



Ochanda & another v Makokha t/a RM Wafula & Co Advocates (Civil Appeal 33 of 2021) [2023] KEHC 787 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 33 OF 2021
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

ROSE A OCHANDA 1ST APPELLANT

AGRICULTURAL FINANCE CORPORATION 2ND APPELLANT

AND

**RICHARD WAFULA MAKOKHA T/A RM WAFULA & CO
ADVOCATES RESPONDENT**

RULING

1. By a Notice of Motion dated October 17, 2022, the Applicants/Appellants seek the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to grant an order of stay of execution in Eldoret HCCA No 33 of 2020; *Rose A Ochanda & Agricultural Finance Corporation v Richard Wafula Makokha T/A RM Wafula & Co Advocates* pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to grant an order of stay of execution in Eldoret HCCA No33 of 2020; *Rose A Ochanda & Agricultural Finance Corporation Vs Richard Wafula Makokha T/A RM Wafula & Co Advocates* pending the hearing and determination of this appeal.
 4. That costs this application be provided for.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Evans Mainga E, dated October 17, 2022.



The Applicants' Case

3. The Applicants are aggrieved by the judgment of this Court delivered on September 28, 2022, in favour of the Respondent. The Applicants deposed that stay was granted for (30) days and they said period will lapsing on October 28, 2022.
4. The Applicant maintain that in the said judgment, the Court directed that; the Applicants herein do pay the Respondent Kshs 2,000,000/= and Kshs 500,000/= in lieu of apology.
5. The Applicants are desirous of filing an appeal against the entire judgement and contend that unless stay is granted then entire appeal process shall only amount to a mere academic exercise.
6. The 2nd Applicant maintains that it a fully owned Government Corporation with assets and investments in the Country exceeding Kshs.1 billion and will able to satisfy the decree herein should the appeal not succeed. The Applicant are further willing to offer a bank guarantee as security equivalent to the decretal sum in the event that the appeal is not successful, then the Respondent shall immediately redeem the amount as ordered by the Court.
7. The 2nd Applicant further deposed that it is mandated to give agricultural development loans to the citizens of this Republic and not to tie the said sums in litigation. According to the 2nd Applicant, it will be prudent that it continues with its services to the public as the suit proceeds in Court and in the event the Court of Appeal pronounces itself then it shall comply with orders therein.
8. The Applicants urged that in the interest of justice, stay of execution ought to be granted pending the hearing and determination of the appeal. That the appeal has high chances of success and if execution is carried out, the appeal shall be rendered nugatory. The Applicants further maintain that no prejudice will befall the Respondent.
9. In addition, the Applicants deposed that this instant application has been brought without inordinate delay.

The Respondent's Case

10. The Respondent opposed the application vide the Replying Affidavit sworn by Richard Wafula Makokha, on October 19, 2022, in which he deposed that that he is an Advocate of the High Court of Kenya and the Proprietor of M/S RM Wafula Co Advocates a law firm engaged in the practice of law and in gainful employment.
11. He further deposed that his law firm is a serious law firm which has a capital, client and income base of over Kshs 50,000,000/=. That the judgment herein was reduced to a mere Kshs 2,500,000/=plus cost which the Respondent maintains that he is capable of refunding instantly should the Appellants succeed in the Court of Appeal. Further that the Respondent is a person of means capable of refunding the decretal sum. The Respondent maintains no substantial loss will be suffered by the Appellants.
12. The Respondent further deposed that he is the owner of motor vehicle registration number KCS 803 Q Toyota Harrier valued at Kshs 3,000,000/=.
13. The Respondent maintains that this instant application does not meet the pre-requisites of order 42 Rule 6 of the Civil Procedure Rules and that the same ought to be dismissed as the Appellants have not demonstrated the substantial loss they are likely to suffer in any event.



14. The Respondent further deposed that he is an officer of this Court and the Appellants will not have any difficulties in recovering the decretal sum from him in the event the appeal succeeds and thus he should be allowed to enjoy the fruits of his judgment.
15. The Respondent maintains that the Appellants are acting in bad faith as this is the second appeal being lodged and the aims by the Appellants are only aimed at denying him from enjoying the fruits of his judgment having instituted this case several years back.
16. The Respondent contends that this instant appeal is incompetent and ought to be dismissed as the Appellants have not produced anything to show that they are worth Kenya Shillings One Billion which burden squarely lies with them. The Respondent contends that the the fact that they are they worth Kenya Shillings One Billion as they allege then they ought to settle the decretal sum which is minimal and capable of refunding.
17. The Respondent contends that the Applicant have not furnished any security for due performance of the decree.
18. The Application was canvassed by way of written submissions. Both the Applicants and the Respondent filed their respective submissions on January 17, 2023.

Determination

19. I have considered the respective pleadings and submissions of the parties in this matter. This being an application for stay of execution pending appeal, it is imperative to indicate that the issue to be addressed is solely on whether stay ought to be granted or not.
20. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42rule 6(1) of the [Civil Procedure Rules 2010](#) which stipulates as follows: -

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.

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.
21. The power of the court to grant stay of execution pending appeal is a discretionary.
 22. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The



courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.

23. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.
24. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No Nai 15 of 1990 [1990] KLR 365.)
25. 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 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 ... 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.

26. In the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi* (Milimani) HCMCA No. 1561 of 2007 the Court 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. 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 judgment.”

27. Regarding the issue of substantial. Although, the Applicants have not sufficiently demonstrated to this Court the substantial loss that they likely to suffer in the event that stay of execution is not granted. The 2nd Applicant has stated that it is a Government owned Corporation who mandate is to give agricultural development loans to citizens of this Country and out to be allowed to do so as the suit proceeds at the Court Appeal. Further that it has assets and investments in the country exceeding over Kenya Shillings One Billion and is able to satisfy the decree herein in the event the appeal succeeds. While appreciating that the Respondent herein is not a man of straw, the Applicants herein are ready and willing to furnish



the Court with security for due performance in the form of a Bank Guarantee in the event the appeal succeeds. I further take judicial notice of the fact that the 2nd Applicant is a public institution with sufficient funds to meet any liability from the decision herein and any liability that may arise from the decision of the Appellate Court should its appeal fail.

28. On whether the application has been filed without unreasonable delay, the judgement herein was delivered September 28, 2022, this instant application was filed on October 17, 2022. It is my finding that this application was timeously filed.
29. Having carefully considered the instant Application, the Court finds and holds that the Applicant has met the threshold to warrant the Court exercise of its discretion in its favour.
30. In the end the Notice of Motion dated October 17, 2022, is found to be meritorious. It is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the Appellants/Applicants provide a Bank Guarantee from a reputable bank as security for the decretal sum within (30) days from the date of this ruling. In default the stay order shall automatically lapse. The costs of the application shall abide the outcome of the appeal.

It so ordered.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY, 2023.

In the presence of Matekwa for Mwimo for the Repondent

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R. NYAKUNDI

JUDGE

Coram: Before Hon Justice R. Nyakundi

Eurry S. Mabonga, & Co. Advocates

M/s Mwinamo Lugonzo & Co. Advocates

