



A One Kenya Trading Company Limited v Macsim Cargo Services Limited (Civil Appeal E143 of 2024) [2024] KEHC 11085 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E143 OF 2024
JK NG'ARNG'AR, J
SEPTEMBER 24, 2024**

BETWEEN

A ONE KENYA TRADING COMPANY LIMITED APPELLANT

AND

MACSIM CARGO SERVICES LIMITED RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion application dated 25th June 2024 under Certificate of Urgency pursuant to Order 42 Rule 6, Order 51 Rule 1 & 3 of the Civil Procedure Rules 2010 and Section 3A, 3B of the *Civil Procedure Act*. The Applicant/Appellant seeks that this honourable court be pleased to issue an order of stay of execution of the judgment and decree issued on 18th April 2024 pending the hearing and determination of the appeal herein and that there be no orders as to costs.
2. The application is premised on grounds on its face and the Supporting Affidavit of Maurice Oyugi sworn on 25th June 2024 that the Respondent is in the process of executing the judgment and decree dated 18th April 2024 obtained in Mombasa Chief Magistrates Court Civil Suit No. 670 of 2020. That the Appellant/Applicant has already filed a Memorandum of Appeal and a Record of Appeal, and that the appeal is arguable with high chances of success. That failure to grant stay of execution pending hearing and determination of the appeal may render it nugatory, and that the Respondent stands to suffer no harm or prejudice if the orders sought herein are granted.
3. In opposition, the Respondent filed a Replying Affidavit sworn on 26th August 2024 by Robinson Mbaka, the Director of the Respondent that the Appellant/Applicant filed the application when the stay period had lapsed. That the Appellant/Applicant avers that the appeal has high chances of success but does not give special circumstances which will make the appeal succeed. That the Appellant/Applicant has failed to establish what loss they would suffer and they have also not presented adequate and proper evidence of the prejudice they would suffer if the decree is executed.



4. The Respondent further averred that the Appellant/Applicant has not indicated that they are ready, willing and able to furnish such reasonable security. That the application therefore ought to be dismissed with costs. That however, if the court is inclined to grant the orders sought by the Appellant/Applicant, the Appellant/Applicant should be ordered to deposit the decretal sum in a joint interest earning account of the parties' advocates on record.
5. The application was canvassed by way of written submissions. The Appellant/Applicant in their submissions dated 12th July 2024 on whether the appeal has merit and a high chance of success relied on the Court of Appeal decision in *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 Others* (2013) eKLR where the learned judges stated the principles to be applied in considering an application for stay of execution. That the appeal lodged is meritorious, arguable and raises pertinent issues of law and unless stay of execution is granted, the entire appeal will be rendered nugatory. The Appellant/Applicant submitted that the Respondent intends to execute the decree against them but the Respondent's physical and financial means are unknown. The Appellant/Applicant is apprehensive that if the substantial decretal amount is paid to the Respondent, the Respondent will not be in a position to refund the same if the intended appeal is successful. That the Appellant/Applicant shall then suffer irreparable loss and damage. The Appellant/Applicant relied on Order 42 Rule 6 (2)(a) of the Civil Procedure Rules and the decisions in *Esther Wanjiru v Jackline Arege* (2014) eKLR.
6. On whether the Appellant/Applicant are ready and willing to furnish security, the Appellant/Applicant relied on Order 42 Rule 6(2)(b) of the Civil Procedure Rules which provides that the applicant has the obligation to furnishing security as the court may order for the due performance of such decree or order as may ultimately be binding on him. The Appellant/Applicant cited decisions in *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others* (2012) eKLR, *Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR and *G. N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* (2018) eKLR. The Appellant/Applicant therefore prayed that this court allows their application for stay of execution pending the appeal.
7. The Respondent in their submissions dated 26th August 2024 contended that the application herein and the Memorandum of Appeal were not served upon them, therefore they did not have a chance to argue out the application and only became aware of it when they were served with submissions on 3rd July 2024. That at that point in time, they had already initiated the execution process and incurred costs. That the application was therefore made with unreasonable delay. The Respondent also submitted that the Appellant/Applicant does not state that there will be substantial loss if stay of execution pending appeal is not granted. To support this position, the Respondent relied on the decisions in *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* (2022) eKLR, *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* (2014) eKLR and *Nyatera v Nyakundi*, Civil Appeal No. E033 of 2022 (2023) KEHC 3086 (KLR).
8. The Respondent argued that the Appellant/Applicant did not indicate their readiness to furnish security pending the appeal but stated in their submissions that they were ready and willing to do so. The Respondent maintained that submissions cannot take the place of evidence. The Respondent relied on the decision of [*Chege v Gachora, Civil Appeal No. 265 of 2023*](#) on the purpose of security under Order 42 of the Civil Procedure Rules. That the court in granting stay has to carry out a balancing act between the rights of the two parties and that the Memorandum of Appeal does not raise any arguable points of law or fact. The Respondent therefore prayed that the Appellant's application be dismissed with costs.



