



**Gatabaki (Suing as Ad Litem Representatives of Dr Samuel Mundati Gatabaki (Deceased)
 & another v Muga Developers Limited & 11 others (Commercial Case 30 of 2020)
 [2024] KEHC 12036 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12036 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
 COMMERCIAL AND TAX
 COMMERCIAL CASE 30 OF 2020**

PM MULWA, J

OCTOBER 3, 2024

BETWEEN

**NANCY WANJA GATABAKI, JOSEPHINE BEATRICE GATHONI
 GATABAKI & ESTHER SUSAN WANGARI GATABAKI (SUING AS AD
 LITEM REPRESENTATIVES OF DR SAMUEL MUNDATI GATABAKI
 (DECEASED) 1ST PLAINTIFF
 NANCY WANJA GATABAKI 2ND PLAINTIFF**

AND

**MUGA DEVELOPERS LIMITED 1ST DEFENDANT
 PETER KIARIE MURAYA 2ND DEFENDANT
 SUSAN WACHEKE MURAYA 3RD DEFENDANT
 SURAYA PROPERTY GROUP LIMITED 4TH DEFENDANT
 SURAYA INVESTMENT FOURWAYS LIMITED 5TH DEFENDANT
 SURAYA SALES LIMITED 6TH DEFENDANT
 NEW ATTITUDE LIMITED 7TH DEFENDANT
 EQUITY BANK LIMITED 8TH DEFENDANT
 THE DIRECTOR OF SURVEYS 9TH DEFENDANT
 THE CHIEF LANDS REGISTRAR 10TH DEFENDANT
 THE ATTORNEY GENERAL 11TH DEFENDANT
 NAIROBI CITY COUNTY 12TH DEFENDANT**



RULING

1. The Court is called upon to determine the plaintiffs Notice of Motion application dated 15th April 2024 brought under Articles 50 and 159 of *the Constitution*; Section 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act* 2010 and paragraph 11 of the Advocates Remuneration Order and Order 42 rule 6 of the Civil Procedure Rules 2010.
2. The plaintiff prayed for an order to stay the execution of the ruling and order of Hon. Stephany Bett delivered on 13th July 2023 pending the determination of an intended appeal.
3. The application is supported by the affidavit of the 2nd plaintiff sworn on 15th April 2024. The grounds of the application are that the taxing master, on 13th July 2023 taxed the 1st – 7th defendants’ bill of costs at Kshs. 264,217,936.00 and the 8th defendant’s bill of costs at Kshs. 17,576,031.00 and that the plaintiffs filed references against the aforementioned decision which the court dismissed on 11th April 2024 for lack of merit.
4. The plaintiffs are dissatisfied with this court’s decision of 11th April 2024 and wish to appeal to the Court of Appeal against the entire decision but are apprehensive that the defendants will execute the taxing master’s decision unless a stay of execution pending appeal is granted.
5. The plaintiffs argue that if the orders sought herein are not granted, the intended appeal shall be rendered nugatory. Further, that the taxing master’s decision involves a colossal amount of money and should the defendants proceed to execute against them, they would suffer substantial loss.
6. In opposition, the 1st – 7th defendants filed grounds of opposition dated 29th April 2024 and contended that the plaintiffs have not demonstrated sufficient cause for the grant of the orders sought and that there are no valid grounds to appeal the decision of the court.
7. They stated that the plaintiffs did not offer any security which is a mandatory condition for the grant of stay of execution pending appeal and that the applicant has not shown the substantial loss or prejudice it would suffer and prayed to have the application dismissed.
8. The 8th defendant also opposed the plaintiffs’ application through a replying affidavit sworn on 13th May 2024 by Kariuki Kingori, its manager of legal services. He averred that the plaintiffs have not shown an arguable appeal against the 8th defendant who is able to reimburse the costs refundable in the unlikely event of the appeal succeeding. And that no sufficient cause has been shown for the grant of stay of execution and no substantial loss will be suffered by the plaintiffs.
9. The plaintiffs filed a further affidavit sworn on 30th May 2024, in response to the defendants’ grounds of opposition and replying affidavit.
10. It was contended that the plaintiffs’ intended appeal raises weighty issues worthy of consideration by the Court of Appeal and has great chances of success; that no evidence has been provided to support the allegation that the 8th defendant liquidity is sufficient to reimburse the taxed costs should it execute against the plaintiff; that the 1st respondent is in receivership while the 2nd – 7th respondents’ means are unknown. And therefore, allowing execution of an amount exceeding Kshs. 264 million would occasion substantial loss to the plaintiffs in the event that the appeal is substantial.
11. The plaintiffs averred that they are willing and ready to deposit security for due performance of the decree in such reasonable terms as may be directed by the court.



Analysis and determination:

12. The plaintiffs, the 1st – 7th defendants and the 8th defendant filed written submissions respectively which I have considered alongside the pleadings herein. The sole issue for determination is whether the threshold for a stay of execution order has been met.
13. A grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant parts state as follows:

“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.”
14. The present application was filed on 15th April 2024, and the ruling in which the plaintiffs are seeking to stay pending appeal was delivered by this court on 11th April 2024. A period of about 4 days lapsed and I find that there has been no unreasonable delay.
15. On substantial loss, the plaintiffs have the obligation to show the court that they would suffer substantial loss if the order is not granted. In the case of *Mukoma v Abuoga* (1998) KLR 645 it was held that - “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
16. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court considered what constitutes substantial loss and 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.”
17. The plaintiffs submitted that if the defendants are allowed to execute against them, the appeal would be rendered nugatory as the defendants have failed to demonstrate that they will be able to refund the decretal sum if the appeal succeeds.
18. The 8th defendant submitted that it is capable of refunding any sums in the unlikely event the plaintiffs’ appeal is successful.
19. On their part, the 1st – 7th defendants submitted that the 1st defendant is not in receivership and no evidence has been provided to prove the same. Further that the 2nd to 7th defendants are not in receivership and have substantial assets in Nairobi and Kiambu counties.



20. I take note that the 8th defendant is one of the largest banks in the country with substantial assets, and this is public knowledge, and therefore I find no weight in the plaintiffs' argument that its liquidity and capability to refund the decretal sum in the event the appeal succeeds has not been illustrated.
21. Further the plaintiff has not tabled evidence of the 1st defendant being in receivership as alleged nor any proof that the 2nd – 8th defendants will be incapable of refunding the decretal sums if their appeal is successful.
22. As stated in the James Wangalwa case (supra), the plaintiffs have the obligation to establish other factors which show that the execution will create a state of affairs that will irreparably affect their essential core as the successful parties in the appeal.
23. Due to the foregoing my view is that the plaintiffs have failed to illustrate the substantial loss they would suffer if the stay is not granted.
24. The court has the obligation to balance the right of the plaintiffs to appeal and that of the successful litigants to enjoy the fruits of their judgment. While the plaintiffs have a right to appeal, they have not sufficiently satisfied the court that they would suffer substantial loss if a stay of execution pending appeal is not granted. On the other hand, the defendants have a right to enjoy the fruits of a decision made in their favour.
25. All things considered, the plaintiffs' application dated April 15, 2024 lacks merit and is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Wanyonyi for plaintiff/applicant

Mr. Ouma for 1st – 7th defendants

Mr. Mosobera hb for Mr. Kiragu for 8th defendant

Court Assistant: Carlos

