



**Mbogah v Mosigisi (Civil Appeal E054 of 2023)
[2024] KEHC 3825 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E054 OF 2023**

WA OKWANY, J

APRIL 18, 2024

BETWEEN

WILSON ONDICHO MBOGAH APPELLANT

AND

HARISON NYANG'AU MOSIGISI RESPONDENT

RULING

1. This ruling is in respect to the Application dated 4th December 2023 wherein the Applicant seeks the following orders: -
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the Appeal, to wit, Nyamira High Court Civil Appeal No. E054 OF 2023, this Honourable Court be pleased to issue a stay of execution of the judgment and decree issued in Nyamira Cmcc No. 59 OF 2018 on 3rd November 2023.
 4. That this Honourable Court be pleased to order that the Appellant furnishes security in the form of a Bank Guarantee for the entire decretal amount of Kshs. 308,150/= pending the hearing and determination of the Appeal.
 5. That costs of this Application be provided for.
2. The Application is supported by the Applicant's affidavit and is premised on the grounds, inter alia, that he has lodged an arguable appeal with high chances of success and that the appeal will be rendered nugatory if the orders sought are not granted. The applicant states that he is willing to abide by all the reasonable conditions that the court may set for the due performance of the Decree.



3. The Respondent opposed the Application through his Replying Affidavit sworn on 17th January 2024 wherein he avers that in as much as the Applicant has a right to appeal, he is equally entitled to enjoy the fruits of his judgment without unnecessary delay. He further states that the Applicant has not demonstrated that he will suffer substantial loss if the application is not allowed.
4. The Application was canvassed by way of written submissions which I considered. The main issue for determination is whether the Applicant has made out a case for the granting of orders sought.
5. Order 42 Rule 6 of the *Civil Procedure Rules* provides 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 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.
 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. In the case of *Elena Doudoladova Korir Kenyatta University* [2012] eKLR the court referred to the decision *Halai & Another Thorton & Turpin* (1963) Ltd [1990] KLR 365 where it was held that: -

“The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan GHassan Guyo Wakalo Straman FA Ltd uyo Wakalo Straman EA Ltd* (2013) eKLR and [2013] eKLR in which it was held thus;



‘In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.’”

7. An Applicant seeking orders for stay of execution pending appeal must satisfy the following conditions: -

- i. That he will suffer substantial loss unless the order sought is granted;
- ii. That the Application has been brought without unreasonable delay; and
- iii. That the Applicant has given such security as the Court orders for the due performance of such a decree or order which may be binding on them.

8. The Applicant argued that the decretal sum of Kshs. 308,150/= is substantial and that he will be unable to recover the same from the Respondent should the Court decline to grant the Orders sought.

9. Substantial loss forms the cornerstone of an order for stay of execution pending appeal. (See *Kenya Shell Limited Kibiru & Another* [1986] KLR, 410). It is trite that once a claim is made regarding a respondent’s financial capabilities, such as in the present case, the evidential burden shifts to the said Respondent to rebut the claim. In *ABN Amro Bank Lemond Foods Limited* Civil Application No. 15 of 2002 the Court Appeal held that:-

“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 bank and so on.”

10. In the present case, I note that the Respondent did not controvert the Applicant’s assertions that he may be a man of straw who will not be able to refund the decretal sum should the appeal succeed. I therefore find that the Applicant satisfied the first condition for the granting of an order for stay pending appeal.

11. On whether the instant application was filed without unreasonable delay, I note that the impugned judgment was rendered on 3rd November 2023 and the present Application filed on 15th December 2023. I find that there was no delay in filing the present Application.

12. On the issue of security for the due performance of the decree, the court is required to examine the security and determine whether it is adequate for the purposes of securing the decretal sum. In *Mwaura Karuga t/a Limit Enterprises Kenya Bus Services Ltd & 4 Others* [2015] eKLR, the court stated thus:-

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”



13. I have considered the nature of security proposed by the Applicant which is a Bank Guarantee dated 6th July 2023 in the sum of Kshs. 200,000,000/= issued by Family Bank issued to Directline Assurance Company Limited. I note that Clause 3 of the said Guarantee stipulates that, “This facility will be utilized for providing security awards and or costs awarded in various court cases claims pending before court.”
14. What is not clear is how many other claims are pegged on the same Bank Guarantee as security for stay of execution so as to ascertain if the said security is adequate.
15. The court is also required to balance the right of an Appellant to appeal and the right of the decree holder to the fruits of his judgment in an Application for stay of execution pending appeal. (See [RWW EKW](#) [2019] eKLR.)
16. I have considered the grounds listed in the Memorandum of Appeal and I find that they are arguable. This means that the appeal may be rendered nugatory should this Application be disallowed. In [Chris Mungai N. Bichage v Richard Nyagaka Tongi & 2 Others](#) (2013) eKLR the Court of Appeal pronounced itself as follows:-

“...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.....”

17. Having regard to the findings and observations that I have made in this ruling I find that it will serve the interests of justice to allow the instant application and I therefore 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 Applicant shall within 30 days from the date of this Ruling deposit the full decretal sum in court as security pending hearing and determination of the Appeal.
 - ii. In the event of failure to comply with the conditions in (i) hereinabove, the stay of execution orders shall automatically lapse and/or be vacated in which case the Respondent will be at liberty to proceed with the execution of the Decree. (See *Butt Rent Restriction Tribunal* (1982) KLR 417)
 - b) I award the costs of this Application to the Respondent.

18. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH APRIL 2024.

W. A. OKWANY

JUDGE

