



REPUBLIC OF KENYA



KENYA LAW
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**Nyagaka & 2 others v Ngeno (Civil Appeal 49 of 2023)
[2024] KEHC 11127 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL 49 OF 2023
RL KORIR, J
SEPTEMBER 23, 2024**

BETWEEN

ALFRED NYAGAKA 1ST APPLICANT

DENNIS ONDIEKI RATEMO 2ND APPLICANT

JOHN LEKAKENY KONGU 3RD APPLICANT

AND

BENARD KIBET NGENO RESPONDENT

RULING

1. The Applicants filed their Notice of Motion Application dated 13th October 2023 which sought the following Orders:
 - i. Spent.
 - ii. Spent
 - iii. That this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on 7/9/2023 and all consequential orders arising therefrom pending the hearing and determination of the Appeal.
 - iv. That this Honourable Court be pleased to issue an order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs 657,897/= only as security pending the hearing and determination of HCCA 49 of 2023.
 - v. That this Honourable Court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
 - vi. That costs of this Application be provided for.



2. The Application was brought under sections 1, 1A and 3A of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rules 4, 6 and 7, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#). The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Alfred Nyagaka on 13th October 2023.

The Applicants' case.

3. The Applicants stated that Judgment in Bomet CMCC No. 49 of 2018 was delivered on 7th September 2023 in favour of the Respondent to the tune of Kshs 657,897/=. That they were dissatisfied with the Judgement and filed an Appeal in this court. They further stated that their Appeal had raised triable issues and had a high chance of success.
4. It was the Applicants' case that the decretal amount was high and they would suffer substantial loss if the Respondent commences execution proceedings. That in the event this court overturns the Judgement of the trial court, they may never recover the decretal sum as the Respondent's ability to refund the amount was unknown.
5. The Applicants stated that they were ready and willing to furnish the court with a Bank Guarantee for the entire decretal amount as security for performance of the Decree. They further stated that the Respondent would not suffer irreparable harm or prejudice if the stay orders were granted.
6. Despite being served with the Application and being granted leave and time extension by this court, the Respondent has failed to file a response.

The Applicants' submissions

7. Through their submissions dated 10th May 2024, the Applicants submitted that they had satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules in regards to their prayer for stay. That they had attached their Memorandum of Appeal which raised triable issues and had demonstrated their willingness to furnish the court with a Bank Guarantee. They relied on [Shanzu Beach Resort Limited v Crown Marbie & Quartz Ltd](#) (2020) eKLR.
8. It was the Applicants' submission that if their Appeal succeeds, the Respondent would not be in a position to refund the decretal sum. That the Respondent had not shown anything to prove that he was a person of means. They relied on [Nicholas Stephen Okaka & another v Alfred Waga Wesonga](#) (2022) eKLR.
9. The Applicants submitted that their Appeal was brought without unreasonable delay and was within the statutory period for lodging an Appeal.
10. The Respondent failed to file their submissions.
11. I have gone through and considered the Notice of Motion dated 13th October 2023 and the Applicants' submissions dated 10th May 2024. The sole issue for determination was whether this court should issue stay of execution for the Judgement dated 7th September 2023.

Analysis

12. Technically this Application was unopposed. The court however has the duty to see that the orders were deserved by the Applicants.
13. The principles that relate to stay of execution orders are well settled. Order 42 Rule 6 of the [Civil Procedure Rules](#) stipulates:-



1. 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.
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.
14. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), the Applicant should satisfy the court that:-
 - i. Substantial loss may result to him unless the order of stay is granted.
 - ii. That the Application has been made without unreasonable delay.
 - iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.
15. Regarding the issue of substantial loss, the court in [Jason Ngumba Kagu & 2 Others v. Intra Africa Assurance Co. Limited](#) (2014) eKLR held that:-

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the [Civil Procedure Rules](#). The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”
16. Similarly in [Tropical Commodities Suppliers Ltd & Others v. International Credit Bank Ltd \(in liquidation\)](#) (2004) 2 EA 331, the court stated that:-

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
17. The Applicants stated that they would suffer substantial loss unless execution was stayed. They further stated that the Respondent would not be able to refund them the decretal sum in the event his Appeal



succeeded because his ability to refund was unknown and that he had failed to prove that he was a person of means.

18. I have considered the Applicants' submissions with respect to substantial loss. All they have stated amounted to fear of execution. This court however holds the view that execution was a lawful process as aptly guided by the Court of Appeal in *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63 where it held:-

“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. The Applicants did not adduce any evidence or set out factual circumstances to demonstrate that they would suffer substantial loss if the execution was not stayed. They failed to discharge their burden of proof.
20. On the issue of unreasonable delay, the trial court delivered its Judgement on 7th September 2023 and the Applicants filed the present Application on 17th October 2023 which was an approximate period of one month. In my view, the Applicants brought the present Application within reasonable time as there was no inordinate delay.
21. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma v. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held 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.”

22. Similarly in *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (2019) eKLR Nyakundi J. observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.



Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.....”

23. The Applicants stated that they were willing to furnish the court with a Bank Guarantee as security for the performance of the Decree. They further stated that their insurer, Directline Assurance Company had an agreement with Family Bank for the provision of the said Bank Guarantee. I am therefore satisfied that the Applicants are willing and ready to deposit security for the performance of the Decree.
24. Flowing from the above, it is clear that the Applicants have not met all the conditions for grant of stay under Order 42 Rule 6 of the *Civil Procedure Rules*. However they have shown keen interest in pursuing their Appeal and have indicated their willingness to deposit security for the performance of the Decree. Weighing the scales of justice, I exercise discretion to grant stay of execution of the Judgment in Bomet PMCC Number 49 of 2018 on the following conditions:-
- i. The Applicants shall issue a Bank Guarantee specific to this suit for the total decretal sum within 14 days.
 - ii. The Applicants shall file the Record of Appeal within 30 days.
 - iii. Failure to meet the above conditions shall void the stay.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 23RD DAY OF SEPTEMBER, 2024.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of the parties and in the presence of Siele (Court Assistant).

