



**Watu Nominees Company Limited v Philis Nanzala Jumbe, Cynthia Nasimiyu Wekulo
(Suing as the Administratrixes of the Estate of Douglas Wekulo Lugongo) & another
(Civil Appeal 81 of 2023) [2024] KEHC 17078 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 81 OF 2023
DKN MAGARE, J
MAY 15, 2024**

BETWEEN

WATU NOMINEES COMPANY LIMITED APPELLANT

AND

**PHILIS NANZALA JUMBE CYNTHIA NASIMIYU WEKULO (SUING AS
THE ADMINISTRATRIXES OF THE ESTATE OF DOUGLAS WEKULO
LUGONGO) 1ST RESPONDENT**

KHATIB SWALEH ABDALLAWHEELCHAIR 2ND RESPONDENT

RULING

1. This is a ruling in respect of an application for stay pending Appeal. A sum of Ksh 1,600,000/= was deposited as security pending Appeal. The court hitherto found that stay is necessary and granted the same pending hearing of Appeal to this court. They are now aggrieved by the decision of this court.
2. The Application for stay pending appeal to the court of Appeal on 18/1/2024. was made within a reasonable time. Order 42 rule 6 provides for stay pending Appeal as doth: -

6. Stay in case of appeal

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

3. The court awarded an amount of Ksh. 1,524,376/=. There is already deposited a sum of Ksh 1,600,000/- as security pending the hearing of this Appeal. I did not find any response related to the capacity of the 1st Respondent to refund.

4. The first Respondent submitted on the issue of stay and relied on the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR, where the court stated as doth; -

“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 corner stone of both jurisdictions for granting a 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.”(Per Platt Ag JA)

It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.(per Gichugi Ag JA).

5. This court having determined the case is, it does not have jurisdiction to deal with and is not required to deal with, chances of success. The only issues are: -



- a. Whether the Applicant as provided security
 - b. Whether the Respondent is capable of refunding.
6. I have already noted that there is no evidence that the 1st Respondent is capable of refunding in the event the Appeal is successful. Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* stated as follows regarding stay pending Appeal:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The Respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

6. In the end security is sufficient. It has been offered, the Respondent should not be worried about the security. If the Appeal is delayed, interest is will suffice to mollify him. I find that the Application dated 18/1/2024 is merited and allow the same.

Determination

6. The Upshot of the foregoing, I make the following orders: -
- a. There be stay pending Appeal on condition that a sum of Ksh. 1,600,000/= hitherto deposited as security pending this Appeal is retained as security pending determination of the Appeal to the court of Appeal.
 - b. In case the security had not been deposited the same be deposited within 30 days from today
 - c. In default execution do issue.



d. Costs be in the intended Appeal

**DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 15TH DAY OF MAY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

..... for the Appellant

..... for the Respondent

Court Assistant- Brian

