



REPUBLIC OF KENYA



**Githii v Royal Media Services Limited (Civil Suit 238 of 2006)  
[2023] KEHC 536 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 536 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 238 OF 2006  
TM MATHEKA, J  
FEBRUARY 1, 2023**

**BETWEEN**

**KENNETH KARIUKI GITHII ..... PLAINTIFF**

**AND**

**ROYAL MEDIA SERVICES LIMITED ..... DEFENDANT**

**RULING**

1. There are two Applications for determination before court. Both have been filed by the Applicant. One is dated 1<sup>st</sup> July, 2021 while the other one is dated 3<sup>rd</sup> October, 2021.
2. The first Application is brought under Order 42 Rule 6 and Order 51 Rules 1-3 of the [Civil Procedure Rules](#) 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). The Applicant seeks the following orders:-
  - i. That there be stay of execution of the Judgement delivered herein on 10<sup>th</sup> June, 2021 pending the lodging, hearing and determination of the Defendant's intended Appeal.
  - ii. That costs of this Application be provided for.
3. The Application is premised on the grounds that:-
  1. The defendant/applicant is aggrieved by the Judgment which was delivered on 10<sup>th</sup> June, 2021 and the intended to appeal to the court of appeal against it.
  2. It filed a Notice of Appeal on 19<sup>th</sup> June 2021 and applied for proceedings to enable it to lodge an appeal in the Court of Appeal.
  3. Unless the stay sought is granted, it will suffer substantial loss in that the plaintiff will execute the said Judgment to its detriment.



4. This Honorable court has discretion to make such orders as will serve the ends of justice as was held in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 472 & *African Safari Club v Safe Rentals Ltd*, Court of Appeal at Nairobi, Civil Application No. NAI 53 of 2010.
  5. Its right of appeal will be rendered nugatory if the plaintiff executes the judgement during the pendency of this application and the intended appeal.
  6. The object of the stay like that of an injunction, is to keep things in status quo so that if, after the hearing of the appeal, Applicant obtains a judgement in its favour, the plaintiff will have been prevented from dealing with the subject matter in such a way as to make that judgment ineffectual.
  7. It is in the interest of justice that this Honorable Court grants the orders sought so as to preserve the subject matter of the intended appeal.
  8. The defendant is ready and willing to furnish a reasonable security for the due performance of such decree as may be ultimately binding on it.
4. The Application is supported by an affidavit of Njenga Njihia, Legal Officer of the Applicant, sworn on 1<sup>st</sup> July, 2021 expounding on the above grounds.
  5. The Application is opposed. The respondent filed Replying Affidavit on 14<sup>th</sup> September, 2021. He deposed that the applicant has not met the threshold for grant of stay set out under order 42 Rule 6(2) of the *Civil Procedure Rules*.
  6. He contended that the Applicant has not demonstrated his inability to repay the judgment sum in the unlikely event of its success in the appeal. He prayed that the application be dismissed but in the unlikely event the court will be inclined to allow it, then Judgment sum be deposited in an interest earning account in the joint names of the parties advocates pending the hearing and determination of the appeal.
  7. The second application is seeking the following orders:-
    1. That this Honorable Court be pleased to set aside the warrants of attachment dated 27<sup>th</sup> July, 2021, ex debito justitiae.
    2. That the costs of this application be borne by the plaintiff.
  8. The Application is premised on the grounds that on 27<sup>th</sup> July, 2021 warrants of attachment of the defendant's property were issued to Ms Nairobi Connection Services Auctioneers and on 3<sup>rd</sup> August, 2021 the said auctioneers attempted to proclaim the assets of the defendant but they were unable to do so; that the intended proclamation is illegal as the plaintiff is attempting to execute a decree which has been appealed against and in a case where costs have not been taxed as mandated by Section 94 of the *Civil Procedure Act*; that as stated by the Court of Appeal in *Bamburi Portland Cement Company Limited v Philemon Oyigo* [1996] eKLR Leave of this Honorable court must be obtained before execution where the costs have not been taxed; that in *Shamsher Kenya Ltd v Body & Soul Limited* [2006] eKLR court stated that it has power *ex debito justitiae* to set aside the illegal warrants of attachment.; and that the defendants now fears that unless the said warrants of attachments are set aside, the plaintiff will execute the said decree to its detriment by attaching its movable properties and it will suffer irreparable damage due to the nature of its business.
  9. The Application is supported by an affidavit of Njenga Njihia, Legal Officer of Royal Media Services Limited, sworn on 3<sup>rd</sup> August, 2021 reiterating the above grounds.