9. I have considered the Appellant/Applicant's Notice of Motion application dated 25th June 2024, the Respondent's Replying Affidavit sworn on 26th August 2024 and submissions by both parties. The issue for determination is whether the Appellant/Applicant's application for stay pending appeal is merited.
10. According to the Appellant/Applicant, the threshold for grant of stay has been met. However, the Respondent is of the position that the application was filed with unreasonable delay, that the Appellant/Applicant has not stated that substantial loss will be suffered if stay is not granted, that the Appellant/Applicant did not indicate readiness to furnish security pending appeal, and that the Memorandum of Appeal did not raise any arguable points of law or fact.
11. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides for stay of execution pending appeal 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 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 referred may apply to the appellate court to have such order set aside.
 2. No order for stay of execution shall be made under sub rule (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.
12. This court relies on the holding in *Nyatera v Nyakundi (Civil Appeal E033 of 2022)* [2023] KEHC 3086 (KLR) (16 March 2023) (Ruling) where it was held as follows: -

“... an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.”
13. This court notes that the impugned judgment of the lower court was delivered on 18th April 2024. The Appellant/Applicant filed the Record of Appeal on 27th May 2024 while the application herein was filed on 26th June 2024. According to this court, the time within which the application was filed cannot be deemed to be unreasonable.
14. On the one hand, the Appellant/Applicant submitted that the Respondent's physical and financial means are unknown and that if the decretal amount which is substantial is paid to the Respondent, he may not be in a position to refund it. That further, they appeal may be rendered nugatory if it succeeds where the stay of execution was not granted. The Respondent on the other hand argued that the Appellant/Applicant has not satisfactorily proven that there will be substantial loss.



15. This court has relied on the decision in *Tabro Transporters Ltd. v Absalom Dova Lumbasi* (2012) eKLR that: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

16. On the issue of security, this court cites the holding in *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

17. In addition to the sentiments of the court in the holding above, this court has the discretion to make orders on security for the interest of justice taking into account the fact that it is important to keep money in an interest earning account because it depreciates in value.

18. Additionally, upon perusal of the Memorandum of Appeal, I find that the Appellant/Applicant have demonstrated that they have sufficient grounds for seeking stay of execution pending appeal.

19. Accordingly, this court allows the Appellant/Applicant’s Notice of Motion application dated 25th June 2024 and grant orders of stay of execution of the judgment and decree issued on 18th April 2024 in Mombasa Chief Magistrates Court Civil Suit No. 670 of 2020 in the following terms: -

- a. That the Appellant/Applicant shall within 30 days deposit the decretal sum into an interest earning account in a reputable commercial bank to be held by advocates for both parties.
- b. That the Appellant/Applicant shall set down the appeal within 30 days from the date hereof.
- c. That there be stay of execution subject to (a) above in default execution to proceed.
- d. Costs shall be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH SEPTEMBER 2024

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J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

Ayugi Advocate for the Appellant



Mokua Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

