



**Shem v Nyangao (Commercial Miscellaneous Application E387 of 2022)
[2023] KEHC 19066 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 19066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E387 OF 2022
DO CHEPKWONY, J
MARCH 24, 2023**

BETWEEN

GRANT SHEM APPLICANT

AND

FLORENCE NYANGAO RESPONDENT

RULING

1. Before this court for determination is the appellant's/applicant's notice of motion dated May 16, 2022 which has been brought under the provisions of sections 1A, 1B and 3A, all of the [Civil Procedure Act](#) and order 40 and order 42 rule 6 of the [Civil Procedure Rules, 2010](#) seeking the following orders:-
 - a. Spent;
 - b. Spent;
 - c. That the honourable court be pleased to issue orders of stay of execution of the judgment and decree given on April 28, 2022 in SCCCOMM No E782 of 2022, Florence Nyangao v Grant Shem pending the hearing and determination of the intended appeal.
 - d. That the costs of this application be in the cause.
2. The grounds adduced in support of the application are *inter-alia* that the small claims court in its judgment and decree dated April 28, 2022, awarded the respondent special damages at Kshs 471,000/=. It is averred that in arriving the said decision, the court failed to consider the appellant's evidence notwithstanding that the respondent had not presented credible and persuasive evidence to the required threshold of the law. It is therefore contended that if stay is not granted, the appellant may be made to make unfair payments and eventually be unable to recover the decretal sum if the execution proceeds and in the end the appeal succeeds. These grounds are further explicated in the



appellant's affidavit sworn on the May 16, 2022, wherein besides the attachments annexed in support of the application, the applicant adds that the respondent would not suffer prejudice if the stay orders are granted.

3. The application is opposed by the respondent *vide* her replying affidavit sworn on June 10, 2022. Her case is that the appellant fully participated in the trial which culminated into the judgment delivered on April 28, 2022 and cannot purport any likelihood of being prejudiced by the same. She avers that the appellant never denied the service agreement between them, hence the application herein is only meant to deny her fruits of her successful judgment. It is the respondents contention that the appellant has not met the threshold set out under order 42 rule 6 of the [Civil Procedure Rules](#) which enjoins that an applicant seeking stay must establish that the intended appeal is arguable, and may be rendered nugatory if stay is not granted. Further, the respondent contends that the appellant/applicant must show what substantial loss he stands to suffer, whether the application has been made timeously and his willingness to offer security in due performance of the decree.
4. In her view, the appellant has not met any of the afore-stated grounds so that his application is entirely frivolous, an abuse of the court process and wastage of the court's time. She has asked the court to dismiss the application but in the event it is allowed, then the court directs that the decretal sum be deposited in a joint interest-earning account in the names of both their counsel.
5. On July 27, 2022, this court directed that the appeal be canvassed by way of written submissions and as the record reflects, the appellant/applicant's submissions are dated September 6, 2022 whilst those of the respondent are dated October 11, 2022. I have considered and read through the said submissions and since they reiterate the summary I have given above, I will not repeat the same here.

Analysis and Determination

6. I have considered the application, the affidavits sworn in support and in rebuttal of the same, the submissions filed by parties as well as the authorities each has relied on. This being an application for stay of execution pending appeal, the applicable provision is order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#) which specifies the circumstances under which a court may order stay of execution of a decree or an order pending an appeal. It provides that in such an application, an applicant must prove to the satisfaction of the court that the application has been filed timeously, that he or she stands to suffer substantial loss if the stay is not granted and lastly, that the applicant is willing to offer such security as may be ordered by the court.
7. Taking cue from the principles as laid hereinabove, the first requirement for testing the application at hand is whether the same has been filed timeously. The judgment against which the appeal lies was delivered on April 28, 2022 whereas the instant application was filed on May 16, 2022, which is a period of less than a month after delivery of the judgment. Thus, although the respondent has intimated that there was delay in filing the application, I am of the view that the application has been filed within the timelines within which an appeal can be lodged and therefore it cannot be said to have been filed after inordinate delay. The applicant has thus satisfactorily fulfilled the first requirement under order 42 rule 6(2) of the [Civil Procedure Rules](#).
8. On the second requirement of whether the applicant stands to suffer substantial loss if the orders for stay are not granted, it is the applicant's case that the respondent may proceed with execution and render the appeal otiose if successful. The applicant adds that he is apprehensive that he might not be able to recover the decretal sum if the same is paid to the respondent upon execution. On the other hand, the respondent has termed that line of argument as an attempt to defeat a lawfully obtained judgment and prevent her from enjoying the fruits of the said judgment. She has pleaded with the



court to make a conclusion that no viable reason has been advanced to demonstrate that the applicant would suffer any substantial loss at all.

