



**My Credit Limited v Kamau (Civil Appeal E225 of 2021)
[2024] KEHC 8098 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E225 OF 2021**

RC RUTTO, J

JULY 5, 2024

BETWEEN

MY CREDIT LIMITED APPELLANT

AND

JOHN WAMBURU KAMAU RESPONDENT

RULING

1. This is an application for stay of execution filed under a certificate of urgency dated 3rd May 2023. From the record of proceedings, I note that the matter was first before court on the 11th May 2023 where the court directed that:
 - a. the same be served upon the respondent within 7 days
 - b. the response be filed and served within 7 days upon service
 - c. mention on 11th June 2023 for further directions
2. Following the above directions, the matter has been before court on four different occasions the latest one being on 3rd June 2024 when the application was placed for determination during the Rapid Result Initiative period. On this day counsel for the appellant was present and he sought to rely upon the written submissions dated 7th August 2023 and prayed for a ruling date. There was no appearance on the part of the respondent although they had filed their submissions dated 23rd May 2024. It is against this background that make this ruling.
3. The application seeks a stay of execution of judgment and the decree made on 20/4/2023 by Justice L.M. Mugambi pending the hearing and determination of the intended appeal. It is supported by the grounds on the face of the application, the supporting affidavit of David Wangai dated 3rd May 2023 as well as submissions dated 7th August 2023.



4. The applicant states that on 20th April 2023 the court (Justice L.M. Mugambi) without notice and in the absence of counsel for the applicant rendered judgment, as a result of which counsel was unable to make an oral application for stay of execution. Further, that the applicant has met all the prerequisites for granting stay of execution pending appeal as the appeal is arguable, and it will be rendered nugatory if stay is not granted. The applicant relied on the case of *Elena D.Korir v Kenyatta University* [2014] eKLR
5. In support of the argument that the appeal raises arguable grounds, the applicant states that the court erred in holding and finding that the contract between parties was null and void; the invalidity of contract between parties based on disbursement of Kshs 1,500,000/- was neither pleaded nor dealt with at the lower court; the court erred by finding that the security placed by the respondent was illegal and directed that all transactions related to its transfer were null and void in blatant disregard to the law of contract and position of parties.
6. On the ground of irreparable loss, it was submitted that the respondent had in the past failed to repay the amount advanced to him by the applicant. Further that the respondent admitted to indebtedness and has not sworn any affidavit of means to disclose that he is in a position to clear the outstanding loan balance hence, if execution is allowed to proceed, the intended appeal will be rendered nugatory as it will be impossible to recover anything. He seeks to rely on the case of *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi* (Milimani) HCMCA No. 1561 of 2007
7. On the issue of security, the appellant undertook to preserve the collateral pending the hearing of the application and the intended appeal. He submits that if the Respondent regains the property and the appeal succeeds then it will be impossible to recover the loan amount plus interests and other charges.
8. The Applicant urged the court to find that it had satisfied all the requirements for granting of stay pending appeal as the application was made timeously, the appeal is arguable, it is ready to abide by the condition of not disposing of the property.
9. In opposing the application, the respondent filed a replying affidavit sworn on 13th June 2023 by John Wamburu Kamau and submissions dated 23rd May 2024. He avers that the application has not met the requisite requirements for granting orders for stay and should be dismissed with costs. He relies on the case of *Butt v Rent Restriction Tribunal* [1979]
10. The respondent submits that the applicant only states that he will suffer. He has failed to show how he will suffer substantial loss in the event stay is not granted. That the applicant has not demonstrated that there is imminent danger of the judgment being executed and has not shown a scenario or any loss or irreparable damage that he is likely to suffer since both parties ought to satisfy certain conditions towards each other. The respondent makes reference to the case of *Kenya Shell Ltd v Kiburi & Another* Civil Appeal No. NAI 97 of 1986 [1986]eKLR.
11. The respondent also refers to Order 42 of the Civil Procedure Rules to urge that the applicant must furnish security as due performance on any decree that may arise. To support this the respondent cites the case of *Arun C Sharma v Ashana Raikundalia & Co Advocates* [2014] eKLR. He submits that the title being in the possession and name of the applicant can be deposited in court as security pending the determination of the appeal.
12. It is their submission that the judgment is two fold; the return of the title and the completion of the payment of the loan balance. They contend that the applicant will not suffer substantial loss since they are still in possession of the parcel of land that is valued higher than the outstanding loan amount, and there is no imminent danger of the judgment being executed.



