



REPUBLIC OF KENYA



KENYA LAW
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**Mabati Rolling Mills Limited & another v Kariuki (Civil Appeal
333 of 2023) [2024] KEHC 8247 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 333 OF 2023**

**HM NYAGA, J
JULY 10, 2024**

BETWEEN

MABATI ROLLING MILLS LIMITED 1ST APPELLANT

MACHE HARDWARE STORES LIMITED 2ND APPELLANT

AND

FREDRICK KARIUKI RESPONDENT

RULING

1. Vide an application dated 23rd February, 2024 brought under Section 63(e) of the *Civil Procedure Act*, Order 22 Rule 51(2), Order 42 Rule 6, 7 & 9 of the Civil Procedure Rules, Article 159 of *the Constitution*, the Applicants seeks for Orders that: -
 1. Spent
 2. Spent
 3. There be a stay of execution of the Decree delivered on 26th October, 2023 in Nakuru SCC0MM/ E579/2023- Fredrick Kariuki Vs Mabati Rolling Mills And Another pending the determination of the Appeal.
 4. The costs of this Application to abide the outcome of the Appeal.
2. The Application is premised on grounds on its face and supported by an affidavit of Fredrick Kariuki, a Senior Legal Officer of the 1st Appellant sworn on 20th February, 2024.
3. He deponed that the Applicants were aggrieved by the Judgement of the lower court delivered on 26th October, 2023 and have since filed the present Appeal.



4. That the Appellants filed an application for Stay of Execution on 23rd November, 2023 and obtained interim stay of execution orders on 14th December, 2023. However, the application was dismissed on 19th February, 2024 and interim orders were discharged.
5. He believes the Applicants have an arguable appeal with a high chance of success and they will suffer substantial loss if stay of execution is not granted since the respondent will commence execution of the said judgement.
6. He averred that the current means of the Respondent is unknown and there is no material to suggest that he is able to pay back the decretal sums should the appeal succeed, and that there is therefore the need for a stay of execution orders to avoid the appeal being rendered nugatory.
7. He stated that the 1st Applicant is willing to furnish security as this court may reasonably order including depositing in a joint account at least a half of the decretal sum.
8. In opposing the Application, the Respondent filed statement of grounds of opposition dated 4th March, 2024 reproduced verbatim as follows: -
 1. That the instant application is premature, misconceived, incompetent and otherwise legally untenable.
 2. That judgement and decree of the Honourable Court herein, which is the subject of the instant application, was entered in favour of the Respondent herein. Consequently, the judgement and the attendant Decree are incapable of an order of stay of execution sought, whatsoever and/or howsoever. In any event, the appellants/applicants have not enumerated and or highlighted the nature and/or kind of loss same is exposed to suffer. Consequently, the allegations pertaining to and/or apprehension of imminent loss, is speculative and remote.
 3. Be that as it may, the Appellants/Applicants have neither established nor satisfied the requisite conditions and/or ingredients, inter alia proof of substantial loss to warrant grant of the order of stay of execution of the Decree pending the hearing and determination of an intended Appeal to the Honourable High Court.
 4. Nevertheless, the instant Application does not meet and/or measure up to the threshold set by the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010.
 5. Notwithstanding the foregoing, the instant application does not raise and/or capture any reasonable cause of action whatsoever.
 6. In any event, the instant application is an attempt by and/or at the instance of the Appellants/Applicants to delay, obstruct and/or otherwise defeat the due process of the Honourable Court.
 7. In the premises, the Notice of Motion Application herein is devoid of merits, whatsoever and/or however.
9. The Application was canvassed through written submissions. Only the Respondent's submissions are on record.

Respondent's Submissions

10. On whether the judgement and decree herein are capable of being stayed, the respondents submitted in the negative for reason that the Appellant's suit was dismissed with costs to him. In support of his



submissions, reliance was placed on the case of Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR

11. On whether the applicants have satisfied the conditions for grant of stay of execution, the Respondent submitted that the Applicants have not demonstrated the substantial loss they will suffer in the event the stay of execution is declined.
12. The respondent posits that the applicant has failed to demonstrate that they have an appeal with overwhelming chances of success.
13. In buttressing his submissions, the Respondent relied on the cases of Philip Kiprotich Tuitoek vs Edna Jebiwott Kiplagat & 2 others [2020] eKLR & Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR.
14. The respondent also posited that the applicants have not provided or security or any intention of giving out the finances and he prayed that the Application be dismissed with costs.

