

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. E354 OF 2024

FAUZIA WANJIRU

ISSA.....APPELLANT

- VERSUS-

**HANNAH NYOKABI MBAYA (Suing as the
legal administrator of the estate of the late
LEONARD WAIGANJO**

KARANJA)RESPONDENT

RULING

1. Before the court for determination are two (2) applications, both brought by **Fauzia Wanjiru Issa** (hereafter the Appellant). The first is **the Notice of Motion dated 13.03.2024** (hereafter the first application) which is supported by the grounds laid out on its face and the depositions in the affidavit of the Appellant. The Motion is seeking to stay execution of the judgment delivered by the trial court on 9.02.2024 in **Milimani CMCC No. E1939 of 2021** (the suit) pending the hearing and determination of the appeal. The first application is expressed to be brought under Sections 1A, 1B, 3A and 79G of the Civil Procedure Act (CPA); and Order 42, Rule 6 and Order 51, Rule 1 of the Civil Procedure Rules (CPR).
2. In her supporting affidavit, the Appellant stated that she was the 1st Defendant in the suit, which was filed by **Hannah Nyokabi Mbaya (Suing as the legal administrator of the estate of the late Leonard Waiganjo Karanja)** (hereafter the Respondent) and concluded by way of the judgment delivered by the trial court on

9.02.2024. That the Respondent has since extracted the resultant decree and is in the process of executing it. The Appellant is apprehensive that unless the stay order sought is granted therefore, she will suffer irreparable loss and prejudice as she may not be able to recover the decretal sum from the Respondent if paid over, and the appeal succeeds, which event would render the appeal nugatory. She further stated that the appeal has high chances of success and that no prejudice will be visited upon the Respondent in the circumstances. That it is therefore imperative that the stay order sought be granted.

3. The Respondent resisted the first application by swearing a replying affidavit on 15.05.2024. Therein, she averred inter alia, that the said application is unmerited given that the Appellant has not satisfied the conditions pertinent to granting an order to stay execution, more particularly the condition on substantial loss/prejudice to be suffered if stay is denied. The Respondent equally averred that execution is a lawful process and that all the goods already proclaimed for attachment do belong to the Appellant, in opposing the latter's averment that certain proclaimed goods belong to her husband.
4. The deponent further stated that the appeal was filed three (3) days outside the statutory timelines and which fact ought to have been disclosed to the court by the Appellant. In her view, the Appellant has not approached the court with clean hands and the appeal has no chances of success. That ultimately, no reasonable explanation has been given to warrant the stay order sought. Consequently, the Respondent has urged the court to dismiss the first application, with costs.
5. **The Notice of Motion dated 15.04.2024** constitutes the second application, being brought under Sections 1A, 1B, 3A and 80 of the CPA and Order 45, Rule 1 of the CPR, and based on the grounds set out on its body and the depositions in the affidavits of the Appellant and one **John Mugo Njeru**. Here, the Appellant seeks a substantive order to the effect that the order previously made by the court, requiring deposit of the sum of Kshs. 2,000,000/- as security, be varied to allow the Appellant to

deposit the title deed for **L.R. No. Ngariama/Ngiriambu/5807** (the property) in its place.

6. In her supporting affidavit, the Appellant deposed that the court granted her an order for stay of execution in the interim, conditional upon her depositing the sum of Kshs. 2,000,000/-. The Appellant further deposed that she has been unable to raise the said amount due to health challenges on her part, as well as financial challenges in raising school fees and related funds for her three (3) children, adding that she is the sole breadwinner in her family. That however, she has spoken with the owner of the property, who is agreeable to offering the same as security in the matter and on her behalf; adding that the said property is valued at the sum of Kshs. 2,500,000/-.
7. By way of his supporting affidavit, **John Mugo Njeru** averred that he is the registered owner of the property and thus conveyed his willingness to have the same deposited as security on behalf of the Appellant, who is well known to him.
8. In opposition thereto, the Respondent's advocate, **James Nyiha**, swore a replying affidavit on 10.07.2024 wherein he stated that the second application is among others, incompetent and an abuse of the court process. That the medical evidence annexed to the Appellant's supporting affidavit has no direct correlation to her ability or lack thereof, in complying with the condition on provision of security. The advocate further stated that the proposal to have the security provided by way of a title deed is risky and prejudicial to the Respondent and could pose a challenge in realization of the decretal amount owing to the Respondent. That in any event, the court took into consideration the Appellant's plight, by allowing her to provide a sum less than the decretal amount, as security. For those reasons, the court was urged to decline to grant the order sought.
9. The two (2) applications were to be dispensed with through written submissions to be filed within 14 days, pursuant to the directions given

by the court on 31.07.2024. However, at the time of writing this ruling, none of the parties had complied with the said directions.

