 - ii. That the application has been made without unreasonable delay; and
 - iii. 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.

7. The Court of Appeal outlined the issues to be considered in determining whether or not to grant a stay of execution pending appeal in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, thus:-

“The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“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 nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at pg. 59.”

8. On the first parameter of substantial loss, the Court discussed what amounts to substantial loss in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR as follows: -

“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.”

9. In the present case, the applicants argued that the judgment debt is for a substantial amount of money and that they are apprehensive that if the Respondent levied execution against them, the Appeal would be rendered nugatory because the Respondent did not disclose or furnish the Court with any documentary evidence to prove his financial standing. They argued that the burden of proving that the Respondent could refund the decretal sum rested on him as was held in High Court of Kenya at Mombasa, Civil Appeal No. 40 of 2014, *Kenya Orient Insurance Company Limited v Paul Mathenge Gichuki & Another* (2014) eKLR.
10. My finding is that the Applicants’ concerns over the Respondent’s financial standing are plausible since the Respondent did not raise any objections to the claims or demonstrate that he is a man of means who is capable of refunding the decretal amount should the appeal succeed. I therefore find that the first parameter has been met because the Respondent failed to discharge his burden of proof.
11. On the issue of security for costs, the Applicants’ proposed that they were ready to furnish sufficient security in the form of a bank guarantee (‘H.M.B.2’). They also argued that opening a joint interest earning account as proposed by the Respondent was time consuming and, in the alternative, proposed that the entire decretal sum should be deposited in court.
12. It is my view that the nature of security to be provided by a judgment debtor is a matter that rests within the Court’s discretion. This discretion entails balancing the interests of the parties and a consideration of the adequacy of the proposed security. I am persuaded by the decision in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR where it was held: -

“...Thus 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. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”
13. I have considered the third condition for stay relating to the timelines within which this Application was made. I note that judgment in the trial court was delivered on 12th October 2023 and the Memorandum of Appeal and application filed on 30th October 2023. I find that the Application was brought without undue delay.
14. This Court is alive to the fact that it must consider whether the Applicants/Appellant have an arguable appeal. This is because, an Application for stay pending appeal is meant to preserve the subject matter of the appeal so that the subsequent appeal is not rendered nugatory. The Court of Appeal held thus in *Chris Mungai N. Bichage v Richard Nyagaka Tongi & 2 Others* (2013) eKLR:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated”



15. I have considered the grounds listed in the Memorandum of Appeal and I find that the Appellant has an arguable appeal.

16. It is not lost on this Court that the Respondent, as the decree holder, deserves to enjoy the fruits of his judgment. This Court must however balance that right against the of the Applicants' right to appeal. This was the determination in *RWW v EKW* [2019] eKLR, where it was held thus: -

“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.”

17. Guided by the above decision, and having found that the Applicants have satisfied the conditions under Order 42 Rule 6, I make the following final orders: -

- a) That the prayer for stay of execution pending the hearing and determination of the intended appeal by the Applicant herein is hereby allowed on the following conditions:
 - i. That the Applicants shall within 30 days from the date of this Ruling pay to the Respondent the sum of Kshs 1,376,425/= being one half of the decretal sum.
 - ii. The Applicants shall within 30 days from the date of this ruling deposit the other half of the decretal sum in Court as security pending hearing and determination of the Appeal.
 - iii. In the event of failure to comply with the conditions in (i) and (ii) hereinabove, the stay of execution orders shall be automatically lapse and/or be vacated in which case the Respondent will be at liberty to proceed with the execution of the Decree.
- b) The costs of this application shall abide the outcome of the appeal.

18. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 11TH DAY OF APRIL 2024.**

W. A. OKWANY

JUDGE

