



REPUBLIC OF KENYA



**Ngombo v Charo & 5 others (Civil Appeal E024 of 2022)
[2023] KEHC 2012 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E024 OF 2022
SM GITHINJI, J
MARCH 7, 2023**

BETWEEN

JOSEPH KITHI NGOMBO APPELLANT

AND

MAURICE KARISA CHARO ALIAS MAURICE MARISA 1ST RESPONDENT

ISMAIL GONA 2ND RESPONDENT

SAID KENGA 3RD RESPONDENT

ENOCK MWAMBURA 4TH RESPONDENT

KALAMA KAHINDI 5TH RESPONDENT

MEALUNGO MAISAKI 6TH RESPONDENT

*(An Appeal from the Judgement delivered on 3rd March, 2022 in Original
Civil Suit Malindi Cmcc No. 120 of 2014 by Hon. Julie Oseko (Dr))*

RULING

CORAM: Hon. Justice S. M. Githinji

Onchangu Kemunto & Associates Advocates for the Appellant.

Wambua Kilonzo & Co. Advocates for the Respondents.

1. The Applicant herein has filed a Notice of Motion application brought under Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules* under Certificate of Urgency dated the August 1, 2022 seeking the following orders:

1. Spent.



2. Spent.
 3. That upon inter-partes hearing herein, there be stay of execution of the Judgment and Decree in CMCC No 120 of 2014 pending hearing and determination of the Appeal herein.
2. The application is supported by the affidavit of Joseph Kithi Ngombo sworn on the August 1, 2022 where he deponed that judgment in the case was delivered on the March 3, 2022 and being dissatisfied with the decision, set in motion the Appeal which according to him has high chances of success. He also deponed that the Respondents are not persons of means and if the execution were to proceed and they are paid, should he succeed in the appeal, the appeal's outcome would be rendered nugatory.
 3. In opposition to the said application, the Respondent filed a Replying Affidavit sworn by Geoffrey Kilonzo on the August 4, 2022. He asserted that an appeal does not operate as a stay of execution of the decree appealed against. That he has not proved that he may suffer substantial loss or demonstrated how he will suffer any loss and for that reason, he has not met the conditions for granting of a stay. He also contended that the application has been filed after unreasonable delay as the Judgment was delivered on March 3, 2022. That the applicant has not offered any security and neither has he pleaded that he is willing to deposit any security.
 4. The application was canvassed by way of written submissions with the Appellant filing his submissions on the September 28, 2022. Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules submitting that the applicant ought to satisfy the court that he has a good appeal with good chances of success, that he filed the appeal without undue delay and that unless the application is granted the Applicant is likely to suffer substantial loss.
 5. He submitted that the quantum of damages granted is contested as having been too high in the circumstances and is therefore appealable. That if the execution was to proceed, the likelihood of recovering funds or compensation would be impossible and that will amount to substantial loss. It is his submission that granting stay is discretionary but the discretion must be balanced so that the Judgment Debtor's appeal will not have been rendered nugatory and on the other hand the Judgment Creditors are not subjected to hardship in realizing the fruits of their judgment. He relied on the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd (2019) eKLR* and that of *Foran Motorcycles Co Ltd vs Amina Wambui Wangui & another (2018) eKLR*.
 6. Further he proposed to provide security in the form of a Land Title Deed for a property valued at Kshs 5,500,000/- and submitted that the security offered is more than adequate and therefore the Applicant has satisfied the requirement of security if need be. On this he relied on the case of *Jeremy Arambi Muron vs Standard Chartered Bank (K) Ltd & another (2019) eKLR* where the court granted stay of execution on condition that the appellant deposits a title deed in court. According to him, the court in so doing, considered the ability of the appellant to raise the decretal sum in the case and accordingly gave the deposit of cash as the 2nd option in the event that the appellant failed to deposit the title documents in court.
 7. The Respondent on the other hand filed submissions on the November 8, 2022.
 8. Counsel submitted that the law on granting stay of execution is anchored on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and a party seeking orders for stay of execution must satisfy the following conditions; substantial loss may result to the applicant unless the order is made, that the application has been filed without unreasonable delay and security as may be ordered by the court has been provided for the due performance of the decree. He relied on the case of *Vishram Halai*



v Thornton & Turpin Ltd 1963 1990 KLR 365 submitting that a party seeking an order of stay of execution pending appeal must satisfy all the conditions set out therein and not only some of them.