10. The Application is opposed by the Respondent vide Replying Affidavit sworn on 15<sup>th</sup> November, 2021. He deposed that he has every right to execute the judgment of this court and that this court pursuant to Section 94 of the Civil Procedure Act has unfettered jurisdiction in allowing execution to proceed before the taxing of costs. That warrants of attachment were issued legally and therefore ought not to be set aside. He prayed that the Application be dismissed and he be allowed to proceed with execution pending taxation but in the event this court allows the same, he prayed that that the judgment sum be deposited in an interest earning account in the joint names of the parties advocates pending the taxation of the costs.
11. The Parties canvassed the Application via Written Submissions.

### **Applicant's Submissions**

12. The Applicant filed its submissions on 19<sup>th</sup> May, 2022.
13. It relied on the grounds stated on the face of its Application in its submissions. To bolster its submissions, the Applicant placed reliance on the case of Fidelis Wambua Musembi v Royal Media Services Ltd [2018] eKLR where the court granted stay of execution in an application similar to this one pending the hearing of the intended Appeal.
14. In urging this court to set aside warrants of attachment issued before taxation, the applicant relied on Section 94 of the Civil Procedure Act and the cases of Bamburi Portland Cement Company Limited v Imranali Chandbhai Abdulbussein [1996] eKLR, Kartar Singh Dhupar & Co. Ltd v Lianard Holdings Limited [2017] eKLR & Shamsber Kenya Ltd v Body & Soul Limited [2006] eKLR where courts concurred that leave of court is required under Section 94 of the Civil Procedure Act before executing a decree that costs have not been ascertained.

### **Respondent's Submissions**

15. The Respondent filed his submissions on 17<sup>th</sup> July, 2022.
16. He submitted on two issues. Namely;
  1. Whether the Applicant is entitled to stay of execution of Judgement delivered on 10<sup>th</sup> June, 2021 pending the hearing and determination of the Intended Appeal.
  2. Should warrants of Attachment dated 27.7.2021 be set aside.
17. On the first issue the respondent submitted that Order 42 Rule 6(2) set out the principles that court should consider while deciding whether to grant stay of execution pending appeal. That the court in Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR court held that the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted.
18. He argued that these two principles go hand in hand and failure to prove one dislodges the other.
19. He argued that the Applicant has not demonstrated it will suffer substantial loss as it has not adduced any evidence of its financial status and thus has not met the threshold for grant of stay of execution. To support this position he referred this court to the cases Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR, in Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 & Bungoma HC Miss App. No. 42 of 2011 James Wangalwa & Another v Agnes Naliaka Cheseto.



20. On security, the respondent cited the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR where it was held that the issue of deposit of security for due performance of decree is a matter for court to determine.
21. He submitted that this court orders the defendant to provide security by depositing the entire decretal sum in a joint interest account in the names of both parties advocate's or in court.
22. Regarding the second issue for determination, the Respondent submitted that will be dependent on the outcome of this application. That if dismissed warrants cannot be set aside if allowed warrants will be nugatory.

### **Analysis & Determination**

23. The issues that arise for determination are:-
  1. Whether stay of execution pending appeal is merited?
  2. Whether warrants of attachment issued on 27.7.2022 should be set aside.

### **Issue No.1**

24. The guiding principles when deciding on application for stay of execution pending appeal are expressly set out under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*, which provides:
  - “(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 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.”
25. The main objection of a stay of execution under Order 42 of the *Civil Procedure Rules* is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the Appeal. The general principle of law is that the successful litigant in possession of a valid court judgment is entitled to the fruits of judgment unless there are exceptional circumstances to deny him or her that right.



