



REPUBLIC OF KENYA



KENYA LAW
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**Kamande v Nation Media Group (Constitutional Petition
E004 of 2021) [2023] KEHC 2184 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2184 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION E004 OF 2021
FN MUCHEMI, J
MARCH 23, 2023
IN THE MATTER OF: ARTICLES 1, 2, 10, 19, 20, 21, 22,
23, 28, 31, 40, 48 & 50 OF THE
CONSTITUTION OF KENYA, 2010
IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
ARTICLES 28, 31(C) & 40(1) OF THE
CONSTITUTION OF KENYA, 2010
IN THE MATTER OF: THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS
PRACTICE AND PROCEDURE RULES,
2013
IN THE MATTER OF: THE DATA PROTECTION ACT, 2019
IN THE MATTER OF: ARTICLE 12 OF THE UNIVERSAL
DECLARATION ON HUMAN RIGHTS
AND OTHER PROVISIONS THEREOF
AND
IN THE MATTER OF: ARTICLE 17 OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL
RIGHTS AND OTHER PROVISIONS
THEREOF
BETWEEN



HILDA KAMANDE PETITIONER

AND

NATION MEDIA GROUP RESPONDENT

RULING

Brief facts

1. This application dated 9th January 2023 brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules seeks for orders for stay of execution of the decree and judgment delivered on 1st December 2022 pending the hearing and determination of the appeal.
2. The respondent filed a Replying Affidavit sworn 24th January 2023, in opposition to the application.

Applicant's Case

3. It is the applicant's case that judgment herein was delivered on 1st December 2022 with the court finding that the applicant had violated the respondent's constitutional rights under Articles 28, 31 and 40 and awarded the respondent general damages in the sum of Kshs. 1,500,000/-. The applicant avers that on 11th January 2023, Hippo Auctioneers General Merchants, agents of the respondent, visited its premises and served them with a proclamation notice of attachment of moveable property and warrants of attachment seeking to recover Kshs. 1,501,500/-.
4. Being aggrieved with the said judgment, the applicant filed an appeal in the Court of Appeal and contends that it has a good and arguable appeal which has chances of success.
5. The applicant is apprehensive that if the orders sought are not granted, the respondent shall proceed to execute which will render the appeal nugatory. The applicant is further apprehensive that if execution proceeds and the respondent is paid the decretal sum, it shall stand to suffer substantial loss as the respondent will be incapable of reimbursing the awarded sum in the event the appeal succeeds.
6. The applicant avers that it is willing to procure a bank guarantee for the sum of Kshs. 1,500,000/- or such sum as the court may deem fit to secure the respondent's interests. The applicant states that no prejudice shall be suffered by the respondent if the application is allowed as it shall be in a position to pay the decretal sum in the event the appeal is determined in the respondent's favour.

The Respondent's Case

7. The respondent states that the applicant has not met the threshold required in granting stay of execution pending appeal. The respondent argues that the applicant has not demonstrated what substantial loss it stands to suffer nor has it provided any security for due performance of the decree. Furthermore, the respondent argues that it is not sufficient for the applicant to allege that she is impecunious and a person of unknown means who may not be able to refund the decree. The applicant has to demonstrate through empirical evidence, reasonable grounds upon which it believes that she will not be in a position to reimburse the decree should the appeal succeed. Moreover, the respondent contends that the applicant has not demonstrated that the decree is such a colossal amount of money such that in the event the orders are not granted, the respondent's operations would be affected grossly.
8. In any event, the respondent states that if the appeal succeeds, she will be in a financial position to reimburse the decree and that she is employed by Ibangua Distributors Ltd earning a salary of Kshs.



24,000/- and with a small business where she trades in consumable items where she makes Kshs. 50,000/- per month.

9. The respondent states that although the applicant has offered a bank guarantee, it has not annexed it to the supporting affidavit. That notwithstanding, the respondent argues that a bank guarantee would be detrimental to her in the event the appeal succeeds as money depreciates in value and the value of Kshs. 1,500,000/- today would be much less by the time the appeal is concluded. The respondent urges the court to balance the applicant's right of appeal against her right to enjoy the fruits of her judgment. In the event the court allows the application, the respondent prays that the applicant deposit 50% of the decretal amount in a joint interest earning account and pay her the remaining 50%.
10. The applicant elected to put in written submissions but the respondent sought to rely on her Replying Affidavit and Case Digest dated 28th February 2023.

