



REPUBLIC OF KENYA



KENYA LAW
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**Rono v Wanguba & 2 others (Civil Appeal 116 of 2022)
[2023] KEHC 871 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 116 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

NANCY CHEPKOECH RONO APPELLANT

AND

SAMUEL OULULA WANGUBA 1ST RESPONDENT

FASHION FOR YOU LIMITED 2ND RESPONDENT

KCB BANK KENYA LIMITED 3RD RESPONDENT

RULING

Coram: Hon. Justice R. Nyakundi

Mukabane & Kagunza Adv for 1st respondent

C.F Otieno & CO. Adv for the appellant

Gumbo & Associates Adv

1. The Applicant approached this court vide a Notice of motion dated August 29, 2022 seeking the following orders;
 1. Spent
 2. Spent
 3. That there be a stay of the Order on payment of costs amounting to Ksh 18,000/- and / or execution of the same in the Ruling delivered on July 19, 2022 and any further consequential Orders in Eldoret CMCC No 1180 of 2018 pending the hearing and final determination of this Appeal
 4. Costs be provided for



2. Any other and further relief that this Honourable Court shall deem just and expedient to grant.
3. The Application is premised on the grounds set out therein and the contents of the affidavit sworn by Nancy Chepkoech Rono in support of the affidavit.
4. The brief facts leading up to the present Application are that on June 28, 2022 the appellant who was the 1st defendant in Eldoret CMCC No 1180 of 2018 applied for an adjournment so as to enable her file further statements and documents and the court allowed the adjournment but condemned the appellant/1st defendant in the trial court to pay the 1st Respondent costs of Kshs 18,000/- before the next hearing date. Upon applying for a Review, the Honourable Court allowed the statements that had been annexed to the Application but disallowed the prayer to Review and set aside the Order for Costs. The Applicant then proceeded to file the present Application.

Applicant's Case

5. On June 28, 2022 the 1st Defendant in Eldoret CMCC No 1180 of 2018 applied for an adjournment so as to file further statements and documents and the 2nd Defendant who are the Proforma Respondents herein also applied for adjournment on the same day on account of illness of counsel. The Applicant was aggrieved by the Order of the trial Court issued on June 28, 2022 condemning her to pay costs to the 1st Respondent. She then applied for Review before the trial Court which prayer to set aside the Order for Costs was summarily rejected.
6. The Applicant filed an Application for the magistrate handling the matter to recuse herself and the file was then placed before the Chief magistrate for directions. she stands to suffer irreparable harm if stay is not granted due to the fact that she has been assembling documentation which had been forcefully confiscated from me by the 1st Respondent including data stored in a computer that was also seized by the 1st Respondent.

Respondent's Case

7. The Respondent opposed the Application vide a Replying Affidavit dated October 18, 2022. It is the 1st Respondent's case that the instant Application is not merited since it does not meet the threshold for grant of stay of proceedings and/or stay of execution orders as provided under order 42 Rule 6 of the [Civil Procedure Rules 2010](#).
8. The 1st Respondent laid out the chronology of events leading up to the present Application as follows; He instituted Eldoret CMCC No 1180 of 2018 on November 14, 2018 which suit was accompanied with all the documents that I intended to rely upon in accordance with Order 3 rule 2 of the [Civil Procedure Rules 2010](#). The Appellant entered appearance on November 23, 2018 and subsequently filed her statement of defence and counterclaim together with her list of documents on December 6, 2018. On January 7, 2019, he filed a reply to the 1st Appellants defence and counterclaim thereby marking close of pleadings for Eldoret CMCC No 1180 of 2018 to be heard. In compliance with order 11 of the [Civil Procedure Rules 2010](#) he filed the pre-trial questionnaires and list of issues on January 11, 2019.
9. When Eldoret CMCC No 1180 of 2018 came up for mention on April 5, 2022 for fixing of a hearing date, the Appellant's advocate prayed for two months period to fully comply and the court being lenient granted the Appellant the period requested and thereafter the matter was fixed for hearing on June 28, 2022 by consent. The Appellant did not file her requisite documents within the two months and waited until June 27, 2022 after the expiry of the two months period the court had granted for her



to file her witness statement and supplementary list of documents aimed at seeking an adjournment on 28.06.2022 and delaying hearing of Eldoret CMCC No 1180 of 2018 which yet to kick off five years down the line.