26. In considering an application for stay of execution *Butt v Rent Restriction Tribunal* Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA) set the following guidelines: -

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

27. Has the Applicant satisfied that it will suffer substantial loss should stay of execution declined? In *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] eKLR the Court cited the case of *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 which held that;

“...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

28. What then is substantial loss? The Court in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 stated:-

“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.”



29. And in Bungoma HC Miscellaneous Application No 42 of 2011 *James Wangalwa and another v Agnes Naliaka Cheseto* the court stated:

“The application 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. This is what substantial loss would entail.”

30. The Applicant contended that it was aggrieved by the Judgment delivered on 10<sup>th</sup> June 2021 and has preferred an appeal against it. It is indisputable that the Appellant has filed a Notice of Appeal before the Court of Appeal. In the said judgement the Applicant was ordered to pay the Respondent General Damages of Kshs.5 million and Aggravated Damages of Kshs. 2 million plus costs of the suit. The Respondent has commenced execution against the Applicant. The applicant is apprehensive that unless the stay sought is granted, it will suffer substantial loss in that the plaintiff will execute the said Judgement to its detriment and that its appeal shall be rendered nugatory.

31. The respondent has not demonstrated his ability to refund the decretal sum in the event the intended appeal succeeds. Therefore in the absence of any evidence to indicate the financial ability of the respondent and upon considering the colossal nature of the decretal amount, the applicant has shown that it stands to suffer substantial loss if the order for stay of execution is declined.

32. Did the Applicant file the instant Application without unreasonable delay? Judgment was delivered on 10<sup>th</sup> June, 2021 and the applicant filed its Notice of Motion under the vacation rules on 5<sup>th</sup> August, 2021. Therefore, there was no delay in the filing of the instant application.

33. On the third and final condition relating to the provision of security, Order 42 Rule 6(2) (b) states “such security as the court orders for the due performance....” In my view this rule gives the court discretion and therefore it can exercise it by granting an order for the payment or deposits of security for the due performance of the decree. The discretion however has to be exercised judiciously. The Applicant herein has demonstrated its willingness to comply with the conditions to be set by this court.

34. The upshot is that the Motion dated 1.7.2021 is allowed in the following terms:

- i. An order for a stay of execution be and is hereby granted against the judgment delivered on 10<sup>th</sup> June, 2021 pending the lodging, hearing and determination of the Defendant’s intended Appeal.
- ii. The applicant to deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates/firm of advocates within 45 days with effect from the date hereof.
- iii. In default of (ii) above the order of stay will lapse and the respondent will be at liberty to execute.

#### **Issue No.2.- Whether warrants of attachment issued on 27.7.2022 should be set aside**

35. The Applicant contended that the Respondent proceeded with execution before taxation of costs and without leave being sought under Section 94 of the *Civil Procedure Act* and as such the execution was irregular and should be set aside. Section 94 of the *Civil Procedure Act* provides as follows:

“ 94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order



that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

36. The Respondent argued that this court pursuant to Section 94 of the *Act* has unfettered jurisdiction to allow execution to proceed before taxation of costs.

37. The Court of Appeal in *Commercial Bank of Africa v Lalji Karsan Rabadia and 2 Others* [2012] eKLR and *Bamburi Portland Cement Co., Ltd v Imranali Chandbhai Abdulhussein* [1996] observed that:

“I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the *Civil Procedure Act* requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties.”

38. It is not in dispute that costs have not been agreed on or taxed. Therefore, under the provisions of section 94 of the *Civil Procedure Act* the Respondent could not proceed with execution except with leave of the court obtained in the proper manner.

39. Clearly therefore the execution was irregular null and void as it was done without leave of the court. The following orders do issue;

- i. The warrants of attachment dated 27<sup>th</sup> July, 2021 be and are hereby set aside.
- ii. The costs of the application dated 3.10.2021 be borne by the Respondent

40. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**MUMBUA T MATHEKA**

**JUDGE**

**CA Jennifer**

**Kamau Kuria & Company Advocates,**

**Kiarie Kariuki & Githii Advocates**

