



REPUBLIC OF KENYA



**Mutuura v Royal Group Industries Limited (Civil Appeal
E070 of 2023) [2024] KEHC 5176 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E070 OF 2023
SM MOHOCHI, J
MAY 14, 2024**

BETWEEN

GEOFFREY GICHURA MUTUURA APPLICANT

AND

ROYAL GROUP INDUSTRIES LIMITED RESPONDENT

RULING

1. There are two Notice of Motion Applications filed by the Appellant/Applicant for the Court's determination. The Application dated 2nd November, 2023 and the Application dated 24th November, 2023 both brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 (1) and (2) and Order 51, Rule 1 of the [Civil Procedure Rules](#).
2. The Application dated 2nd November, 2023 seeks:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of Nakuru Civil Appeal No. 70 of 2023 there be a stay of execution of the judgement delivered on 3rd April 2023 in Nakuru Civil Suit No. 626 of 2020.
3. The Application is supported by the Affidavit sworn by the Applicant himself on even date by stating that the Applicant was sued in Nakuru Civil Suit No. 626 of 2020 by the Respondent and that the Court found in favour of the Respondent for the sum of Kshs 6,200,000 vide Judgement dated 3rd April, 2023. He added that being aggrieved by the decision he preferred an appeal vide Memorandum of Appeal dated 14th April, 2023.
4. He stated further that, he also filed an application dated 8th May, 2023 in the Subordinate Court seeking stay of execution pending appeal. By the Ruling dated 6th October, 2023, the Court ordered



that the Applicant deposit the decretal amount in an interest earning account in the names of the advocates within 21 days thereof failure to which the application stood dismissed. He added that, he was aggrieved by the said Ruling and was also not in a position to raise the amount and the Respondent would proceed with execution which would be prejudicial to him.

5. He averred that, the amount was colossal and that if the Appeal is successful, the Respondent may not be able to liquidate the amount subjecting him to substantial loss. He however contended that, he was willing to abide by any reasonable conditions for security imposed by Court and was also willing to deposit his title deed for parcel known as LR. Gilgil/Gilgil Block 1/60328 (Kekoepy) as security. He argued that his appeal would be rendered nugatory should the Court decline to issue the orders sought.
6. The Court on 21st November, 2023 ordered that there be a temporary stay pending the hearing and determination of the Application, and that the Applicant does deposit 50% of the Decretal amount(s) in the Judgements/Decree of Nakuru CM's Court Civil Suit No. 626 of 2020 in a joint interest-bearing bank account in the names of the counsels on record within 21 days thereof.
7. The Respondent in its Replying Affidavit sworn on 9th January, 2024 by Zoher T. Dawoodbhai, Director of the Respondent opposed the Application. He deponed that, the Application does not meet the legal threshold for it to be allowed, is an abuse of the Court process, unmerited and that the Applicant has come to Court with unclean hands, is guilty of laches and undeserving of the orders sought.
8. He stated that, the Applicant has failed to comply with the Orders of 6th October, 2023 and has moved to Court seeking orders that had already been dispensed with in the Subordinate Court. He avers that the Applicant does not deny owing the Respondent Kshs 6,200,000 but has moved to Court to seek stay orders and he is yet to comply with the judgement or the stay conditions issued.
9. He argued that, security ought to be monetary in nature being a liquidated claim, and should be equivalent or more than the decretal amount, costs plus interests. The property Gilgil/Gilgil Block 1/60328 (Kekoepy) cannot be relied on as the value is not ascertained with no valuation report availed.
10. He further averred that, the Memorandum of Appeal lacks merit and therefore the Application too lacks merit and has been filed to frustrate the Respondent and prevent it from enjoying its judgement.
11. He nevertheless stated that, should the Court be inclined to allow the Application; the Applicant should pay the Respondent three quarters of the decretal sum within 21 days and the remaining amount be deposited in an interest earning account in the name of the advocates on record. Alternatively, should the Court be inclined to allow the Applicant furnish the title deed as security, the Applicant should furnish two title deeds for Gilgil/Gilgil Block 1/60328 (Kekoepy) and LR North West of Njoro township (original number, I.R. 40924) to strike a balance between the parties' interests.
12. It was his argument that, the Applicant has not advanced any good reason to allow the prayers sought. That the Respondent company is in a position to refund the decreed amount should the appeal succeed as it is in the business of manufacturing pipes and tanks and there is no chance of it failing to refund the amounts. He averred that the Application should be dismissed.
13. The second Application filed by the applicant is the Application dated 24th April, 2023 seeking: -
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to vary the terms of Order No. 3 of the directions issued on 9th November, 2023 and the same be substituted with an order that the Appellant/



Applicant does deposit his title deed for the land parcel known as LR Gilgil/Gilgil Block 1/60328 (Kekopey) in Court as security.

