



**UAP Insurance Limited v Nyabuto (Civil Appeal E041 of 2023)  
[2024] KEHC 5335 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E041 OF 2023  
SM MOHOCHI, J  
MAY 2, 2024**

**BETWEEN**

**UAP INSURANCE LIMITED ..... APPELLANT**

**AND**

**ROSE OSEBE NYABUTO ..... RESPONDENT**

**RULING**

1. This ruling determines the Notice of Motion dated and filed on 10<sup>th</sup> March, 2023 brought under the provisions of Rules 28, 29 and 30 of the Small Claims Court Rules, Order 42 Rule 6 of the Civil Procedure Rules, Section 3 of the Small Claims Act as well as Articles 159 (2) and 169 (6) of *the Constitution*.
2. The Appellant/Applicant seeks the following orders:
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. That this Honourable Court be pleased to grant stay of execution of the judgement/Decree dated 6<sup>th</sup> February 2023 entered in Nakuru SCCOMM E534 of 2022 Rose Osebe Nyabuto vs UAP Insurance Ltd pending the hearing and determination of the Appeal arising herefrom being Nakuru HCCA No E041 of 2023 UAP Insurance Ltd vs Rose Osebe Nyabuto.
  - v. That the costs of this application be provided for.
3. The Application is predicated on the grounds on the face of it and the Supporting affidavit of Eric Onderi, advocate. He deposes that judgement was delivered in Nakuru SCCOMM E534 of 2022 on



6<sup>th</sup> February, 2023 and a 30 day of execution granted and which was due to lapse on 9<sup>th</sup> March, 2023. The Applicant preferred an Appeal against the judgment in Nakuru HCCA No E041 of 2023 and filed it on 6<sup>th</sup> March, 2023.

4. He stated that the 30-day period of execution granted has since lapsed and that the Respondent is at liberty to execute the judgement. He contended that it would be in the interest of justice that there be stay of execution as the appeal has high chances of success and if the judgment is executed, the appeal shall be rendered nugatory and a mere academic exercise.
5. He further stated that Applicant filed an application for stay of execution on 7<sup>th</sup> March, 2023 which the Trial Court summarily dismissed on 8<sup>th</sup> March 2023 on account that it had been filed outside the 30 days period of stay of execution. He added that there was a clear arithmetic error as February 2023 had 28 days thus the application had been filed within the prescribed time. That the Applicant filed for review orders of the directions issued on 8<sup>th</sup> March, 2023 but the Court summarily dismissed the application on 9<sup>th</sup> March 2023 and directed the Applicant moves the High Court for orders of stay of execution.
6. He deponed that although the Applicant ought to move the lowest Court to deal with the application, the lowest Court has declined to exercise jurisdiction and referred the Applicant to the High Court. He added that Rule 30 of the Small Claims Court Rules, 2019, provides that a person aggrieved by the judgment and order of the Court may pursuant to Section 38 of the Act appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules. He deposed that Order 42 Rule 6 of the Civil Procedure Rules, 2010 gives the Court discretion to grant stay of execution pending the hearing and determination of the appeal and the trial Court was properly moved.
7. He stated that an application filed within 30 days has been held by Superior Courts to have been filed without undue delay. That the Appeal has appreciable chances of success and that if execution ensues, the appeal may be rendered nugatory. That the Respondent is a person of unknown means and may not refund the decretal sum if the same is paid to her and that the Applicant shall suffer substantial loss if the orders sought are not granted. He also contended that the Applicant is willing to comply with Court Orders or any conditions that may be imposed. That it would be fair in the circumstances that there be a stay of execution.
8. Opposing the Application for stay, the Respondent vide a Replying Affidavit sworn on 21<sup>st</sup> February, 2024 and filed on the 22<sup>nd</sup> February, 2024 contends that the power to grant or refuse and an application for stay of execution is discretionary. That the 30 days stay that had been given by Court lapsed within the time the Applicant was supposed to file an appeal and that the Court should not entertain an application that is intended to derail this matter and deprive a successful litigant the fruits of his judgments.
9. She added that the instant application does not meet the legal threshold for grant of stay of execution and no substantial loss has been demonstrated, the application is brought in bad faith which will greatly prejudice the Respondent and should therefore not be allowed.

