



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthee v Ndegwa & another (Civil Appeal E018 of 2021)  
[2024] KEHC 9909 (KLR) (6 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9909 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E018 OF 2021  
S MBUNGI, J  
AUGUST 6, 2024**

**BETWEEN**

**FREDRICK MUTHEE ..... APPELLANT**

**AND**

**PETER MAINA NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**PETER WAIRIA MAHENIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 11th November 2022 seeks for orders for stay of execution of the judgement and decree delivered on 26th April 2021 in Nyeri CC No. 152 of 2017 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 14th December 2021.
3. The applicant's case is that the orders to deposit 50% of the decretal sum by way of bank guarantee in court within 14 days be enlarged as compliance with the stay conditions pending hearing and determination of the application.
4. The parties canvassed the application by way of written submissions. The applicant contended that the court had jurisdiction to grant stay under Order 42 of the *Civil Procedure Rules* meted out by discretion. That the memorandum of appeal raised triable issues that merit consideration by the court and if the stay was not granted and time not enlarged the appeal will be rendered nugatory and will suffer irreparable damage.
5. The applicant further submitted that the application was brought without unreasonable delay, it was filed 8 months after the impugned judgement and as at the time party and party bill of costs by the respondent had not been filed and decree had not been issued.



6. The applicant further contends that the ability to furnish security should not give an unfair advantage to the appellant and that they have attached a bank guarantee from Family Bank.
7. The applicants placed reliance on: *Global Tours & Travels Ltd Nairobi* HCWC No. 43 of 2000, *Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Kilach* (2003) KLR, *Denniss Mogambi Mangar v AG & 3 others* (2011) (UR 175/2011), *Butt v Rent Restriction Tribunal* (1982) KLR 417, Nairobi Civil Application No. 238 of 2005 *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* UR, *Kenya Hotel Properties Ltd v Willesden Properties Ltd* Civil Application No. 322 of 2006 and *Water Resources Management Authority v Kyrstalline Salt Ltd* (2018) eKLR et al.
8. It is the respondent's case that pursuant to the judgement the application had been overtaken by events as the execution had already proceeded by way of Notice of Motion dated 5th December 2022. That the instant application was only brought to the respondent counsel via email and period to grant the applicant to comply had since lapsed and likewise orders for the stay.
9. Further the respondent contended that no order of stay was feasible unless the court had extended the period granted and in any event no material had been disclosed to warrant extension of period to comply. Further that the respondent had been kept from enjoying the fruits of her judgement for almost 2 years.

### **Analysis and Determination**

10. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by both counsel for their respective clients.
11. The main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:
 

“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.
13. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
14. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”



15. The court, in [RWW v EKW](#) [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court, when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. In [Elena Korir v Kenyatta University](#) (2012)eKLR, the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd* (1993)KLR 365, where the Court of Appeal held that, the High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely;- sufficient cause, substantial loss would ensue from a refusal to grant stay. The applicant must furnish security, the application must be made without unreasonable delay. In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”

17. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

18. As to what substantial loss is, it was observed in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, that:

“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.”

19. It is sufficient that if an applicant seeking a stay of execution demonstrates that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such a decretal sum would render his appeal nugatory if he or she was successful. (See [G. N. Muema P/A \(516\) Mt View Maternity](#)



Ɖ Nursing Home v Miriam Maalim Bisbar Ɖ Another (2010) eKLR , National Industrial Credit Bank Ltd v Aquinas Francis Wasike Ɖ Another (2006) eKLR.)

20. Guided by the above authorities, I do find that the applicants have demonstrated that if the decretal amount is paid out, there is likelihood that, if they succeed in this Appeal, they may not recover the said amount from the respondent, who did not file any affidavit of means and thus will suffer irreparable loss and damage. On the security, the Appellants indicate that they are willing to furnish the court with a bank security from Family Bank taking into account the fact that no such security had been offered in deciding the application.
21. On whether or not the application was brought without undue delay the judgement was delivered on 21st April 2021 and the applicants notice of appeal filed on 6th May 2021. Unreasonable delay depends on the circumstances of each case. In Jaber Mohsen Ali Ɖ Another v Priscillah Boit Ɖ Another the court held;-

“The question arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be an unreasonable delay depending on the judgement of the court and any other order given thereafter.”

22. I do find that there was no inordinate delay.
23. The applicant is enjoined to provide security as well. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer on security must come from the applicant as a price of stay.
24. The importance of complying with the said requirement was well emphasised in Machira T/A Machira Ɖ Co. Advocates v East African standards (2002)KLR 63, where it was held that;-

“The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

25. It is my considered view that proof of substantial loss and proof that the appeal will be rendered nugatory have been established as stated above. This is espoused further in the case of Global Tours and Travels Ltd WC No. 43 of 200 where it was held that;-

“Whether or not grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interests of justice to order a stay, the court should essentially weigh pros and cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought timeously.”



26. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent. In other words, the court should consider the interest of both parties. (See; Kenya Shell Ltd v Kibiru & another (Supreme); Mukuma v Abuoga (1988) KLR 645.)
27. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant/issue the following orders;
- a. An order of stay of execution of the Judgment/decree issued in Nyeri CC No. 152 of 2017 is hereby granted pending the hearing and determination of this appeal on condition that the applicants pay the respondent a sum of Ksh.263,062/= and provide a bank guarantee for the balance of the decretal amount being Kshs.263,062/=:, which bank guarantee will be specific to this Appeal and shall be valid for the entire duration of the Appeal.
  - b. The appellant shall have 30 days within which to comply with order (a) above and In default, the orders staying execution of the decree issued in Nyeri CC No 152 of 2017 shall lapse and the respondent shall be at liberty to execute.
  - c. The costs of this Application will be in the cause.

Right of appeal 30 days explained

**SIGNED, DELIVERED & DATED AT KAKAMEGA VIRTUALLY THIS 6TH DAY OF AUGUST 2024.**

.....

**HON JUSTICE. S. MBUNGI**

**JUDGE.**

Court:

Ruling read in absence of the Parties/Advocates.

Court assistant – Elizabeth Angong’a

Right of appeal 30 days.

