



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nyatera v Nyakundi (Civil Appeal E033 of 2022)
[2023] KEHC 3086 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E033 OF 2022
WA OKWANY, J
MARCH 16, 2023**

BETWEEN

PURITY NYATERA APPELLANT

AND

DAVID ANGWENYI NYAKUNDI RESPONDENT

*(Being an Appeal against the Judgment/Decree of Hon. W. K. Chepseba (Mr.)
– CM Nyamira dated and delivered at Nyamira on the 5th day of July 2022
in the original Nyamira Chief Magistrate’s Court Civil Case No. 197 of 2017)*

RULING

1. The Appellant/Applicant herein, Purity Nyatera, filed the application dated July 21, 2022 seeking the following orders: -
 - (i) Spent
 - (ii) Spent
 - (iii) That his Honourable Court be pleased to stay execution of the decree in Nyamira MCCC No 197 of 2017 in respect of the judgment delivered on July 5, 2022 pending hearing and determination of the appeal herein;
 - (iv) That upon grant of prayer ‘iii’ above, the Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution;
 - (v) That costs of this Application be in the cause;
2. The application is supported by the Applicant’s affidavit and is premised on the grounds that: -



- (a) That Judgment herein was delivered on July 5, 2022 in the following terms;
Liability at 100% against the defendant.
General damages – Kshs 1,400,000/=
Future Medical expenses – Kshs 200,000/=
Special damages – Kshs 39,710/=
Total amount – Kshs 1,639,710/=
Costs and interest of the suit.
- (b) That the Applicant is aggrieved by the said judgment on the issue of quantum.
- (c) That the Applicant have lodged an appeal against the judgment in Nyamira CMCC No 197 of 2017 to wit, Nyamira High Court Civil Appeal No E033 of 2022, which appeal has high chances of success.
- (d) That there is an impending threat of execution by the Respondent against the Applicants since the stay of execution granted on July 5, 2022 is almost lapsing.
- (e) That the Decree is for a substantial sum of Kshs 1,639,710/= which if paid to the Respondent and the Appeal is successful, the Applicant will not be able to recover the same from the Respondent and the appeal will therefore be rendered nugatory.
- (f) That the Applicant will suffer substantial loss and damage if orders sought herein are not granted and further that the appeal will be rendered nugatory.
- (g) That this application has been filed timeously.
- (h) That the Respondent will not be prejudiced in any way if the orders sought herein are granted.
- (i) That it is in the interest of justice that the execution of judgment and/or decree herein be stayed pending the hearing and determination of the appeal.
- (j) That the Respondent is a person of straw and will not be able to refund the decretal sum if they are allowed to execute and the appeal thereafter succeeds.
- (k) That the Applicant is ready, willing and able to furnish such reasonable security as this Honourable Court may deem fit and in particular, the Applicant is willing and able to furnish security by providing a bank guarantee as security for the whole decretal sum.
3. The Respondent opposed the application through the replying affidavit sworn on August 19, 2022 wherein he states that the application lacks merit, is misconceived and does not meet the threshold set for the granting of orders for stay of execution pending appeal.
4. It is the Respondent's case that the Applicant's appeal is an afterthought and is manifestly devoid of any real triable issues. The Respondent maintains that the Bank Guarantee facility offered by the Appellant, as security, is not a safe kind of security owing to the fact that most public service vehicles underwriters, including M/s Directline Assurance Company Limited have collapsed and/or are on the verge of collapsing and that it would thus be fair for the Applicant to be directed to pay half of the decretal sum and deposit the remaining half in an interest earning account in the parties' Advocates' joint names.
5. The application was canvassed by way of written submissions which I have considered.



6. The main issue for determination is whether the instant application is merited.
7. The law governing the granting of orders for stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the *Civil Procedure Rules* which stipulates as follows: -

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (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.

8. The above provision requires an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.
9. In the instant case, the impugned Lower Court judgment was delivered on July 5, 2022 and the present application filed on July 21, 2022. I therefore find that the application was filed without unreasonable delay.
10. The Applicant has also filed an appeal which, in his view, raises triable issues. I find that the Applicant has demonstrated that he has sufficient cause for seeking orders of stay of execution pending the appeal.
11. Regarding substantial loss, the Applicant stated that the Respondent will not be able to refund the decretal sum is for the sum of Kshs 1,639,710 should the appeal be successful owing to his financial unknown and/or shaky financial standing.
12. The Respondent, on the other hand, argued that he will be able to refund the decretal sum in the event that the appeal succeeds. I however note that the Respondent did not tender proof of his financial standing before this court as a confirmation of his averments. In *Kenya Shell Limited v Kibiru* [1986] KLR 410, it was held 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 corner stone of both jurisdictions for granting a 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.”

13. In the above cited case, the court further observed that: -

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

14. It is trite that the mere fact that the decree holder is not a man of means does not necessarily justify stopping him from benefiting from the fruits of his judgement. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the Applicants to prove that the Respondent will not be able to refund to the Applicants any sums paid in satisfaction of the decree. In *Machira T/A Machira & Co. Advocates v East African Standard* (No 2) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

15. In the present case, the Applicant has simply stated that the Respondent will not be in a position to refund the decretal sum if paid over to him. It is however not enough for the Applicant to speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, he is a successful litigant who is entitled to the sum decreed in his favour. I note that there was no allegation that the payment of the said sum would ruin the applicant’s business. I am guided by the decision in HCCA No 161 of 2019; *Awale Transporters Ltd v Kelvin Perminus Kimanzi* where the court observed that:

“In this case it was the applicant’s case that unless the stay is granted, the appeal will be rendered nugatory. It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply



exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicant.”

16. In the instant case, I note that the Respondent did not demonstrate that he will be in a position to refund decretal sum if the same is paid over to him apart from bare averment that he is a man of means.
17. Turning to the aspect of security for the due performance of the decree, I note that the Appellant offered to provide Bank Guarantee as security while the Respondent insisted on the payment of half of the decretal sum and the deposit of the remaining half in a joint interest earning account. The position taken by courts, when faced with similar applications, is that they ought to weigh the likely consequences of granting or not granting the stay and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. This is to say that the Court should place the parties before it on equal footing so as to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice. In this regard, the Court is required to exercise its discretion in a manner that opts for the lower rather than the higher risk of injustice. This is the position that was adopted in *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

18. In *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 the court observed that:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...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...”

19. Similarly, Warsame, J (as he then was) held as follows in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 that:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...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 thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

20. Having regard to the findings that I have made in this ruling and in balancing the interests of both parties, I will allow the instant application in the following terms: -

- a. There shall be stay of execution of the decree/judgment in Nyamira CMCC No 197 of 2017 delivered on July 5, 2022 but on condition that: -
 - i. The Appellant shall, within forty-five (45) days from the date of this ruling, pay to the respondent the sum of Kshs 600,000/= being part of the decretal sum.
 - ii. The Appellant shall, within forty-five (45) days from the date of this ruling, provide security in the form of a Bank Guarantee from a reputable financial institution in respect to the remaining balance of the decretal sum.
 - iii. In the event of failure to comply with the conditions in (a) (i) & (ii) herein above, the stay orders issued herein shall automatically lapse and the Respondent shall be at liberty to proceed with the execution process.



b. The costs of the application shall abide the outcome of the appeal.

21 It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS
16TH DAY OF MARCH 2023.**

W. A. OKWANY

JUDGE

