



**Ndunda v Nairobi City County & another (Civil Appeal 279 of 2017)
[2024] KEHC 3965 (KLR) (Civ) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3965 (KLR)

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

CIVIL

CIVIL APPEAL 279 OF 2017

CW MEOLI, J

APRIL 18, 2024

BETWEEN

MICHAEL MUASYA NDUNDA APPELLANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

SILVERSTAR INVESTMENT LIMITED 2ND RESPONDENT

RULING

1. Before the court for determination are two (2) applications. The application first filed is the Notice of Motion dated 6th July, 2023 (the first Motion) brought by Silverstar Investment Limited (hereafter the 2nd Respondent), supported by the grounds set out on its body and the depositions in the affidavit of the 2nd Respondent’s Managing Director, Evance Ochieng. And seeking to stay execution of the judgment delivered in the appeal on 29th June, 2023 pending the hearing and determination of an intended appeal against the said judgment, to the Court of Appeal.
2. In his supporting affidavit, the deponent stated that being dissatisfied with the judgment, the 2nd Respondent wishes to challenge it on appeal and has filed a Notice of Appeal to that effect. The deponent also stated that the 2nd Respondent has at all material times been in possession of the property known as L.R. No. 2259/196 off Karen Road (the suit property) and hence the need for status quo to be maintained pending the hearing and determination of the appeal; that unless the stay order sought is granted, the status quo is at risk of being disrupted and which would bring untold suffering and loss to the 2nd Respondent; and that if the stay order sought is granted, no party will suffer prejudice that cannot be compensated by way of costs. The deponent further added that the first Motion has been timeously filed and that the 2nd Respondent is ready and willing to abide by any conditions regarding the provision of security.



3. Michael Muasya Ndunda (hereafter the Appellant) resisted the first Motion by swearing a replying affidavit on 3rd October 2023. Therein, he averred inter alia, that contrary to the claims made in the first Motion, the suit property only became vested in the 2nd Respondent pursuant to a Vesting Order issued on 11th April, 2016. He further averred that during the pendency of the present appeal, temporary injunctive orders had been granted in respect of the suit property and which orders lapsed upon delivery of the judgment. That in view of this, the 2nd Respondent could not have lawfully registered the Vesting Order and transfer of the suit property to its name. Moreover, the 2nd Respondent was not in possession of the suit property and in the absence of any evidence proving the 2nd Respondent's ownership of the said property, the intended appeal is not arguable and stay ought not to be granted.
4. The Notice of Motion dated 17th August, 2022 (the second Motion) which was brought by Nairobi City County (hereafter the 1st Respondent) is similarly supported by the grounds set out on its body and the facts stated in the affidavit of the acting County Solicitor of the 1st Respondent, W.S. Ogola. The live prayer in the second Motion seeks leave of the court to file an appeal against the judgment. In support thereof, the deponent stated that the 1st Respondent is aggrieved by the judgment rendered by the court and is desirous of lodging an appeal against it. The deponent stated that a Notice of Appeal dated 30th June, 2023 has been filed to that effect, at the Court of Appeal. That the 1st Respondent has an arguable appeal with high chances of success and therefore urges the court to exercise its discretion in its favour.
5. It is worth noting that despite the directions given by the court on 11th October 2023 and thereafter on 5th December 2023 requiring the parties to comply by filing their requisite responses and submissions, there was no compliance by the Appellant or the 2nd Respondent in respect of the second Motion. This despite evidence by way of an affidavit of service sworn by the 1st Respondent's process server on 11th October, 2023 confirming that service of the second Motion had been effected upon the parties' legal representatives.
6. The two (2) Motions were canvassed through written submissions. From the record that at the time of writing this ruling, only the submissions by the 1st and 2nd Respondents are available. The Appellant did not put in written submissions on either Motion.
7. Submitting in support of the first Motion, the 2nd Respondent's counsel anchored his submissions on the decision in *Absalom Dova v Tarbo Transporters* [2013] eKLR and the provisions of Order 42, Rule 6 of the Civil Procedure Rules (CPR) on the principles for consideration in applications seeking to stay execution. Counsel further referenced the decision in *RWW v EKW* (2019) eKLR regarding the purpose of a stay order, which is to preserve the subject matter in dispute. Counsel went on to submit that the first Motion was timeously filed and that unless a stay is granted to preserve the status quo, the 2nd Respondent is likely to suffer substantial loss in the manner set out in the said Motion. Counsel here citing *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR on the factors pertinent to granting a stay order.
8. Regarding the question of security for the due performance of the decree, counsel whilst relying on the decisions in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR and *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, asserted that the 2nd Respondent complied with the order of 10th July, 2023 by depositing the sum of Kshs. 100,000/- in court as security. In the circumstances, the court was urged to exercise its discretion by allowing the first Motion.
9. In respect of the second Motion, counsel for the 1st Respondent anchored his submissions on the decision in *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR on the guiding; and Section



75 of the *Civil Procedure Act* (CPA) and Order 42, Rule 2 of the Civil Procedure Rules (CPR) regarding the requirement for a party to seek leave of the court in order to lodge an appeal, where no such right of appeal exists. He reiterated and elaborated upon the grounds on which leave to lodge an appeal in the Court of Appeal is sought, namely, that the court lacked jurisdiction to hear the appeal, and that proper service of summons had been effected in the matter. He also argued in favour of an order to stay execution pending appeal, citing the decision in *Charles Kariuki Njuri v Francis Kimaru Rwara* [2020] eKLR on relevant principles. On those grounds, counsel urged the court to allow the second Motion as prayed.