9. It behoves the court to guide on what amounts to substantial loss. I am agreeable with the finding in the persuasive case of *Sewankambo Dickson v Ziwa Abby* HCT-OO-CC-MA 0178 of 2015, where it was stated that substantial loss is a qualitative concept which connotes a loss with real value as opposed to a nominal loss. That court went on to state that substantial loss refers to any loss, great or small, that is real worth of value as distinguished from a loss without value.
10. Similarly, in the case of *National Industrial Credit Bank Ltd v Aquinans Francis Wasike* (unreported), Court of Appeal civil appeal No 238 of 2005, the superior court held as follows:-

“This court has held before and it would bear repeating that while the legal duty is on the applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or 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 shifts to the respondent to show what resources he has since that is a matter which is peculiar within his knowledge.
11. This court as well reiterates that once a reasonable fear is expressed with regard to the respondents impecunily as was the case herein, the burden of prove shifts to respondent to adduce evidence which would rebut a claim that she is a woman of straw as alleged. Unfortunately, the respondent has not even sworn an affidavit to show that she is a person of means and able to repay the decretal sum should the appeal succeed. With the unresolved puzzle as regards the respondent’s ability to repay the decretal sum in the event the appeal succeeds, I am persuaded that the appellant has established to the satisfaction of the court that he stands to suffer substantial loss in the event the orders for stay sought are granted, hence the second requirement has as well been satisfied.
12. The third and last condition for grant of orders for stay of execution is the willingness by the applicant to offer security in terms of order 42 rule 6(2) of the *Civil Procedure Rules*. The applicant has submitted that he is willing to deposit insurance bond from a reputable insurance institution of the value of Kshs 528,024/= which he describes as sufficient security. On the other hand, the respondent argues that the application has maliciously been made to prevent her from enjoying the fruits of the successful judgment. She however, urges the court to direct the applicant to deposit the decretal sum in a joint-interest earning account in the event the applications for stay is allowed.
13. In my view, whereas I agree that a successful party is entitled to the fruits of his/her judgment, the court should not lose sight to the equally important right of a party to appeal against the finding of the trial court until the appeal goes through its due course upto the apex court. The court is therefore under duty to balance the two competing rights and interests of both parties. Such equallitorium would be achieved by offering security for the due performance of the decree in question, as is outlined under order 42 rule 6(2) of the *Civil procedure Rules*. The purpose of security is not to punish the judgment debtor but to secure the performance of the decree which in civil proceedings is regarded as a debt unless set aside by a superior court.
14. In this case, although the applicant has expressed the willingness to provide security, it is upon the court to determine the form and extent of security to be offered and not the applicant. Having established the three (3) grounds under order 42 rule 6(2) of the *Civil Procedure Rules*, I am persuaded that the applicant’s application dated May 16, 2022 is merited and proceed to allow the same in the following terms:-



- a. That a conditional order of stay of execution be and is hereby issued staying the execution of the judgment issued by the Small Claims Court in SCCCOMM No E782 of 2022, Nairobi pending the hearing and determination of the intended appeal.
- b. That order (a) above is premised on condition that the applicant deposits within thirty (30) days from the date herein, the judgment sum amounting to Kshs 471,000/= in an escrow interest earning account in the names of the advocates on record for the parties, within 30 days from the date hereof, failure to which the stay shall automatically lapse.
- c. Costs of the application to abide by the outcome of the appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Njagi counsel for Applicant

Mr. Kinoti counsel for the Respondent

Court Assistant - Sakina

