



Board of Management Kamuwongo Mixed Day Secondary School & another v Mwanzia & 4 others (Civil Appeal E050 - E054 of 2024) [2024] KEHC 6760 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E050 - E054 OF 2024**

FR OLEL, J

JUNE 7, 2024

BETWEEN

THE BOARD OF MANAGEMENT KAMUWONGO MIXED DAY SECONDARY SCHOOL 1ST APPLICANT

JOHN MWANTHI MWANZIA 2ND APPLICANT

AND

ROSEMARY MWIKALI MWANZIA 1ST RESPONDENT

JOSHUA SENGE MWANZIA & JOSEPHINE NDULULU MWANZIA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE STANLAUS MWANZIA SENGE) 2ND RESPONDENT

LYDIA KALEE NZUKI & ROSEMARY MWIKALI MWANZIA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE GIFT NZUKI) 3RD RESPONDENT

LYDIA KALEE NZUKI & ROSEMARY MWIKALI MWANZIA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE FREDRICK MWANGANGI NZUKI) 4TH RESPONDENT

JOSHUA SENGE MWANZIA & JOSEPHINE NDULULU MWANZIA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE AGNES KOKI MWANZIA) 5TH RESPONDENT

RULING

A. Introduction

1. For purposes of determining the Application(s) for stay of execution pending Appeal, in all the above five (5) Appeal files as indicated in the heading above, this court has made the *suo moto* decision of



consolidating the said Application(s) and determining the said application(s), under one ruling as the appellants/applicants as against who judgment was entered in the same entity/person and all the claims arise from the same cause of Action/ accident which occurred 2nd April 2022 as a result of which the 1st respondent got seriously injured, while the 2nd to 4th Respondent lost their loved ones.

2. The application(s) before this court are the Notice of Motion application(s) dated 8th March 2024 brought pursuant to provisions of Section 1A, 3A, 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules* and all other enabling provision of law. The applicants pray that this court be pleased to issue an order of stay of execution of the judgment/decree of Honourable P Wechuli -Principal Magistrate, delivered on 1st February 2024 in the various primary files pending the hearing and determination of the appeal(s) filed herein and that costs be provided for. The said application(s) are supported by the supporting affidavit of one Joy Muthoka, a legal officer, working at UAP Old Mutual, the Applicants insurer, while the respondents have filed their various replying Affidavits in opposition to the same.

B. The Application.

3. The Applicants seeks for an order of stay of execution of various decrees issued by the trial court dated 1st February 2024, where Liability was determined at 80.20 in favour of the respondents and quantum determined as follows;
 - a. KithimaniPMCC No E087 of2023 – Kshs.4,060,000/=
 - b. KithimaniPMCC No E066 of2023- Kshs.2,582,460/=
 - c. KithimaniPMCC No E068 of2023- Kshs.1,621,500/=
 - d. KithimaniPMCC No E069 of2023-Kshs.5,580,841.60/=
 - e. KithimaniPMCC No E067 of2023- Kshs.1,523,015.60/=
4. The appellants state that, being dissatisfied by the said judgments/decrees, they had filed various appeals to challenge the trial courts finding on quantum. The said appeals as filed were not frivolous and raised strong arguable grounds of appeal, which had high chances of success. Thus, unless stay of execution was granted the appeals as filed would be rendered nugatory.
5. Further, the Appellants deponed, that unless stay was granted, the respondents would move to execute and attach their goods, which act would cause them substantial loss and damage. The respondents were not persons of means and would not be in a position to re-fund the decretal sums paid out if the Appeals filed turned out to be successful. The said applications had been brought without undue delay and the orders sought if issued would not prejudice the respondents.
6. The Respondents did oppose the various application as filed, through their various replying Affidavits all filed on 17th April 2024. They deponed that these appeals were filed in bad faith, and the Appellants had deponed to falsehood and half-truths meant to mislead court. The appellants had not offered security as mandatorily required, and even after their advocate wrote to the Appellants Advocate seeking to have them provide the same, they had remained non comital. Before the trial court, they had recorded a consent on liability and the awards issued were within range as compared to other cases of similar nature and therefore were not excessive. The application(s) as filed were therefore not meritorious and they prayed for the same to be dismissed.



C. Analysis & Determination

7. I have carefully considered the Application(s), Supporting Affidavits, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should grant stay of execution of the various Judgments/decrees dated 1st February 2024 issued in Kithimani SPMCC No E066-E069 & E087 all of 2023.
8. Stay of Execution is provided under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
9. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance
10. These principles were enunciated in [Butt vs Rent Restriction Tribunal](#) [1979], where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
11. In *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
12. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), to enable court give effect to its overriding objective. While in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions, the Court in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See [Suleiman v Amboseli Resort Limited](#) [2004] 2 KLR 589.

i. Undue Delay

13. As to whether the Applications have been filed without undue delay, the judgment appealed against was delivered on 1st February 2024. The Appeals herein was filed on 27th February, 2024 and this application also filed on 14th March, 2021. Thus, it can be said that this appeal and application for stay of execution have been file timeously.

Substantial Loss

14. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd* (in liquidation) [2004] 2 EA 331 stated that:
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.’
15. In the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR the court expressed itself as hereunder:
- “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.”



16. The same position was adopted by *Kimaru, J in Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

17. The respondents did file their replying affidavit(s) to rebut the averments made by the applicants in the supporting affidavit, but never filed any affidavit of means to show or prove that indeed if paid the decretal sum and the appeal is successful, they will be in a position to refund the decretal sum paid to him.

18. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

19. Guided by the above authorities and in the absence of the requisite proof from the Respondent(s) that they are person(s) of means, I find that the Appellants have satisfied this court that they will suffer substantial loss if the entire decretal sum is paid to the Respondent(s) before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

ii. Security

20. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was 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 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.”

21. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
22. The issue of adequacy of security was dealt with by the Court of Appeal in *Ndubiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.

So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

23. Though applicants did not state in their pleadings that, they are ready and willing to provide security, on 17.04.2024, when the matter was mentioned in court, their counsel Mr Nzioka did confirm that he had spoken with Mr Bosire counsel for the respondents and agreed to have the decretal sums deposited in a joint interest earning account. The court at this stage notes that there was a consent on Liability was entered into at the ration of 80: 20 in favour of the respondents. The appeal under these circumstances, would be basically as against quantum awarded.



Disposition

24. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since the same is based against quantum awarded, I do grant stay of execution of all the decree(s) herein on condition that;
- a. The Appellants/Applicants do pay the respondents the following sums;
 - i. Machakos Hcca No E050/2024-Kshs 1,000,000/=
 - ii. Machakos Hcca No E051.2024-Kshs 700,000/=
 - iii. Machakos Hcca No E052/24-Kshs 500,000/=
 - iv. Machakos Hcca No E053/24- Kshs 1,000,000/=
 - v. Machakos Hcca No E054/24- Kshs 500,000/=
 - b. The Appellants are also directed to provide a bank guarantee for Ksh.4,000,000/= and the same shall be valid for the entire period of the Appeal. The same shall be filed in Appeal file Machakos Hcca No E050/24 but valid for all the Appeals filed herein.
 - c. These conditions are to be met within 45 days from the date of this ruling or in default, these application(s) shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
25. The costs of these Applications will be in the cause.
26. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 7th day of June, 2024

In the presence of: -

Mr. Achola for Appellant

Mr. Nzioki Respondent

Sam Court assistant

