



REPUBLIC OF KENYA



**Makanga v Maina (Civil Appeal E025 of 2024)
[2024] KEHC 12512 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E025 OF 2024
MA ODERO, J
OCTOBER 11, 2024**

BETWEEN

SUSAN WANJIRU MAKANGA APPLICANT

AND

DUNCAN WACHANIA MAINA RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 20th May 2024 by which the Applicant Susan Wanjiru Makanga seeks the following orders;-
 1. Spent....
 2. Spent
 3. That pending the hearing and determination of the intended appeal herein this honourable court be pleased to stay the execution of the judgment and Decree in Nyeri SCCC No. E024 of 2024 Duncan Wachania Maina v Susan Wanjiru Makanga.
 4. That the costs of this Application be in the cause.
2. The application which was premised upon Order 40, Order 42, Order 51, Rules 1 and 3 of the *Civil Procedure Rules* Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Duncan Wachania Maina opposed the application through the Replying Affidavit dated 30th May 2024.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 21st June, 2024 whilst the Respondent relied upon her written submissions dated 26th June 2024.



Analysis And Determination

5. This application for stay arises from the judgment delivered on 16th May 2024 by Hon. Gaithuma in Nyeri SCC No 024/2024 in which judgment the trial court entered judgment in favour of the claimant (the Respondent) herein against the Respondent (the Applicant herein) in the sum of Kshs. 455,230 plus costs and interest.
6. Being aggrieved by this decision the Applicant filed the Memorandum of Appeal dated 20th May, 2024. Contemporaneously with that Memorandum of Appeal the Applicant filed this application for stay which application is premised upon the following grounds;-
 - “(a) That the Appellant was one of the Landlords of the Plaintiff in the suit premises known as Gura bar within Nyeri township.
 - (b) That the Respondents was a habitual rent defaulter owing arrears of Kshs. 278,770/= to the suit premises.
 - (c) That the appellant merely exercised her right to levy distress for rent as provided in Cap 301.
 - (d) That the Respondent himself is guilty of laches in failing to discharge his cardinal duty to the Appellant and that’s why the Appellant distressed for rent.
 - (e) That the trial court ought not to have entertained this matter in the first instance and further by disregarding the evidence of the Appellant.
 - (f) That unless this court issues an order staying the judgment and Decree in Nyeri SCC No. E024 of 2024 Duncan Wachania Maina v Susan Wanjiru Makanga the appellant stands to suffer irreparable [harm].
 - (g) That it is in the interest of justice to allow the prayers.
 - (h) That no prejudice shall be visited upon the Respondent herein if the Application is allowed.”
7. It is not the duty of this court at this state to determine the merits or otherwise of the intended appeal. The Court is only being called upon to determine whether the application for stay is merited.
8. Order 45 Rule (1) of the *Civil Procedure Rules* provide that:-
 - (1) any person considering himself aggrieved.
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”
9. The judgment in question was delivered on 16th May 2024. This application for stay was filed on 20th May, 2024 barely four (4) days after delivery of the judgment. I find that this application was filed in a timely manner.
10. The next question is whether the Applicant is likely to suffer substantial loss if the stay prayed for is not granted.
11. 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 herein 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.” [emphasis my own]
12. Further on the issue of substantial loss, the Court of Appeal in the case of *Kenya Shell Ltd v Kibiru & Another* (1986) KLR 410, held that:
- “Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay”.
13. The mere fact that execution is imminent or that it has occurred does not amount to proof of substantial loss. “Kimaru J. as then was In *Century Oil Trading Company Ltd v. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:
- “The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that.... Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”



14. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the Court of Appeal held as follows;

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.

15. This court has to strike a balance between the Applicants right not to have the appeal rendered nugatory and the right of the Respondent to enjoy the fruits of her judgment.

16. Order 45 provides that an Applicant deposit security for performance of the decree.

17. In *Gainfranco Manenthi & another v. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed as follows:-

“.....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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails. 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 ... This 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.” [own emphasis]

18. Finally I do allow this application for stay and make the following orders:-

- (1) The judgment and Decree in Nyeri SCC No. E025 of 2024 Duncan Wachania Maina -v- Susan Wanjiru Makanga, be and is hereby stayed pending the hearing and determination of the intended appeal.

Subject To

- (2) The Applicant depositing the entire decretal sum within fourteen (14) days into a joint interest earning account opened in the name of the Advocates for each party.



- (3) In event of failure to comply with (2) above the stay hereby granted will lapse automatically with no further reference to the Applicant.
- (4) Costs of this application to be met by the Applicant.

DATED IN NYERI THIS 11TH DAY OF OCTOBER, 2024.

MAUREEN A. ODERO

JUDGE

