



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngonye & another v Rugendo (Civil Appeal E599 of 2021)  
[2023] KEHC 3795 (KLR) (Civ) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3795 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E599 OF 2021**

**DO CHEPKWONY, J**

**APRIL 19, 2023**

**BETWEEN**

**JACKSON MWANGI NGENYE ..... 1<sup>ST</sup> APPELLANT**

**KELVIN NGATIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BETTY KARIMI RUGENDO ..... RESPONDENT**

**RULING**

1. For determination before this court is the applicant's notice of motion application dated October 1, 2021 expressed in terms of section, 1A, 1B, 3A and 3B all of the [Civil Procedure Act](#) and Order 22 Rule 22, Order 42 Rule 4, 6 and 7, Order 50 Rule 6 and Order 51 Rule 1 and 3, all of the [Civil Procedure Rules](#), 2010. In the said application, the Applicant is seeking for the following orders that:-
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to order a stay of execution of the Judgment issued by the Honourable Trial court on August 27, 2021 pending hearing and determination of the intended appeal;
  - d. That the application be heard inter parties on such a date and time as this honourable court may direct;
  - e. That the costs of this application abide the outcome of the appeal.



2. The application is premised on the grounds on its face and supported by the affidavit of Janerose Nanjira, which can be summarized as follows:-
  - a. Judgment was entered on August 27, 2021 whereby the court awarded the respondent general damages of Kshs.600,000/=.
  - b. The appellants seek to appeal the said Judgment delivered on August 27, 2021.
  - c. The appellants have already filed an appeal.
  - d. The intended appeal raises pertinent issues and has a high chance of success.
  - e. The appellants are ready, willing and able to give a reasonable security in the form of a bank guarantee as security in this matter.
  - f. The application has been done without any unreasonable delay.
3. The application is opposed by the respondent who filed grounds of opposition dated November 12, 2021. The grounds are couched in the following manner;
  - a. The application is unmerited and misconceived.
  - b. The application has been brought in bad faith and with an aim of denying the Plaintiff/Respondent the fruits of her rightly obtained Judgment.
  - c. The intended appeal has nil chances of success.
  - d. The application is an abuse of the process of this court and should be dismissed.
4. On March 30, 2021, directions were issued that the application be canvassed by way of written submissions. Both parties have complied with the directions and filed their respective submissions. The applicant's submissions are dated April 4, 2022 while the Respondents are dated April 1, 2022. I will endeavour to consider the submissions in my determination of the application.

### **Analysis and Determination**

5. I have considered the application dated October 1, 2021, the affidavit in support of the said application, the grounds of opposition and the written submissions filed by both parties as well as the authorities relied upon. In my considered view, I find the relevant issue for determination before this honourable court being whether the applicant has met the threshold for grant of the orders of stay.
6. In addressing this issue, this Court is guided by the provisions of Order 42 Rule 6(2) of the [Civil Procedure Rules](#), 2010 which provides as follows:-
  - “(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 preferred 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.”

7. In an application of this nature, the Applicant must satisfy the requirements under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which are that if the applicant is not granted stay substantial loss may result, that the application is made without unreasonable delay and lastly, that such security as the court may order for the due performance of such decree or orders.
8. I am guided by the authority of [Butt v Rent Restriction Tribunal](#) [1979] eKLR, where the Court of Appeal highlighted several requirements to be considered in determining whether to grant or not to grant stay of execution pending appeal. It stated as follows:-
  - 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 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 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 say will consider the special circumstances of the case and its unique requirement.”

9. Now turning to the requirement regarding substantial loss, the Applicant has urged that if the orders of stay are not granted the Applicant shall suffer irreparable loss emanating from payment of the decretal sum so that, if execution is allowed to proceed the appeal will be rendered nugatory. In the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012]eKLR, the Court held 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 [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.”

10. In the instant application before court, the applicants have submitted that they stand to suffer substantial and irreparable loss as there is a likelihood that the applicant will be unable to recover the decretal sum. The appellant further urged that unless the application is allowed, the appeal will be rendered nugatory and an exercise in futility. It is important to note that the applicant must prove with evidence that if orders of stay are not granted, substantial loss shall be suffered. In the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, the Court held that

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; it follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

11. With regard to the question of unreasonable delay, I note that the judgment in the trial court was delivered on August 27, 2021 and the application before court was filed on October 1, 2021. An application for stay ought to be filed timeously and without delay. In the case of *JMM v PM* [2018] eKLR, Civil Appeal No 192 of 2017, where the Court held that;

“The principles upon which the Court may stay the execution of orders appealed from are settled. The applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 Rule 6(2) of the *Civil Procedure Rules*.

The decision appealed from was handed down on November 16, 2017 and the appeal filed in the same month. The present application was filed on February 22, 2018. The period is reasonable.”

12. As stated above the current application as was filed on October 1, 2021 and the impugned Judgment was delivered on August 28, 2021 approximately less than a month and in my view a period of four (4) days is reasonable time.

13. As for the issue of the requirement of security for due performance of the decree or order to be furnished by the Applicants, I am guided by the decision in the case of *Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, where the court held that:-

“... 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. The position was echoed in the case of *Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others* [2014]eKLR, where the court held that:-

“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 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.”

15. The applicants have submitted and shown willingness to provide security for the due performance of the decree or order as provided for in line with Order 42 rule 6 of the *Civil Procedure Rules*, 2010. The applicants have submitted that they are ready to provide security for the decretal sum. They are ready and willing to provide a bank guarantee immediately upon the issuance of this order.

16. It is trite that orders of stay are discretionary in nature and court has discretion to either grant or not to grant depending on the circumstances of each case.

17. For the above stated reasons, the exercise my discretion in favour of the appellants is required and I believe that it will be in the interest of justice to grant orders of stay in this matter so as not to render this appeal nugatory.

18. In the upshot and for the reasons stated above, I find that the application dated October 1, 2021 is merited and is allowed in terms of Prayer No.(3) and further on the following terms and conditions:-

- a. That the appellants to deposit the entire decretal sum of Kshs.600,000/= with the court within 30 days from the date hereof.
- b. The Deputy Registrar to call for and avail the original record of proceedings to enable the Record of Appeal be prepared and filed within 60 days from today's date.
- c. Mention on June 19, 2023 before the Deputy Registrar to confirm compliance and further directions.
- d. Failure to comply with the aforementioned conditions the orders of stay shall lapse and the appeal shall stand dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...19<sup>TH</sup> ... DAY OF ...APRIL... 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

No appearance for and by either party

Court Assistant – Simon/Martin

