



Kariuki v Mutungu t/a Mutirithia Enterprises & 2 others (Civil Appeal E031 of 2022) [2023] KEHC 709 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E031 OF 2022
CM KARIUKI, J
FEBRUARY 9, 2023**

BETWEEN

JULIUS WACUMA KARIUKI APPELLANT

AND

**JOHN GITARI MUTUNGU T/A MUTIRITHIA ENTERPRISES 1ST
RESPONDENT**

SAMUEL WAWERU 2ND RESPONDENT

STEPHEN NGANGA 3RD RESPONDENT

RULING

1. By Notice of Motion dated 7/11/2022. The Applicant sought a stay of orders decree in Lower Court Civil Case No 3 of 2020 at Engineer pending hearing and determination of Appeal. The same is supported by an affidavit of Julius Wacuma Kariuki sworn on 7/11/2022 and the grounds on the face of the Application.
2. The Application is opposed via affidavit sworn by John Gitari Mutungu sworn on 16/11/2022; the parties were directed to canvass the same via submissions which they filed and exchanged

3. Applicant's Submissions

4. The Applicant submits that under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, the conditions an applicant needs to satisfy before a stay of execution pending Appeal can be granted are as summarized below;
 - i) That the Application should be made without undue delay
 - ii) That the Applicant shall suffer substantial loss unless the order is granted.



- iii) Security.
5. On the 1st issue being whether the Application has been brought without unreasonable delay, it is clear from the ruling attached in our Application as Annexure JWK3 that it was delivered on 2nd November 2022 at Engineer Law Courts while the Appeal herein and the subject application was filed on 7th November 2022 which is barely a week after delivery of the ruling. We thus submit that the Applicant has satisfied the first limb as the Application was brought without delay.
6. The substantial loss was defined by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 as;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
7. Annexure JWK-I of the supporting affidavit, the Respondents have, through Tango Auctioneers, proclaimed four Motor Vehicles being, three matatus, and one bus, which they intend to sell to recover the decretal sum of Kshs. 610,547/=. The Motor Vehicles' Registration Numbers are KCF 654F, KDB 161G, KDB,201G, and KBQ 01IZ. The said Motor Vehicles are the source of livelihood for the first Appellant and his family, including servicing loans, and the Respondents intend to sell them at this stage.
8. The Applicants herein submit that if the order is not granted and execution proceeds, he shall suffer substantial loss as there is a likely situation that he might not be able to recover the decretal amount nor the value of the proclaimed Motor Vehicles if the Appeal succeeds thus rendering the entire Appeal an academic exercise.
9. While the Respondents have alleged that they have substantial financial ability to refund the decretal amounts, no proof of such financial muscle has been produced to bolster the same. Further, the Photographs attached as JGM-I are neither proof of ownership of the building nor ownership of the land it is erected on as it is a well-settled principle of law as to evidence of ownership of land. Further, alleging that they own businesses without attaching proof they own the businesses or that the businesses make any profits is not enough to deny the Applicant the orders sought.
10. Reliance is made on the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR.
11. Going by the above decision, the Respondents have not produced proof that they are able to refund the decretal sum save for the unsubstantiated allegations as held in the case of *Nancy Kibet (suing as the Legal Representative and as Administrator of the Estate of Brigit Jepkorir Kimutai (Deceased) v King'ori Munene Erastus* [2021] eKLR (Nyahururu Civil Appeal Case No.E003 of2021).
12. It is Submitted that the order sought is aimed at preserving the subject matter as held in the case of Consolidated *Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi) "
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory”.
13. Similarly, in the case of *Butt v Rent Restriction Tribunal*, Madan JA (as he then was) held as follows: -
- “It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying



execution. It has been said that the Court as a general rule, ought to exercise its best discretion in a way so as not to prevent the Appeal, if successful being nugatory. "

14. Thus, on this limb, it is submitted that if execution is allowed to proceed, the Applicants shall suffer substantial loss rendering his Appeal a nugatory.
15. This issue is within the discretion of the Court; the Applicants have maintained that he is willing to abide by the conditions the Court might set forth to grant a stay of execution and provide security if the Court decides so.
16. From the foregoing, it is submitted that the Application meets the threshold for grant of stay of execution pending Appeal, and we pray that this Honourable Court grants a stay of execution as we undertake to expedite the appeal.

17. Respondents Submissions

18. The Respondent submits that substantial loss has not been established in terms of the case of *James Wangalwa & Another – versus – Agnes Naliaka Cheseto* [2012] eKLR where the Court stated thus:

“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 amounts to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process”.
19. The Applicants must demonstrate that the Respondents are jointly and severally men of straw with financial disability and who may be unable to effect a refund to the decretal sums paid out by the Applicants. It ultimately turns out that the Appeal herein succeeds and is allowed by the Court. It is worthy for the Court to note that the decretal amount in question, as contained in the warrants of attachment issued by the lower Court on 7/11/2022, is a paltry sum of Kshs. 610,547/=.
20. In paragraphs (6) and (7) of the replying affidavit, the Respondents have tendered photographic evidence to demonstrate that contrary to what the Applicants may want the Court to perceive of the Respondents' financial ability, they (Respondents) are men of good financial means with the financial ability to refund the entire decretal sums either separately, jointly and/or severally if paid out to them by the Appellants this in the unlikely event that the Appeal herein ultimately succeeds.
21. The 1st and 2nd Respondents operate a supermarket, and a hardware shop, respectively, as shown in the photographic evidence adduced and marked "JGM-1" in paragraph (7) of the replying affidavit and that the 3rd Respondent is the owner of the said building.
22. In the results, it, therefore, follows that the Applicants have not tendered any evidence to show that the Respondent's financial ability is doubtful and, consequently, that the Respondent would be unable to perform the decree in the unlikely event that the Appeal succeeds.
23. Consequently, there is no gain in saying that having failed to meet the requirement on proof of substantial loss, the Appellants' Application is unmerited, and nothing turns on their ability to furnish the Court with security for the due performance of the decree as a condition for a stay of execution.
24. The respondents equally rely on the legal principle established in *James Wangalwa & another v Agnes Naliaka Cheseto*[2012]eKLR, *supra* on the proposition that, in effect, of the twin conditions under Order 42 Rule 6 (2), the condition on substantial loss is the cornerstone of the jurisdiction of the Court to grant a stay of execution orders and bearing in mind the fact that the Applicants have failed