13. The respondent has urged the court to exercise discretion in balancing the rights of both parties. He agrees with the applicant that indeed the application was filed in good time.

Analysis and Determination

14. The main issue for determination is whether an order for stay of execution is merited and should be allowed.

15. The applicant seeks stay of execution pending appeal as set out under Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#) which provides as follows: -

- “(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. [Emphasis mine]

16. The power of a court to grant stay of execution is discretionary as correctly submitted by the Respondent. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal succeed. (see [Butt v Rent Restriction Tribunal](#) [1979]).

17. The Court of Appeal in [Visbram Ravji Halai v Thornton & Turpin](#) Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It 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 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions that the applicant needs to satisfy namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security

18. The background of this matter is that the respondent, John Wamburu Kamau, filed a claim against the applicant before the lower court. Aggrieved by the determination by the lower court, the applicant lodged an appeal before the High Court. The appeal was heard and judgment delivered on the 20th



April 2023. The applicant, aggrieved by the judgment of the High Court, appealed to the Court of Appeal and now seeks that the execution of the judgment be stayed pending the determination of the appeal. It is common ground that this application was filed within reasonable time.

19. The applicant urges this court to find that the appeal is arguable and it will be rendered nugatory. They allege that the appeal raises the following arguable questions on the finding that the contract between parties was null and void; the question of invalidity of contract between parties based on disbursement of Kshs 1,500,000/- was neither pleaded nor dealt with at the lower court and the court raised it suo moto; the court erred by finding that the security placed by the respondent was illegal and directed that all transaction related to its transfer were null and void in blatant disregard to the law of contract and position of parties.
20. On the other hand, the respondent's position is that the applicant has not demonstrated that he will suffer substantial loss in the event that stay is not granted. That the applicant has not demonstrated that there is imminent danger of the judgment being executed and has not demonstrated a scenario or any loss or irreparable damage that they are likely to suffer since both parties ought to satisfy certain conditions towards each other but only stated that he will suffer.
21. Having analysed the submissions of parties, I am of the view that indeed the applicant has established arguable grounds to warrant a stay of the execution. At this juncture, it is not on me to decipher whether the arguments are merited and only one argument is sufficient to satisfy this ground.
22. As to whether the applicant will suffer irreparable loss, it is observed that both parties ought to satisfy certain conditions towards each other. The respondent is required to refund any money received from the appellant within 45 days of the date of the judgment failure of which the appellant is at liberty to execute. On the other hand, the appellant is required to ensure the title to Thika Municipality/Block 19/1042 reverts to the respondent.
23. It is the applicant's submission that he wishes to keep holding the title as collateral while the respondent submits that the title currently in the name and possession of the applicant be deposited in court as security pending the determination of the appeal.
24. From the above I decipher the issue of irreparable loss lies in the title deed, the applicant wishes to keep the title as a collateral, while the respondents submits that the title be remitted to court as security since it is worth more than the balance owed an argument not disputed by the applicant. I also note the applicant argument that the respondent has previously failed to pay money due to them. Having considered these arguments I find that the balance of probability tilts in favour of allowing this application in order to preserve the substratum of the intended appeal and to allow each party to progress their respective arguments in the intended appeal. Having found that the applicant will suffer irreparable loss, it follows that the grant of stay will prevent the appeal being rendered nugatory.
25. Order 42 requires the provision of security by the applicant. From my reading of the parties' submissions the parties are agreeable that the security is comprised in the title Thika Municipality/Block 19/1042. Consequently, the Notice of motion application dated 3rd May 2023 is allowed in the following terms;
 - a. Stay of execution is hereby granted pending hearing of and determination of this appeal on condition that, the original Title document in respect of the property known as Thika Municipality/Block 19/1042 currently in possession of the applicant be submitted to Court as security within 14 days.
 - b. The stay orders will stand discharged in the event that the applicant fails to comply with the condition set out in (a) above.



- c. Costs of the application to abide by the outcome of the appeal before the Court of Appeal.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 5TH DAY OF JULY 2024

For Appellants: Ms. Mutua H/b For Mr. Abida

For Respondent: Nyamu H/b For Mr. Gachau

Court Assistant: Peter Wabwire