14. The Application is supported by the grounds listed on the face of the Application and the Supporting Affidavit of the Applicant himself on even date, annexed thereto. He averred that he has not been able to comply with the orders issued on 9th November, 2023 for him to deposit 50% of the decretal sum as he is unemployed with his health deteriorating. He deponed that he was however willing to depot his title to Gilgil/Gilgil Block 1/60328 (Kekopey) as security.
15. He argued that, should the Respondent proceed with execution; it would be prejudicial to him. That the property is worth Kshs 4.5 million as per the valuation report dated 21st November, 2023 which is more than 50% of the decretal amount and would be ideal to substitute the order of depositing 50% by alternatively depositing the original title.
16. The Respondent vide Replying Affidavit sworn on 9th January, 2024 by Zoher T. Dawoodbhai opposed the Application. He deponed and reiterated what was in his Affidavit in Response to the application dated 2nd November, 2023 and added that, the Applicant annexed medical documents after failing to comply with the Court's directions of 6th October, 2023 and 9th November, 2023. That the medical records did not excuse him from depositing security in monetary terms or portray his financial inability to settle the decretal amount or comply with the various orders issued.
17. He further added that the proposed security of title deed to Gilgil/Gilgil Block 1/60328 (Kekopey) can not be relied on as this is a monetary claim and that the valuation report is in doubt since the valuer was commissioned by the Applicant. Further that the amount of Kshs 4,500,000 is below the decretal amount and that the Applicant has deliberately failed to address the balance.
18. The Applicant on the other hand in response filed a further Affidavit sworn on 29th January, 2023. He stated that the reason for filing the Application dated 24th November, 2023 was because the Court did not consider his financial position and allow him to deposit the title deed which he was still willing to deposit. He argued that his health has been failing him and still not in a position to deposit the decretal amount as directed by the Court and not as an attempt at delay tactics or an attempt to abuse the Court process.
19. By an order of 14th December, 2019, the Court directed that both Applications shall be canvassed by way of written submissions. Both parties have complied.

Applicant's Submissions

20. The Applicant filed written submissions dated 29th January, 2023 on 30th January, 2023. It was submitted the application is merited as the Applicant has met hard financial times as well as health issues and a dip in his health condition has necessitated seeking specialized treatment in India. It was submitted that the Applicant has no other property that can be used as security or funds to deposit as security but was willing to deposit his title deed as security. He relied on the Court's pronouncement in *Nicholas Mwaka v Caroline Nthenya* (2019) eKLR where the Court considered the Application to have title deed used as security.

Respondent's Submissions

21. The Respondent filed separate submissions for the two Applications both dated 16th February 2024 and filed on 19th February, 2024 and a replica of each other. The Respondent submitted that the Appeal was not valid as the Memorandum of Appeal was not dated and relied in the case of *Emma Wambui*



- Mbuchu & 2 Others v Alpha Land Investment & 2 others* (2013) eKLR which addressed the issue of unsigned pleadings.
22. The other issue was that the Applicant has wanting conduct as he has on separate occasions defied Court orders which was aimed at frustrating the Respondent and delaying the fruits of its judgement.
23. It was the Respondent's contention that the Applications have not met the legal threshold for grant of orders of stay pending appeal as stipulated under the provisions of Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*. Reliance was placed on the following authorities: *RWW v EKW* [2019] eKLR, *Meteine Ole Kilelu & 19 Other v Moses K. Nailole* [2009] eKLR, *Kenya Shell Limited v Kibiru & Another* [1986] KLR 410 Civil Appeal No. 45 of 2015, *M'ndaka Mbiuki v James Mbaabu Mugwiria* (2016) eKLR, *Co-op Holdings Co-operative Society Limited v Migori Teachers Sacco Society Limited* [2016] eKLR, *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Service Ltd & 4 Others* [2015] eKLR, *Apar Industries Limited v Joe's Freighters Limited* [2015] eKLR.
24. Reasons whereof the Respondent prayed that both applications be dismissed for lack of merit.

Analysis and Determination

25. I have considered both applications, the grounds thereof, the affidavits and annexures. I have also considered the submissions together with case law cited by both counsel for parties. The issues for determination are
- i. Whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited.
 - ii. Whether the Court can vary the terms of Order No. 3 of the directions issued on 9th November, 2023
26. First and foremost, the Respondent has challenged the Appeal in the sense that there is no valid appeal for lack of a signature in the Memorandum of Appeal. From the Record, the Memorandum of Appeal is properly on record as the same is dated and signed.
27. As regards the first issue, the principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the *Civil Procedure Rules* which provides:
- “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.”
28. Therefore, an Applicant seeking orders for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned videlicet:
- i. that substantial loss may befall the Applicant unless the order is issued
 - ii. that the Application has been made without unreasonable delay,
 - 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. See *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu* [2021] eKLR.