to satisfy the said condition on substantial loss, it is immaterial whether the Applicants have made an undertaking to furnish the Court with security for the due performance of the decree as a condition for a stay of execution.

25. In the end, the Respondents respectfully submit that the Appellants' Notice of Motion dated 7/11/2022 is unmerited, and the Respondents humbly urge the Court to dismiss the exact costs.
26. In the alternative, If the Court is inclined to grant a stay of execution pending Appeal that another condition is imposed that half the decretal sums being Kshs.300,000/= be paid out to the respondents by the Applicants and the balance be deposited in a joint interest-earning account in the names of parties' advocates so that once the Appeal is determined, the winner will have ready access to the money.
27. The respondents rely upon the case of *Amal Hauliers limited -versus - Abdulnasir Abukar Hassan* [2017]eKLR

28. Issues, Analysis, And Determination

29. After careful analysis, the issue for determination is whether the applicants have met the prerequisite threshold for grant of stay of execution pending Appeal.

The Law

30. Whether the applicants have met the prerequisite threshold for grant of stay of execution pending Appeal.
31. The principles upon which the Court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

“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.

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 1st 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.
32. 1Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an Applicant should satisfy the Court that:
 1. Substantial loss may result to him unless the order is made;
 2. That the Application has been made without unreasonable delay; and



3. The Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
33. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979]; the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The Court said that:-
- a. The power of the Court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, 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 the appeal court reverse the judge's discretion.
 - c. Thirdly, 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.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The Court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon Application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

34. Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:-

“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 this 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....”

35. 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.



36. 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 LJ in *Wilson v Church (No.2)* (1879) 12 ChD 454 at page 458 where he said:-

"I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of Appeal, this Court ought to see 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."

37. The applicants state that they stand to suffer substantial loss as they do not know the financial position of the Respondent and as such they are apprehensive that if paid the decretal sum may not be refund in event the Appeal succeeds. The respondents on the other hand states that they are not persons of straw and that they are financially capable to repay back the decretal sum in the event the Appeal succeeds.

38. It is trite law that a mere claim that the Respondent cannot refund the decretal sum is not efficient. There must be reasonable grounds provided by the Applicant to show that the Respondent cannot make a refund of the decretal sum, after which the Respondent will be called upon to discharge his evidential burden.

39. On the other hand, the Court observes that the Respondents have not produced proof that they are able to refund the decretal sum save for the unsubstantiated allegations in that, in the instant case, they did not provide evidence to show their financial capabilities; however, I do find that the Applicant has not demonstrated substantial loss likely to be sustained in event orders sought are not granted.

The Application has been made without unreasonable delay.

40. On the 1st issue being whether the Application has been brought without unreasonable delay, it is clear from the ruling attached in our Application as Annexure JWK3 that it was delivered on 2nd November 2022 at Engineer Law Courts while the Appeal herein and the subject application was filed on 7th November 2022 which is barely a week after delivery of the ruling. We thus submit that the Applicant has satisfied the first limb as the Application was brought without delay.

Security of costs.

41. The Applicant ought to satisfy the condition of security. In the persuasive decision of [*Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd*](#) [2019] eKLR, the Court observed:-

“The Applicant must show and meet the condition of payment of security for the 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 the 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 to enjoy the fruits of his judgment in case the Appeal falls.



Further, Order 42 should be seen from the point that a debt is already owed and due for payment to the successful litigant in litigation before a court that 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 monetary decree. Instead, 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 established to ensure that courts do not assist litigants in delaying the 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. Counsel for the Applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

42. Similarly in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

"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 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 the due performance of such decree or order as may ultimately be binding on the applicants. Therefore, I presume the security must be one which can serve that purpose."

43. From the above persuasive decisions, it is clear that the security issue is discretionary, and the Court must determine the same. Notably, in their submissions, the applicants stated that they are willing to offer security if called upon by this Honourable Court to do so. On the other hand, the Respondent prays that if stay is granted, the Court should order the applicants to pay half of the decretal sum pending the hearing and determination of the Appeal.

44. It is worth noting that the right of Appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR where the Court upheld the decision of *Portreitz Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that:-

"That right of Appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. Accordingly, there must be a just cause for depriving the plaintiff of that right."

45. It is my view on a balance of interests, as the applicants are willing to deposit the decretal sum, and the Respondent is amenable to paying half of it, I find that it is fair for the applicants to pay the respondent half of the decretal amount as this Court may direct.

46. Consequently, I find this Application merited and allow it in the following terms: -

- i. That stay of execution against the judgment delivered on 28th June 2021 in CMCC No. 265 of 2017 is hereby granted on condition that half of the decretal amount shall be paid to the respondents within 30 days pending hearing and determination of the Appeal. Costs of the Application shall abide by the result of the Appeal.



ii. In default execution to issue.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9th DAY OF February 2023.

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CHARLES KARIUKI

JUDGE

