



**Njimu v Jaswant Singh & Brothers Ltd & 2 others (Civil Appeal E563 of 2021) [2024] KEHC 9601 (KLR) (Civ) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E563 OF 2021**

**CW MEOLI, J**

**JULY 23, 2024**

**BETWEEN**

**JANE WANGUI NJIMU ..... APPELLANT**

**AND**

**JASWANT SINGH & BROTHERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**ELEGANCE DESIGNERS & PRINTERS LTD ..... 2<sup>ND</sup> RESPONDENT**

**HENRY BETT ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the Notice of Motion dated 5<sup>th</sup> February, 2024 (the Motion) brought by Jane Wangui Njimu (hereafter the Applicant) supported by the grounds set out on its body and the affidavit of the Applicant. Seeking to stay the warrants of arrest and order of committal to civil jail issued against her in execution of the decree issued in Milimani CMCC No. 5448 of 2019 (the suit) pending the hearing and determination of the present appeal. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); and Orders 40 and 42, Rule 6 of the Civil Procedure Rules (CPR).
2. In her supporting affidavit, the Applicant stated that she had previously filed an application dated 29<sup>th</sup> June, 2023 before the High Court seeking inter alia to stay execution of the judgment delivered by the lower court in the suit, and further seeking an order for her release from civil jail. That the said application was on 5<sup>th</sup> July, 2023 certified urgent and therefore fixed for interparties hearing on 19<sup>th</sup> July, 2023, and in the interim, the court issued an order for the unconditional release of the Applicant. That when the application subsequently came up in court on the scheduled 19<sup>th</sup> day of July, 2023 the court was not sitting.



3. The Applicant stated that meanwhile, there were two (2) applications pending before the lower court, namely, the application dated 3<sup>rd</sup> July, 2023 and that dated 8<sup>th</sup> September, 2023. She proceeded to state that when applications came up before the lower court on 31<sup>st</sup> January, 2024 the former dated 3<sup>rd</sup> July, 2024 was dismissed vide a ruling delivered on the said date, resulting in the reinstatement of warrants of arrest previously issued against her. She claimed that the ruling delivered on 31<sup>st</sup> January, 2024 contradicted the orders above made by the High Court on the 5<sup>th</sup> of July, 2023 for her unconditional release from civil jail. Moreover that the application before this court dated 29<sup>th</sup> June, 2023 is still pending and that unless the stay order sought is granted, she stands to suffer substantial loss by way of infringement of her right to liberty and to her properties through execution.
4. Elegance Designers & Printers Ltd and Henry Bett (hereafter the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) resisted the Motion by way of a replying affidavit sworn by the latter Respondent on 20<sup>th</sup> February, 2024, in his capacity as Director of the former Respondent. The 3<sup>rd</sup> Respondent deposed inter alia, that the Applicant herein was the plaintiff in the suit, which suit was eventually dismissed by the lower court, the court finding in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein. That since then, the Applicant has filed multiple applications in a bid to evade settling the decretal sum awarded by the lower court.
5. For instance, the 3<sup>rd</sup> Respondent deposed, the Applicant filed an application dated 8<sup>th</sup> September, 2021 before the lower court, to stay of execution of the judgment pending appeal upon which a stay was granted on the condition that the said Applicant deposits a sum of Kshs. 200,000/- in a joint interest earning account, but which conditions were not complied with. That the Applicant subsequently filed the application dated 29<sup>th</sup> June, 2023 (referenced hereinabove) before the High Court seeking a similar order for stay, which application she has made no efforts at setting down for hearing. That various other applications were subsequently filed before the lower court, seeking a myriad of orders. It is the averment by the 3<sup>rd</sup> Respondent therefore, that the above actions by the Applicant constitute an abuse of the court process and hence she is not entitled to the stay order now being sought.
6. Directions were previously given by this court on 20<sup>th</sup> March, 2024 for the parties to canvass the Motion by way of written submissions. However, when the parties subsequently attended court on 9<sup>th</sup> April, 2024 it was noted that there had been non-compliance on their part. In the circumstances, the parties' respective advocates presented oral arguments in respect of the Motion, with counsel for Jaswant Singh & Brothers Ltd (hereafter the 1<sup>st</sup> Respondent) indicating that his client would not be opposing the Motion.
7. Mr. Kago counsel for Applicant by and large relied on the grounds laid out in the Motion as well as the Applicant's supporting affidavit, adding that the Applicant is willing to comply with any conditions that will be imposed by the court on the provision of security. Counsel further argued that the execution process has commenced by way of attachment of the Applicant's goods, and that unless stay is granted, the appeal will be rendered nugatory. That the Applicant has pledged one of her properties and has further provided sureties and was desirous to liquidate the decretal amount by way of instalments. That the Respondents herein do not stand to be prejudiced if the stay order sought is granted.
8. In response, Mr. Thiong'o counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents similarly relied on the replying affidavit on record. Counsel went on to reiterate that the Applicant has filed various other applications, one of which resulted in issuance of a conditional stay order by the trial court, in respect of which there was non-compliance on her part. That the said application has since been dismissed. Counsel further reiterated that the Applicant has essentially avoided meeting her obligations pursuant to the lower court decree and that as it stands, his clients are claiming the decretal sum of Kshs. 2,600,000/-



from the Applicant. Counsel asserting that there is no demonstration of good faith on the part of the Applicant, since the filing of the present appeal. Based on those arguments therefore, counsel urged that the Motion be dismissed.