Substantial Loss

29. For this Court to grant a stay of execution, the Applicant has to aptly establish what substantial loss he is likely to suffer. The Applicant stated that he would suffer substantial loss unless the execution was stayed. That the decretal amount was a colossal amount and the Respondent would be unable to refund him should his appeal succeed and that his appeal would this be rendered nugatory in the event that the Appeal succeeded.
30. The Applicant has claimed that the Respondent may not refund the decretal amount. He has to however demonstrate that the Respondent would not be in a position to refund the decretal amount should his appeal succeed. It is simply not enough to aver without supporting the allegations. Although Kshs 6,200,000 is not a small amount but merely making an allegation does not persuade the Court. See: *Michael Ntoutbi Mitheu v Abraham Kivondo Musau* (2021) Eklr the substratum of the dispute was sale on hire purchase of a truck of which the Applicant continues to enjoy without pay.
31. The Respondent to rebut the assertions, stated that it was in the business of making pipes and tanks and was in a position to refund the decretal amount should the Appeal succeed. Although the claims were not followed by facts the Respondent alluded to its financial ability those assertions can definitely not go unnoticed. Fear of execution cannot be considered as substantial loss. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, the Court stated;
- “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.”
32. From the foregoing the Court in this instant is not satisfied that the Applicant is likely to suffer substantial loss.

Unreasonable Delay.

33. Judgment herein was delivered on 3rd April, 2023. The first application was filed on 8th May, 2023 in the Subordinate Court which is about 36 days later. The next Application for stay of execution was filed on 7th November, 2023 which was thirty (30) days after the ruling of 6th October, 2023 by the Subordinate Court that issued conditional stay which was within the period of stay stipulated. As such, the Applicant has satisfied the timely threshold.

Security

34. This is what gave rise to the instant Applications since the Applicant claims he is not able to abide by the conditions set by Court on 6th October, 2023 and applied to be allowed to deposit a title deed as security to substitute the order of 9th November, 2023.
35. When it comes to security, the Applicant is required to furnish to the Court security for the due performance of the judgment debt should his appeal fail. This is stipulated in mandatory terms under the Provisions of Order 42 Rule 6. The Applicant pleaded hard economic times and a failing health.



He did not attach any financial records as proof of his inability to satisfy the security in monetary terms but attached a medical report dated 24th November, 2023 by Dr. F. Wainaina which indicated that the Applicant has been receiving treatment for Myocardial Infarction and Controlled Hypertension from the Provincial General Hospital Nakuru for the last 3 years and referred him for specialized treatment in Apollos Hospital India.

36. The Court is sympathetic with the Respondent's health issues however in the persuasive decision of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR the Court observed: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the Lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The Court would order for the release of the deposited decretal amount to the respondent in the appeal....

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.”

37. In all his affidavits, the Applicant clearly stated that he was willing and able to abide by the conditions set by Court for security. Yet he never abides by the conditions, but moves Court seeking to vary the conditions imposed. The Respondent submitted that the Applicant is deploying delay tactics in order to frustrate the Respondent and to prevent it from enjoying its judgement which the Court agrees with. There has been non-compliance with satisfaction of the judgment and decree for over one year, the orders of 6th October, 2023 and those of 9th November, 2023.
38. The Orders of 9th November, 2023 were to be satisfied within 21 days that is, by 30th November, 2023. The Applicant filed an application dated 24th November, 2023 seeking to review those orders. The Applicant offered to have his title deed deposited in Court as condition for grant of orders of stay. The Applicant has been weaponizing litigation by filing application after application and riding on temporary stay orders at the detriment of the Respondent.
39. The Applicant claims in his further affidavit dated 29th January, 2024 that he filed the Applications for failure of the Subordinate Court to allow his application to deposit a title. In *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (*supra*) the Court stated that it was not a matter the willingness but an issue of the Court to determine matters of security. The orders sought are



discretionary and the Applicant cannot dictate to Court what security to order. He is already in debt by way of judgement entered hence the term “judgement debtor”.

40. Further security must be one that serves the purpose. The dispute involved a liquidated amount, the proposed property is for the sum of Kshs 4,500,000 which is below the decretal amount. It would be unreasonable to order security to be an asset whose value is below the decretal amount and the valuation has been done by the Applicant without the input of the Respondent or the Court hence the value cannot also be ascertained. It would also be unfair to entertain the Applicant further in denying the Respondent fruits of its judgement, it would be delaying justice. The Court is not satisfied that the threshold of security has been met. It is on this pronouncement that the second issue thus fails.
41. In view of the foregoing and having regard to the rights of the parties, the Court hereby finds that the Applicant has failed to satisfy the conditions to warrant the grant of the orders sought in the Application dated 2nd November, 2023 and the Application dated 24th November and the Applications are consequently dismissed with costs.
42. The Applicant shall cause the Appeal to be set-down for admission, directions and hearing within the next sixty (60) days of today.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 14TH DAY OF MAY 2024.

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MOHOCHI S. M.

JUDGE

