



REPUBLIC OF KENYA



**Wagatira v Equity Bank Limited & another (Civil Suit 22 of 2014)
[2023] KEHC 1979 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 22 OF 2014
A MABEYA, J
MARCH 10, 2023**

BETWEEN

PATRICK WAGATIRA PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

GABRIEL NDUNGU 2ND DEFENDANT

RULING

1. This ruling disposes the application dated 31/12/2021. It was brought under order 42 rule 6,7 and 9, order 51 rule 1 of the Civil Procedure Rules, section 3A of the Civil Procedure Act cap 21 of the laws of Kenya.
2. The application sought orders for stay of execution of the judgment delivered on 21/2/2021 and reviewed by this court on 10/6/2021 pending appeal.
3. The grounds for the Motion were set out on the face of it and the supporting affidavit of John Njenga sworn on 23/12/2021. It was contended that the applicant intended to appeal against that judgment. That the appeal had valid grounds with high chances of success. It was the applicant's case that the decretal sum of Kshs 17,365,100/- had been accruing interest to more than Kshs.30,000,000/- and the applicant was apprehensive that the 1st respondent would execute the decretal amount. That unless the orders sought were granted the appeal would be rendered nugatory and the applicant was willing to provide security as per the court directions.
4. The 1st respondent opposed the application vide the replying affidavit of Patrick Mwaura Wagatira sworn on 9/2/2022. It was averred that the plaintiff was a successful litigant who was entitled to enjoy the fruits of his judgment. That the applicant had failed to satisfy the conditions for stay of



execution and that the application was brought two years from the date of the judgment making the delay inordinate. It was averred that the security being offered by the bank would not benefit him and termed the application as an abuse of the court process.

5. Parties canvassed the application by way of written submissions. The applicant's submissions were dated 25/5/2022 whereas the respondent's were dated 30/6/2022.
6. I have considered the application, the response and the submissions. This is an application for stay of execution pending appeal. The principles applicable are provided for under order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides that: -

“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.”

7. From the above, the applicant ought to satisfy the conditions that the application was filed without undue delay, that it would suffer substantial loss if the stay sought is not granted and that it has offered security for the due performance of the decree.
8. As to whether the application was timeous, the decree was made on 21/2/2020 and amended in 10/6/2021. The present application was made on 31/12/2021 which was six months after. To this Court's mind, there was inordinate delay and the application cannot be said to have been made timeously.
9. On substantial loss, the applicant contended that the amount in the decree was substantial. That the respondent had not given evidence to show that he had the ability to refund the amount in case the appeal succeeds. On his part, the plaintiff averred that the applicant had failed to demonstrate that it would suffer loss if the stay of execution was not granted.
10. As to what substantial loss is, 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.”

11. From the foregoing, the applicant needed to demonstrate that it would irreparably suffer loss if the stay orders were not granted. It questioned the plaintiff's ability to repay the decretal amount if the appeal succeeds. On the other hand, the plaintiff did not state whether he is capable of refunding the money if paid to him and the applicant succeeds on appeal. In my view, once an applicant claims that if the monies are paid over and the appeal succeeds, the applicant would not be able to recover the same, it



behooves the successful party to show that he is capable of refunding the same. Failing such evidence, substantial loss in view would be said to have been demonstrated.

12. In the present case, even though the applicant averred that the plaintiff will be incapable of refunding the sum if paid over, the plaintiff did not rebut that averment. I am satisfied that in the circumstances of this case, substantial loss has been demonstrated.

13. The third principle for consideration is security for the due performance of the decree. In *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others* [2015] eKLR, it was held: -

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

14. Further, in *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed: -

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.”

15. In the present case, the applicant contended that it was willing to provide a bank guarantee as security. The applicant further averred that it was a reputable financial institution with the ability to pay the decretal sum should the appeal fail.

16. Taking all the factors into consideration, the purpose of stay of execution is to preserve the subject matter of the suit to avoid rendering the appeal nugatory. The orders for stay of execution are discretionary and thus the competing interests of both parties need to be taken into consideration. On one hand there is a successful litigant who is entitled to the fruits of his judgment while on the other hand there is a party seeking exercise its right of appeal.

17. In the interests of justice, this court finds that the application of stay of execution is justified and the same is allowed on condition that the applicant pays the decretal sum into an interest bearing account in the joint names of the advocates on record for the parties within 14 days of the date of this ruling. In default, execution to issue. The costs of the application is awarded to the plaintiff in any event.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

