



REPUBLIC OF KENYA



**Njoroge v Wambui (Civil Appeal 364 of 2023) [2024] KEHC 8258 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 364 OF 2023**

**HM NYAGA, J**

**JULY 10, 2024**

**BETWEEN**

**MESHACK NDEGWA NJOROGE ..... APPELLANT**

**AND**

**ANTHONY NJUGUNA WAMBUI ..... RESPONDENT**

**RULING**

1. Before me is an Application dated 20<sup>th</sup> December, 2023 brought under Section 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* wherein the Applicant herein seeks for orders That;
  - a. Spent
  - b. Spent
  - c. This Honourable Court be pleased to stay execution of the judgment/decree dated 21<sup>st</sup> December, 2023 issued in in Nakuru SCCCOMM No. 357 of 2022 pending the hearing and determination of the intended Appeal herein;
  - d. Costs of this Application be awarded to the Appellant/Applicant.
2. The Application is supported by grounds set out on the face of it and the Supporting Affidavit of the applicant.
3. In a nutshell, the applicant states that he was dissatisfied with the judgment and decree of the subordinate court and he has lodged an appeal.
4. He believes the Respondent may commence execution proceedings against him any time.
5. He believes his appeal raises weighty issues of law and facts, has high chances of success and will be rendered nugatory if execution is allowed to proceed.



6. He depones that the Respondent is a man of straw who may not be able to refund the decretal sum in the event his appeal succeeds hence he will suffer substantial loss if execution is not stayed.
7. He is willing to abide by any conditions that this court may impose for the due performance of the decree.
8. On 18<sup>th</sup> March, 2024 the Respondent sought for three days to file his response but he has not done so.
9. The Application was canvassed by way of written submissions. Only the Applicant's submissions are on record.
10. The Applicant urged this court to allow the Application considering the same is unopposed.
11. On the issue of substantial loss, he submitted that there is no contrary position that the respondent is not a man of means and may not be able to refund the decretal sum should his appeal succeed hence he will suffer substantial loss if execution is not stayed. To buttress his submissions, he cited the case of *ABN Amro Bank NK vs Le Monde Foods Limited*, Civil Application No. 15 of 2002 (Nrb).
12. On whether the application has been filed timeously, the Applicant submitted in the affirmative for reason that the subordinate judgement was delivered on 21<sup>st</sup> November, 2023 and the instant application was filed on 20<sup>th</sup> December, 2023.
13. On security, the Applicant submitted that respondent is holding his household items valued at Ksh. 74,000/= which sum surpasses the decretal sum and therefore such items are sufficient security.
14. He posited that he has met all the requirements for grant of stay of execution. He urged the court to allow the application with costs to him.

### **Analysis & Determination**

15. The sole issue for determination is; Whether stay orders sought should be granted.
16. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:

“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 orders set aside.”
17. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
  - a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. 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.



18. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 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:-

“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.

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.

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.

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.”

19. Under the head of substantial loss, an applicant must clearly state what loss, if any, he stands to suffer. This principle was expressed in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410. Platt, JA which set out two different circumstances when substantial loss could arise as follows: -

“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 this 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....”

20. 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.

21. The Applicant contended that his appeal will be rendered nugatory should execution commence against him. This court therefore at this stage should only be concerned with the question of whether or not the appeal will be rendered nugatory. The annexed memorandum of appeal raises triable issues and the same will be rendered nugatory should the decision of the appellate court overturn that of the trial court.

22. I find that the applicant has therefore succeeded on this particular limb.



23. On whether the application has been filed timeously, it is undisputed that the lower court judgement was delivered on 21<sup>st</sup> November 2023. The instant application was filed on 20<sup>th</sup> December, 2023. It is thus clear that this application has been filed expediently.
24. On the issue of security, the applicant submitted that the Respondent is holding his households' items valued at Ksh. 74,000/= and that these items are sufficient security. This position has not been controverted by the Respondent. The Applicant further deponed that he is willing to abide by the reasonable conditions as may be directed by this Honourable Court.
25. The determination of what amounts to a suitable security is a matter of court's discretion. In *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another* [2018] eKLR, the court stated that:
- “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security....”
26. Going by the above, I find that the Applicant has similarly succeeded on this limb, by submitting himself to the discretion of the court.
27. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that: -
- “The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 is without merit.”
28. The Applicant herein has, in my opinion, succeeded on all the limbs of his application. I therefore allow the application on the following terms;
- a. The appellant/applicant to file and serve the record of appeal within the next 30 days.
  - b. There will be a stay of execution of the decree of the lower court pending the determination of the appeal, on condition that the entire decretal sum be deposited in a joint interest earning account in the names of the advocates for the parties herein court within 30 days of the date hereof.
  - c. In default of orders above, the stay orders shall stand vacated without further reference to the court.
  - d. The costs of this application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Jeniffer



Ms Kimoriot for Respondent

No appearance for Applicant