The Applicant's Submissions

11. The applicant submits that it stands to suffer substantial loss as it will be denied a colossal sum of Kshs. 1,500,000/- which it would have utilized in investing and generating income for its business, threatening its existence and its status as a going concern which shall have serious financial repercussions both to it and the country's economy. Additionally, the applicant contends that it stands to suffer substantial loss as the appeal will be rendered nugatory as the respondent shall not be in a financial position to repay the decretal sum in the event the appeal succeeds. The applicant states that the respondent did not establish her ability to repay the decretal sum nor did she produce any evidence to establish her financial resources that can satisfy the decretal sum in the event the appeal is successful.
12. The applicant cites the case of *Ndubiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 and submits that it is willing to offer security for the due performance of the decree by offering a bank guarantee from a tier one bank. The applicant further states that in the alternative, it proposed to remit half the decretal sum to the court which will ultimately be binding upon it thereby securing the performance of the decree and at the same time not disadvantageous to the respondent who will have a fair chance of recovering the funds in the event the appeal succeeds.
13. The applicant submits that depositing half the decretal sum in a joint interest earning account would subject it to double jeopardy as it would have parted with funds which it could have otherwise invested in to generate more funds thereby ensuring its ability to settle the decretal sum and at the same time it would be required to settle the decretal sum together with interest which would have been assessed at a higher rate. The applicant urges the court to be guided by the cases of *Rana Auto Selection Ltd v Lilian Osebe Moses* [2021] eKLR and *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR and allow the application on the condition that it remits a bank guarantee which is the most secure form of security that guarantees protection of the interests of both parties. As such, the applicant prays that the court exercise its discretion in its favour and allow the application with costs.



The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

- “ 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 orders 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 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.

15. Thus 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/her 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.

16. 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:-

1. 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.
2. 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.
3. 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.



4. 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

17. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:-

“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 argued that the appeal will be rendered nugatory and substantial loss suffered if execution of the decree proceeds as there is a likelihood that the respondent will be unable to repay the decretal sum should the appeal succeed. The respondent asserted that she is employed by Ibangua Distributors Ltd and earns a salary of Kshs. 24,000/-. She further averred that she has a small business where she trades in consumable items and makes Kshs. 50,000/- per month and thus she would be in a financial position to repay back the decretal sum in the event the appeal succeeds.

19. In the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* [2006] eKLR the Court of Appeal stated that:-

This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

20. The judgment awarded by the court is Kshs. 1,500,000/- which is a substantial sum. The respondent has averred that she is a woman of means and has annexed her pay slip to support her contentions. Although the respondent has averred that she runs a small business making Kshs. 50,000/- she has not annexed any proof to support her contentions. It is therefore my considered view that given the substantial amount in the decree and in the absence of sufficient proof of the respondent's financial means, it may be well that if the decretal sum is paid out, the applicant may be unable to recover the sums in the event the appeal succeeds, thereby rendering the appeal nugatory. As such, I find that the applicant has demonstrated substantial loss that it stands to suffer.



Has the application has been made without unreasonable delay.

21. This application was filed on 13th January 2023 and judgment delivered on 1st December 2022. As such the application was filed without delay.

Security of costs.

22. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & 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 in civil process 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. I presume the security must be one which can serve that purpose.

23. Evidently, the issue of security is discretionary and it is upon the court to determine the same. Notably, the applicant has stated that it is willing to offer security in the form of a bank guarantee and in the alternative to deposit half the decretal sum in court. The respondent has argued that in the event the court should consider allowing this application, it ought to direct the applicant to pay her half the decretal sum and deposit the other half in a joint interest earning account.

24. Additionally, 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 *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

25. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent her right of enjoying her judgment. The respondent states that the applicant has not satisfied the conditions to warrant it stay of execution. The applicant on the other hand states that its appeal has high chances of success and if the orders sought are not granted, the appeal shall be rendered nugatory. The applicant has alluded to this fact quite ably due to the fact that execution may be carried out.

26. The grounds of appeal in my view raise issues of fact and law on the violation of the respondent’s constitutional rights and the award of damages. Without going to the merits of the appeal, it is my considered view that the appeal raises arguable points of facts and law.

27. I am of the considered view that this application has met the threshold set out under Order 42 rule 6 of the *Civil Procedure Rules*. The application is therefore allowed in the following terms:-



- a. That orders for stay of execution are hereby granted on condition that the whole decretal amount is deposited in an interest earning account in the names of the advocates on record for the parties within 30 days.
- b. That in default of making the deposit as directed in paragraph 27(a) the orders of stay to lapse automatically.
- c. That the costs of this application shall abide in the appeal.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 23RD DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 23rd day of March, 2023