10. Thus, the court considered the affidavit material filed in support of and in opposition to the first and second applications. It is apparent that both applications relate to the prayer for stay of execution. Consequently, the court will consider the same contemporaneously.
11. As earlier mentioned, the Appellant by way of the first application, seeks a stay of execution of the judgment delivered by the trial court on 9.02.2024 in the suit, pending the hearing and determination of the appeal. It is trite law that the courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See **Butt v Rent Restriction Tribunal (supra)**. The applicable provision is **Order 42, Rule 6** of the **CPR** which stipulates that:

“(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 preferred may apply to the appellate court to have such order set aside.

- (2) 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”.**

12. Concerning the first condition on whether the first application has been brought without unreasonable delay, while none of the parties availed a copy of the impugned judgment, a copy of the decree was annexed to the Appellant’s supporting affidavit as **“FW 2”** which indicates that the said judgment was delivered on 9.02.2024 whereas the first application was brought just over one (1) month later, on or about 13.03.2024. In the court’s view, the first application has been timeously filed.

13. On the second condition, the relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410** when it held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

14. The Court went on to set out the following still on the subject of substantial loss:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

15. The decision of Platt Ag JA, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”

16. The learned Judge continued to observe that:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both

jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

17. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

18. The court considered the averments made on behalf of the Appellant concerning the manner in which she stands to suffer substantial loss, alongside the resisting arguments by the Respondent on the same subject. On the one part, a successful party to be allowed the privilege of enjoying the fruits of his or her judgment, except where the court is satisfied to grant an order to stay execution.

19. As to proof of substantial loss arising from the inability of a decree holder to refund monies paid in satisfaction of a decree, hence portending substantial loss, the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** held that:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the

evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

20. As earlier mentioned, no copy of the impugned judgment was availed for this court’s reference. Nevertheless, going by the contents of the decree annexed to the Appellant’s supporting affidavit to the first application, it is apparent that the trial court awarded the Respondent a total sum of Kshs. 6,596,680/- (excluding costs of the suit and interest thereon). In the court’s view, the sums are substantial and in the absence of any proof of the Respondent’s financial capacity or ability to refund the decretal sum if called upon to do so, the court finds that the Appellant has reasonably demonstrated likely substantial loss if the order for stay of execution is denied.
21. The third and final condition which is the provision of security for the due performance of the decree while equally a key consideration in the first motion is the focus of the second application. From the record, it is noteworthy that when the first application was placed before the court under a certificate of urgency on 14.03.2024 the court certified it urgent and scheduled it for hearing on 9.05.2024 whilst granting an interim stay of execution on the condition that the Appellant deposits the sum of Kshs. 2,000,000/- into court by 21.04.2024.
22. From a reading of the second application as well as the record, it is not in question that the Appellant has not complied with the conditions set out above. The court has considered her request to vary the nature of security to be provided, with a proposal that the same be substituted with a title deed. On her part, the Respondent is opposed to the proposal made though she did not necessarily offer any counterproposal. In essence, that motion is more or less spent as it related to the interim order, but the court has nevertheless considered its purport in the determination of the question of appropriate security.

23. Suffice it to say that, upon considering the depositions raised by the Appellant on her inability to comply with the conditions earlier set, the court is of the view that no credible material has been tendered to support the said averments. Whereas the Appellant tendered medical documentation to support the averment that she was undergoing medical attention at all material times, she did not demonstrate the manner in which her medical condition has hindered her ability to comply with the directions earlier given.
24. Similarly, regarding her proposal to have the title deed in respect of the property deposited as security in place of the ordered sum of Kshs. 2,000,000/-, the question remains whether the type of security being offered is appropriate. In the court's reasoned view, this would not constitute an appropriate security given that should the appeal ultimately fail, the process of recovering the security will likely be a long and tedious one. Furthermore, it is apparent from the record that the property in question does not belong to the Appellant; rather, it is registered in the name of John Mugo Njeru, which raises greater concerns as to the prospects of recovery in the event that the appeal is dismissed.
25. In view of all the foregoing circumstances, the court is hesitant to accept the security proffered by the Appellant. Ultimately the Appellant's entitlement to pursue her undisputed right of appeal must be balanced against the Respondent's right as the decree-holder. The words stated in **Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** and others, are apt:

"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to give advantage the

Defendant while giving no legitimate advantage to the Plaintiff... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal..."

26. Thus, the court must balance the competing interest of the parties here. The Appellant is apprehensive that the appeal will be rendered nugatory if the orders sought are disallowed, hence occasioning the Appellant substantial loss. At the same time, the decree-holder is entitled to a security for the eventual performance of the decree. Consequently, the following orders are made:

- a) The Notice of Motion dated 13.03.2024 is hereby allowed on condition that the Appellant shall deposit into a joint interest earning account held in the names of the parties' advocates, the sum of Kshs. 3,000,000/- (Three Million) within 45 days from today's date, failing which the stay order shall automatically lapse. Costs in respect of the first Motion will be in the cause.**
- b) The Notice of Motion dated 15.04.2024 is hereby dismissed with costs to the Respondent.**

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2024.

**C. MEOLI
JUDGE**

In the presence of:

N/A for the Appellant

Mr. Banji for the Respondent:

C/A: Erick