### **Court's Directions**

10. The Court on 13<sup>th</sup> February, 2024 directed that the application be disposed by way of written submissions. The Respondent filed written submissions dated 21<sup>st</sup> February, 2024 on 22<sup>nd</sup> February, 2024. The Applicant's submissions are not on record.



## Respondent Submissions

11. The Respondent submitted that Order 12 Rule 7 provides for recourse by setting aside or varying a disputed order prior to appeal therefore the appeal is incompetent as there is no automatic appeal against a judgment entered under Order 12. In emphasizing that the application is an abuse of the Court process she relied on in the case of *Machira T/A machira & Co Advocates v East African Standard (No. 2) (2002) KLR 63*.
12. It was further submitted that the power to grant or refuse stay orders is discretionary and relied in *Victory Construction v BM (Minor suing through next friend one PMM) (2019) eKLR*. She opined that the Court should give effect to the overriding objectives as well as the principles of proportionality and equality of arms as was envisaged in *Vishram Ravji Halai v Thornton Turpin Civil Application No. 15 of (1990) KLR 365* which insisted on placing the parties to the suit before it on an equal footing.
13. It was the Respondent's contention that application has not met the conditions of security as required and propounded in *Arun C Sharma v Ashan Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR. Further that it was not enough to merely state substantial loss, one has to demonstrate substantial loss which according to the Respondent, the Applicant in this instant has failed to. She also submitted that commencement of execution does not amount to substantial loss and further reliance was placed in *Century Oil Trading Company v Kenya Shell Limited and Samur Trustees Limited v Gurdian Bank Limited Nairobi HCCC 795 of 1997*.

## Analysis and Determination

14. After carefully consideration of the evidence adduced, the parties' rival written submissions as well as the authorities relied on by the parties, what is for determination is whether the Applicant has met the threshold to grant the orders sought.

## Stay of Execution Pending Appeal

15. The principles on granting orders of stay of execution pending appeal are well settled and provided for under Order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 which provides:
  - “(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.”

16. The rationale behind granting orders of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties while still considering the circumstances of the case. On the same vein, the power of Court to grant or refuse stay of execution is discretionary as submitted and aptly emphasized by the Respondent.

17. The discretion should however be must not be exercised whimsically but judiciously. It ought to be exercised so as not to prevent a party pursuing an Appeal does not suffer irreparably should the decision be overturned on Appeal. This position was echoed by the Court of Appeal in *RWW v EKW* (2019) as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

- 9. 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.”

18. Therefore, the import of the above is that, for this Court to grant the orders sought the Applicant has to demonstrate;

- a. that it will suffer substantial loss unless the orders are not granted.
- b. that the application has been made without unreasonable delay, and;
- c. that such security as the Court orders for the due performance has been given.

#### Undue Delay

19. The Applicant lodged an Appeal against the Ruling of 6<sup>th</sup> March 2023 within a month of delivery and that was within the statutory timeline. The instant Application was filed on 10<sup>th</sup> March 2023 which was also within 30 days after delivery of the decision. There has therefore been no undue delay.

#### Substantial Loss

20. The Court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, observed that:

“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.”

21. In the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the Court thus held that:-

“... 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 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 fails.

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 judgement 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.”

22. In this instance the Applicant has not demonstrated any substantial loss to be suffered should the orders sought not be granted as was espoused in *Arun C Sharma v Ashan Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR.

“that it was not enough to merely state substantial loss, one has to demonstrate substantial loss which according to the Respondent, the Applicant in this instant has failed to. She also submitted that commencement of execution does not amount to substantial loss and further reliance was placed in *Century Oil Trading Company v Kenya Shell Limited* and *Samur Trustees Limited v Gurdian Bank Limited* Nairobi HCCC 795 of 1997”.

23. This Court notes that no offer to deposit security of costs has been made by the Applicant.
24. This Court in balancing the rights of the parties is persuaded that the conditions for grant of stay of execution of judgment have not been met constraining me to disallow the Application for want of merit.
25. Therefore, the Notice of Motion dated and filed on 10<sup>th</sup> March, 2023 is dismissed for want of merit. The Applicant may set down the Appeal for admission, hearing and determination.
26. Costs follow the event and thus the costs of this Application are awarded to the respondents.

It is so Ordered

**SIGNED, DELIVERED AT NAKURU**



ON THIS 2<sup>ND</sup> DAY OF MAY, 2024

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MOHOCHI S.M

JUDGE