10. On the date of hearing on June 28, 2022, it was crystal clear that the Appellant was determined to have the matter adjourned at all costs. The 1st Respondent drove all the way from Nairobi to attend to this matter and slept at Sirikwa Hotel where he expended Kshs 12,000/= and Kshs 6,000/= on fuel for to and fro and accommodation respectively.
11. Staying proceedings and/or execution hereto would cause greater prejudice to the 1st Respondent by further stalling the hearing of Eldoret CMCC No 1180 of 2018 which has stalled in court for over five years.
12. The Respondent concluded by deposing that this instant Application is an afterthought lacks merit and is tainted by concealment of material facts and urged the honourable court to dismiss it with costs in the interest of justice.

Issues for Determination

Whether the application for stay is merited

13. The orders the Applicant seeks stay against were delivered on June 28, 2022. The Application for review whereby the trial court declined to set aside the order of payment of costs was delivered on August 23, 2022. The present Application was filed on September 27, 2022. I find that the Application was timeously filed.
14. In the premises, the Application is dismissed with costs to the Respondent.
15. The instant Application is expressed to be brought under Order 42 rule 6 of the *Civil Procedure Code* which provides as follows;

“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.”
16. Consequently, it follows that the threshold to be satisfied in the circumstances are that;
 1. The Applicant will suffer substantial loss if the orders are not granted
 2. The Application has been filed without unreasonable delay.
 3. Security.

Whether the applicant will suffer substantial loss

17. With regard to substantial loss, 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.”

18. The Applicant has not demonstrated that substantial loss will be occasioned upon her if the orders sought are not granted. She has only stated that she will suffer irreparable harm if the orders sought are not granted. The costs she has been condemned to pay are Kshs 18,000/-, far from what one would consider a colossal sum of money. I find that the Applicant has not proved that she will suffer substantial loss. As stated in the case of *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd*, Nairobi (Milimani) High Court Civil Case number 154 of 2009 this application cannot see the right of the day if giving effect to the following principles is something not to be ignored thus Kimaru J observed

“In this matter the plaintiff is essentially seeking to stay the orders of this court pending the hearing and determination of the intended appeal to the Court of Appeal. Under Order 41, rule 4(2) of the Civil Procedure rules, the court has discretion to either grant or refuse stay of orders pending the hearing and determination of the intended appeal.See *Butt v Rent Restriction Tribunal* (1982) Kenya Law Reports 417 reference in *Odunga Digest on Civil Case Law and Procedure* page 7417 3rd Edition Volume 9.”

19. It is also the decision of the court that an application for the stay of execution being a discretionary remedy greater consideration has to be given to the principles in: *Deposit Protection Fund Board Suing as the Liquidator of Reliance Bank Limited (In Liquidation) v Panachand Jivraj Shah and others*, Nairobi (Milimani) High Court Civil Case Number 1529 of 2001 (Anyara Emukule, J on 17 June 2004).

“In addition the court in the case of *National Bank of Kenya Ltd v Jivraj Raishi & Brothers Ltd and Others* Nairobi civil application number 153 of 2002 (Tunoi O’ Kubasu and Githinji, JJA on 18 June 2004). Reinforced the foregoing statements by this observation “ that is the duty of the court to safeguard the interest of both parties-the plaintiffs are entitled to the enjoyment of the fruits of their success. While on the other hand the applicant is entitled also to have its interests secured so that in the event of its intended appeal succeeding the recovery of the sum would not be in vain. All these conflicting interests must be weighed and considered against each other”

20. Similarly, in the application before me I find that the trial magistrate properly applied her mind to the facts common questions of law and the evidence to decline the earlier motion on this subject matter. There is no new compelling evidence to revisit the issue as agitated by the applicant.

Security

21. The Applicant has made no offers on security for costs. In fact, she has not addressed this limb at all.
22. Stay of execution orders are discretionary in nature. The Applicant failed to mention that she has repeatedly delayed the trial, evinced by the chronology of events as laid out by the 1st Respondent. It is



my view that the Application is unmerited and an effort to delay the matter in the trial court. Justice delayed is justice denied and this court shall not participate in the denial of justice to the Respondents.

23. In the premises, the Application is dismissed with costs to the Respondent.

It is so ordered.

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

IN THE PRESENCE OF C.F. OTIENO FOR THE RESPONDENT

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R. NYAKUNDI

JUDGE

