



REPUBLIC OF KENYA



**Mwangi & another v Mundia (Civil Appeal E009 of 2021)  
[2024] KEHC 9908 (KLR) (6 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E009 OF 2021  
S MBUNGI, J  
AUGUST 6, 2024**

**BETWEEN**

**FRANCIS WAHOME MWANGI ..... 1<sup>ST</sup> APPELLANT**

**FRANCIS W. CHEGE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANGELICA WANJIRU MUNDIA ..... RESPONDENT**

**RULING**

1. The application dated 23rd April 2021 seeks for orders for stay of execution of the judgement and decree delivered on 22nd March 2021 in Nyeri CMCC No. 345 of 2015 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 18th June 2021.
3. The applicant case is that they are aggrieved by the judgement, where the trial court awarded the Respondent Kshs. 100,000/ for pain and suffering, kshs. 100,000/ for loss of expectation of life, kshs. 3,257,496 for lost years and kshs. 101,400/ for special damages totaling Kshs. 3,558,896/ plus costs and interests at court rates. They are apprehensive that the respondent may proceed to levy execution for the substantial decretal amount and as such if stay is not granted they stand to suffer substantial loss since the respondent's financial capability to refund the substantial amount in case the appeal succeeds is unknown.
4. The applicants further averred that they can only offer a Bank guarantee that will be provided by a reputable bank within the Republic, and that the application was made in good faith and will not cause any prejudice to the respondent.
5. Opposing the application for stay pending appeal vide a replying affidavit contends that the application is unfair and unjust. That she was a woman of means and is able to pay the decretal sum in the event the



- appeal is unsuccessful and the application lacks merit since it has been brought in bad faith with the intention of delaying her from enjoying the fruits of the judgement and should be dismissed with costs.
6. The parties canvassed the application by way of written submissions. The applicants in their submissions contended that the appeal had a high chance of succeeding and the court should be guided by the doctrine of stare decisis. They further submitted that if the said stay of execution is not granted the applicant appeal will be rendered nugatory and the applicants will be suffer irreparable damage as the respondent may proceed to execute as there are no stay condition order granted in this owing to the reason that the same was delivered electronically in the absence of both parties. It is imperative that the honourable court stays the judgement so as to safeguard the appeal at the high court.
  7. The applicants further submitted that they are apprehensive that the decree is for a substantial sum of money and if paid to the respondent the applicants are apprehensive that they will not be able to recover the whole sum. That the ability to furnish security should not give an unfair advantage to the applicants.
  8. The applicants placed reliance on: *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 et al.
  9. It is the respondent's case that none of the grounds set under Order 42 Rule 6 of the Civil Procedure Rules 2010 have been met, the applicant has not demonstrated what loss he stands to suffer, no decree has been attached to persuade the court that indeed execution is imminent and no such security has been furnished. No substantial loss may be visited upon the applicants as the respondent is a large scale farmer and should the decretal sum be paid and it turns out that the applicants are successful in the appeal then the respondent has the means and ability to refund the same as she is not a man of straw.
  10. That there is no way a monetary decree can be rendered nugatory if paid to a successful litigant and that the applicant is only aimed at denying the respondent the enjoyment of the fruits of her judgement.
  11. The respondent avers that the instant application is a delaying tactic made in bad faith that is misconceived, incompetent, lacks merit and an abuse of the court process and ought to be dismissed with costs.

### **Analysis And Determination**

12. 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.
13. The main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
14. 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.
15. 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.
16. 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.”
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. On his part, the applicant has not addressed the issue of stay of execution but instead delved into the merits of the appeal. This is evident from a scrutiny of the authorities relied on by the applicant which as earlier stated address setting aside of orders of a trial court.



20. 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.”

21. 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”

22. On whether or not the application was brought without undue delay the judgement was delivered on 22nd March 2021 and the application filed on 23rd April 2021. Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another v Priscillah Boit & 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.”

23. As observed no explanation has been given for the delay in filing this application. The applicant is enjoined to provide security as well. The offer of security made in satisfaction was as bland as it could get. 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 & 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 not 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. In the upshot I hereby disallow the application and dismiss it with costs to the respondent.

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

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**HON. JUSTICE. S. MBUNGI**

**JUDGE.**

**Court:**

Ruling read in absence of the parties and the Advocates.

Court Assistant – Elizabeth Angong’a