9. In rejoinder, Mr. Kago contended that part of the decretal amount has been recovered from the Applicant but that accounts thereof have not been provided by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, in confirming the exact amounts recovered. Counsel further contended that the Applicant has indeed come to court with clean hands and offered to settle what was outstanding by way of monthly instalments.
10. The court has considered the material canvassed in respect of the Motion.

The Motion essentially seeks to stay of execution of the lower court judgment. Order 42, Rule 6 of the Civil Procedure Rules (CPR) provides that:-

- “(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”.

11. Concerning the first condition being whether the relevant application has been brought without unreasonable delay, the Applicant annexed a copy of the ruling delivered by the lower court on 31<sup>st</sup> January, 2024 to her affidavit (annexture marked “JWN-2”). Therein the lower court upon dismissing the Applicant’s application dated 3<sup>rd</sup> July, 2023 seeking leave to enable her settle the decretal sum by way of instalments, proceeded to allow the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ application dated 8<sup>th</sup> September, 2023 for reinstatement of the warrants of arrest issued against the Applicant. The said ruling triggered the instant Motion, filed on or about the 5<sup>th</sup> of February, 2024. The court is therefore satisfied that the Motion has been timeously filed.
12. As regards the second and key condition, namely, demonstration of likelihood of substantial loss, the Court of Appeal case in the renowned case of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410 held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”



13. The Court proceeded to state on the subject that :

- “ 1. ....
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

14. The decision of Platt Ag JA (as he then was), in the Shell case in the humble view of the court sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”

15. The learned Judge continued to observe that:

“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 cornerstone of both jurisdictions for granting 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.”

16. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson v Church (No 2)* [1879] 12ChD 454 at page 458 where he said:-‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.’”



17. The court considered the depositions by the Applicant as to how she stands to suffer substantial loss, specifically that unless the stay order is granted the warrants of arrest will be effected and her right to liberty threatened or impinged upon, thereby rendering the appeal nugatory. As earlier stated, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on their part stated inter alia, that the stay order sought is purely intended to avoid settlement of the decretal sum. The said Respondents further stated that the Applicant previously filed various applications seeking a variety of orders including stay of execution pending appeal, and yet she did not comply with any conditions set.
18. The record herein shows that the Applicant had filed a memorandum of appeal on 7<sup>th</sup> September, 2021 to challenge the lower court judgment delivered on 27<sup>th</sup> August, 2021 by which the trial court dismissed the Applicant's claim while allowing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' counterclaim. It is apparent that subsequently, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents commenced the execution process against the Applicant.
19. The Applicant subsequently moved the High Court by way of an application dated 29<sup>th</sup> June, 2023 seeking to stay of execution pending hearing and determination of the appeal. When the said application came before Nyagah, J. on 4<sup>th</sup> July, 2023 the Judge certified it urgent and scheduled it for inter partes hearing on 19<sup>th</sup> July, 2023, whilst granting an order in the interim, for the Applicant's unconditional release from civil jail. The application appears to be still pending. The Applicant further annexed a copy of the letter dated 10<sup>th</sup> October, 2023 (annexture marked "JWN-3") to support her assertion that attempts were made to have the application dated 29<sup>th</sup> June, 2023 set down for hearing.
20. The Applicant had subsequently filed the application dated 3<sup>rd</sup> July, 2023 before the lower court, seeking inter alia, leave to settle the decretal sum by way of instalments. The said application was heard together with an application dated 8<sup>th</sup> September, 2023 filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, seeking reinstatement of the warrants of arrest issued against the Applicant. As earlier mentioned, the lower court by way of its ruling delivered on 31<sup>st</sup> January 2024 dismissed the former application whilst allowing the latter one.
21. Thus, it is apparent that subsequent to the order made by Nyagah, J. on 5<sup>th</sup> July, 2023 for the unconditional release of the Applicant, the warrants previously issued were reinstated pursuant to the lower court ruling of 31<sup>st</sup> January, 2024. However, there is no firm evidence that the orders of Nyagah J which were temporary in nature were extended after the initial hearing date collapsed. Suffice to say that execution whether by attachment of goods or committal to civil jail is a lawful process. However, because execution by way of committal of the judgment debtor to civil jail interferes with the judgment debtor's freedoms, it may well be impossible for the successful appellant to reverse the consequences in the event of her appeal succeeding. Thus, in this case the likelihood of substantial loss rendering the Applicant's appeal, if successful, nugatory is evident.
22. On the provision of security for the due performance of the decree or order, the Applicant expressed willingness to comply with any conditions imposed by the court in that regard. She has complied with the court's order of 9<sup>th</sup> April, 2024 granting interim stay on condition that the Applicant deposits the sum of Kshs. 800,000/- in court by close of business on 24<sup>th</sup> April, 2024.
23. Consequently, the Motion dated 5<sup>th</sup> February 2024 is allowed subject to the following conditions: -
  - a. The Applicant shall deposit a further sum of Kshs. 500,000/- (Five Hundred Thousand) into court by COB on 23.08.2024, in order to raise the total security furnished to the sum of Kshs. 1,300,000/- (One Million Three Hundred Thousand).
  - b. The Applicant shall fully prosecute this old appeal within 4 (four) months of today's date, failing which it shall stand automatically dismissed for want of prosecution with costs to the



2<sup>nd</sup> and 3<sup>rd</sup> Respondents. In furtherance of this condition, the court shall soon hereafter give directions on the appeal, noting that the Applicant is yet to file her Record of Appeal in compliance with the court's order of 9.04.2024.

24. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are awarded the costs of the Motion dated 5.02.2024 in the circumstances.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Ms. Mbugua h/b for Mr. Njuguna

For the Respondents: N/A

C/A: Erick