10. The court has considered the grounds laid out on the body of the respective Motions, the depositions in the affidavits on record and the submissions.
11. Starting with the first Motion that is seeking to stay execution of the judgment delivered by on 29th June, 2023 pending an appeal to the Court of Appeal, the 2nd Respondent primarily invoked Order 42 Rule 6 of the Civil Procedure Rules. Hence the consideration whether an arguable appeal has been demonstrated may not apply before this court as it would in the Court of Appeal under Rule 5(2) of the Court of Appeal Rules.
12. That said, it is trite that the courts have discretionary power to stay execution of a decree or order pending appeal, but the discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal* (supra). Order 42, Rule 6 of the CPR 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”.
13. Concerning the first condition, the judgment which triggered the first Motion was delivered on 29th June, 2023 and the said Motion presented on or about the 6th of July, 2023. Thus, the Motion was timeously filed.



14. Concerning the condition relating to substantial loss, the Court of Appeal in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 stated that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

15. 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.”

16. The decision of Platt Ag JA (as he then was), in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th 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.”

17. 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.”

18. 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 L J in *Wilson -Vs- 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.”

19. The court considered the averments by the 2nd Respondent’s depositions on the manner in which it stands to suffer substantial loss, alongside the resisting arguments by the Appellant. The decree herein is not a money decree, but at the heart of the dispute is the suit property herein. Allegations have been made on both sides concerning its current ownership status. What cannot be disputed is that the value of the property could be relatively substantive, and its dissipation through alienation pending appeal would probably swing the scales in a manner adverse to the party who eventually succeeds in the appeal. The object of orders staying execution is to preserve the subject matter of the dispute, so that the intended appeal is not defeated or rendered nugatory. The court must therefore balance the competing interests of the parties pending appeal.
20. While it is true that the Appellant has a judgment in his favour, which would potentially pave way for re-opening and retrial of the suit which was before the lower court, it is also apparent that the 2nd Respondent is intent on challenging the said judgment, on appeal. The Appellant and the 2nd Respondent claim to possess separate Vesting Orders in respect of the suit property. In the circumstances, the court is of the view that it would be best to have the status quo maintained until the appeal is heard and determined by the Court of Appeal, so as to prevent a situation where the appeal, if successful, is rendered nugatory.
21. On the provision of security for the due performance of the decree it is noteworthy that the 2nd Respondent complied with the orders earlier given by the court on 10th July, 2023 requiring it to deposit the sum of Kshs.100,000/- as security for costs.
22. In view of all the foregoing, the court is persuaded that conditional stay of execution ought to be granted to the 2nd Respondent as sought in the first motion.
23. Proceeding now to the second Motion which was brought by the 1st Respondent, the live prayer therein is seeking leave of the court to appeal against the judgment delivered on 29th June, 2023. The court observed that whilst the 1st Respondent additionally submitted in respect of a prayer for stay of execution, the prayer in the motion seeking stay of execution was sought in the interim and is spent. Be that as it may the live prayer stood unopposed in the absence of any responses on the part of the Appellant as well as the 2nd Respondent to the second Motion.
24. While an appeal does not lie as of right from an order arising from Order 5 of the CPR, and which was a key issue in the judgment of this court, it appears that the 1st Respondent has also elected to challenge the jurisdiction of this court post judgment, as no such challenge was raised during the canvassing of the appeal before this Court.
25. Section 75(1) of the CPA spells out the orders from which a party can lodge an appeal as of right, as follows:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;



- (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) an order under section 64;
 - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) any order made under rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.”

26. Order 43 of the CPR states that:

- “(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
- (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance).
 - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);



- (p) Order 27, rules 3 and 10 (payment into court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
- (3) An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

27. The Court of Appeal spelt out the considerations attaching to an application seeking leave to file an appeal, in the case of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR . The Court stated inter alia that::

“Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered. Some guidance in that regard was given by this Court in *Machira t/a Machira & Company Advocates v Mwangi & Anor.* [2002] 2 KLR 391 as follows: -

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”

See also *Mohamed Yakub & Anor t/a Yasser Butchery vs. Mr. Badur Nasa & 2 others* Civil Appl. NAI. 285/99 (ur) where the court added that the approach will naturally differ



depending on the category and subject matter of the decision and the reason for seeking leave to appeal. It is those principles that we shall apply in this matter.”

28. Thus, the decision whether to grant leave to appeal where such appeal does not lie as of right is a matter of the court’s discretion, which ought to be exercised judicially. In this case, the grounds upon which leave was sought include the question of jurisdiction and service of summons. The issues proposed for appeal cannot peremptorily be described as having “no realistic prospects of succeeding “. Underlying the dispute between the parties are latent questions of public interest arising from the circumstances leading to the initial suit in the subordinate court. On this score alone, the court is persuaded to exercise its discretion in favour of the 1st Respondent by granting the second Motion.
29. Consequently, the court will make the following orders:
- a. The Notice of Motion dated 6th July, 2023 is hereby allowed and an order to stay execution granted, upon the condition that the Applicant (2nd Respondent) whether by itself or through its agents/servants/employees shall refrain from any acts of commission or omission, or undertaking any steps in any manner adverse to the suit property, pending the determination of the appeal in the Court of Appeal.
 - b. The Notice of Motion dated 17th August 2023 is similarly allowed in terms of prayer 1). Accordingly, leave is hereby granted to the 1st Respondent to appeal against the judgment delivered herein on 29th June, 2023.
 - c. In the circumstances of the case, the parties shall each bear their own costs in respect of the respective Motions.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Njongoro

For the 1st Respondent: Ms. Misiati h/b for Mr. Ojenda

For the 2nd Respondent: Mr. Njugi

C/A: Erick