Analysis and Determination

15. The sole issue for determination is whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
16. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules.
17. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -
 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 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 of stay shall be made under sub rule (1) unless-
 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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”
18. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
19. These principles were enunciated in Butt vs Rent Restriction Tribunal [1979] eKLR 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: -



1. 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.
 2. 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.
 3. 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.
 4. 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.
20. As to what amounts to substantial loss, this has been the subject of consideration by courts. In *James Wangalwa & another vs 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”
21. On whether the applicants will suffer substantial loss, they have argued that the respondent means is unknown and he may not be able to refund the decretal amount if their appeal succeed. Further, the applicants have stated that they stand at the risk of being executed against. The Respondent did not swear any replying affidavit to controvert this position.
22. In the case of *National Industrial Credit Bank Ltd. v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held as follows:
- “This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden”.
23. Similarly, in the case of *Lawrence Musyoka Ndambuki & Another v Daniel Kato Ndambuki* [2018] eKLR the court held:



47. The decretal amount is substantial and the Respondent has no known source of income. Further, the Respondent has not demonstrated that he would be able to refund the said amount in the event the Applicants appeal is allowed.
 48. There is no sworn affidavit of means that has been served upon and or on record.
 49. The law as it is requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts to the Respondent to demonstrate, by way of affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the appeal is successful they shall be in a position to reimburse/refund the decretal sum".
24. Further in *Equity Bank Ltd vs Taiga Adams Company Ltd* [2006] eKLR, the Court again stated that the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution proceeds or is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he has no means of doing so.
 25. In view of the foregoing, the Applicants have successfully demonstrated the substantial loss they will suffer if stay is not granted.
 26. On timeous filing of the application, the lower court judgement was delivered on 26th October, 2023 while the instant application was filed on 23rd February, 2024. Prior to filing of this application, the Appellants deponed that they had filed a similar application on 23rd November, 2023 before the lower court and they obtained interim orders of stay of 14th December, 2023, however, their application was dismissed on 19th February, 2024. They did not annex either a copy of that particular application or a ruling to substantiate this position. What has been annexed is a certificate of urgency dated 18th January, 2024 and a supporting Affidavit of one Fridah Kwamboka Machora which prima facie show that they had filed such an application and obtained the said interim orders. This position has not been controverted by the Respondent herein. I therefore find that upon dismissal of the stay of application on 19th February, 2024, the Applicants filed this application on the said date of 23rd February, 2024. I am therefore satisfied that this application was filed without delay.
 27. However, it is noted that the applicants only moved the lower court after the respondent had commenced execution in the said court. Judgment had been delivered on 26th October 2023 and they moved that court on 23rd November 2023. For this they have to bear the costs so incurred in the execution process.
 28. Regarding the issue of Security of costs, the Appellants have shown willingness to offer security by depositing half of the decretal amount in a joint account.
 29. The Applicants have therefore satisfied all the conditions necessary for the grant of orders of stay of execution pending Appeal.
 30. The court has to strike a balance between the interests of the respondent who has a Judgment in his favour, and the applicants who are exercising their right to appeal. In the case of *Absolom Dova vs Turbo Transporters* [2013] eKLR that: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any advantage but administers the justice the case deserves. This is in recognition that both parties have rights; the appellant to appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree holder to the decree which includes



full benefits under the decree. The court in balancing the two competing rights success on their reconciliation which is not a question of determination.”

31. Having considered the matter, I am inclined to allow the application dated 23rd February, 2024 on the following terms:-
- i. A stay of execution of the judgment of the lower court delivered on 26th October, 2023 is hereby granted on condition that the applicants do deposit the decretal sum in an interest earning account in the joint names of the advocates for the parties herein within 30 days from the date hereof.
 - ii. In default the order for stay of execution shall stand discharged.
 - iii. The appellant/applicant to file and serve the record of appeal within the next 30 days.
 - iv. For reasons given hereinabove, the applicants shall bear the auctioneer’s costs, if any, to be agreed or taxed.
 - v. Costs of this application, subject clause IV above, shall abide by the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 10TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Mr. Miruka for Respondent

No appearance for Applicant