9. On substantial loss, he submitted that the Appellant has not pleaded, proved, alluded or alleged that he will suffer any substantial loss if the court were to fail to grant stay of execution. He relied on the case of *Kenya Shell Limited vs Kabiru (1986) KLR 410*. It is his submission that where the allegation is that the respondent will not be able to refund the decretal sum, the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree as held in the case of *Caneland Ltd & 2 Others vs Delphis Bank Ltd Civil Application No 344 of 1999*.
10. On reasonable delay, he submitted that the application has been filed after unreasonable delay as the Judgment was delivered on March 3, 2022 and the application filed on August 1, 2022. According to him, the delay by the Applicant is evidence that this application has been brought in bad faith and therefore should be dismissed.
11. On the issue of security, the applicant has not offered any security to court and neither has he pleaded that he is willing to deposit any security and as such the application ought be struck out. He submitted that as long as an inhibition / charge has not been placed as security on the proposed property in favour of the Respondents, it will not serve the purpose of security as the property may be transferred. Further, that if the appeal fails, the Respondents will not be able to recover the decretal sum by selling the property as it's subject to spousal consent among other consents. That the Respondent being a successful party should not be put in a disadvantageous position by the form of security ordered by the court. He relied on the case of *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others (2015) eKLR*.

DISPOSITION

12. This court has considered the application, the response and submissions made on behalf of the parties by both counsels. I have also considered the authorities relied on. This is an application for stay of execution pending appeal brought under Order 42 Rule 6(1)(2) of the Civil Procedure Rules.
13. The rules give this court a wide discretion to grant stay pending appeal. However, such discretion is to be exercised judiciously and under well-settled principles. Most important is that an applicant must establish that if stay is not granted he or she will suffer substantial loss, the application have been brought without unreasonable delay and that the applicant should offer security for the performance of the decree if the court so require.

Order 42 rule 6 provides;

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 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.



2. No order of stay 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 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'
14. When considering the grounds for granting or refusing to grant stay pending appeal, the Court of Appeal stated in *Butt v Rent Restriction Tribunal (1982) KLR 417* that;
 - a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principal 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 that appeal court reverse the judge's discretion.
 - c. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.'
15. The applicant brought the present application through the application dated August 1, 2022 and the Judgment was delivered on March 3, 2022. Though reason for the delay is not given, I do find that the delay herein is not lengthy and therefore unreasonable. On whether the applicant will suffer substantial loss, I note that this is a money decree for a specific amount that has been determined by court.
16. As to what substantial loss is, the court observed in [*James Wangalwa & another v Agnes Naliaka Cheseto \(2012\) eKLR*](#), the Court;

' 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 Civil Procedure Rules. 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.'
17. Having noted that, it is my finding that the Respondents ought to be given a chance to enjoy the fruits of the Judgment to avoid the prejudice and even injustice likely to be suffered by them if the appeal is not resolved within a reasonable time. I have equally noted that this is a matter that was filed in 2014 and Judgment delivered in 2022. I agree that the Respondents being successful parties should



not be put in a disadvantageous position by the form of security ordered by the court and the form of security offered by the Applicant will not suffice. I accordingly find that this present case requires that the Applicant do satisfy half of the decretal sum to each of the Respondents as a condition for the stay of execution, to be paid in the next Forty-Five (45) days. The costs to abide the determination of the appeal. Failure to pay, the application stands dismissed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 7TH DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of;

Mr Kilonzo for the Respondent

