



**Fredrick Githutu Nganga t/a Genlose Commercial Agencies v Kamau (Miscellaneous Application 132 of 2023) [2023] KEHC 17498 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION 132 OF 2023  
SM MOHOCHI, J  
MAY 19, 2023**

**BETWEEN**

**FREDRICK GITHUTU NGANGA T/A GENLOSE COMMERCIAL AGENCIES ..... APPLICANT**

**AND**

**HARUN MBITU KAMAU ..... RESPONDENT**

**RULING**

**Introduction**

1. The Application(s) before the Court are two Notice of Motions dated 12<sup>th</sup> October 2022 and the one dated 27<sup>th</sup> January, 2023 brought under Section 3A, Section 63E, 79G and 95 of the [Civil Procedure Act](#) and Orders 12 Rule (7), 22, Rule (22), and 42 Rule (6) of the [Civil Procedures Rules](#).
2. The 1<sup>st</sup> application seeks one substantive prayer namely: -
  - a. The Application be certified as urgent and the same be heard ex-parte dispensing with service-Spent.
  - b. A stay against execution of judgment in Nakuru CMCC No 644 of 2020 be issued pending inter parte hearing of the Application-Spent;
  - c. A stay against execution of judgment in Nakuru CMCC No 644 of 2020 be issued pending hearing and determination of the Application-;
  - d. Leave to appeal out of time against the Judgment/Ruling of Hon. Y.I. Khatambi PM, delivered on 4<sup>th</sup> February 2023 in Nakuru CMCC No 644 of 2020;
3. The 2<sup>nd</sup> application seeks one substantive prayer namely: -



- a. That the Court be pleased to set aside its orders lifting the orders issued on the 27<sup>th</sup> October 2022.
4. The background of the dispute between the Applicant and the Respondent is a contractual relationship of “agent and principal”, The Applicant having been the appointed agent to manage and collect rent from four (4) properties referenced as Nakuru Municipality Block 30/279, Plot 5/322 Lanet, Plot 2/5123 Teachers and Njoro Ngata Block 1/3662 on behalf of the Respondent.
5. The dispute is, of outstanding rent collected by the Applicant and not remitted of kshs. 477,155/- giving rise to Nakuru Chief Magistrate’s Court, Civil Suit No.644 of 2020 where Ex-Parte judgment was entered in favor of the Respondent on the 4<sup>th</sup> February 2022.
6. The Applicant did not contest the judgement by filing an appeal within the statutory timelines and on the 20<sup>th</sup> October 2022, he eventually moved the Court in the instant application, under certificate of urgency seeking: -
  - a. “Stay of execution of judgment”, pending hearing of the Application; and
  - b. “leave to appeal out of time”, against a ruling in the trial Court dated 4<sup>th</sup> February 2022 dismissing the Applicant’s Application to set-aside the ex-parte judgement and against the Judgment dated 20<sup>th</sup> October 2022.
7. The Instant Application gave rise to the ex-parte interlocutory order of stay of execution of judgement. The Applicant was further ordered to serve the Respondent within 3 days, the Respondent was to file response within 14days of service, a mention date for direction was to be assigned by the Court assistant within 17days as per the Court diary, parties were directed to consider Court administered alternative justice systems (AJS) and mediation.
8. On the inter-parte mention date of 8<sup>th</sup> December 2023, there was non-appearance of any of the parties and at 15.45 hours the matter was called out and still there was no response, the Court duly recorded the same and directed a new date be assigned by the Court Assistant.
9. The Temporary Stay against execution of judgment thus lapsed without extension and were thus extinguished giving rise to the instant Application.
10. After the Instant Application was filed, the matter came up before Court on the 7<sup>th</sup> February, 2023, where Mr. Bosire Counsel, held brief for Muriithi for the Applicant and Cheptalam Counsel, held brief for Koome for the Respondent, and the matter was re-assigned to this Court with a mention for the 28<sup>th</sup> February 2023.
11. On the 28<sup>th</sup> of February 2023, directions were issued to dispose-off the both applications jointly by way of filed written submissions, and the parties were assigned time for filing of written submissions, and a mention date, for confirming the compliance, was scheduled on the 28th March 2023, on which date, the parties confirmed filing their written submission and the Court scheduled the 5th of May 2023, as the date for the Ruling.
12. From the record the Applicant filed his single page written submissions on the 27<sup>th</sup> March 2023 while the Respondent file his written submissions together with his undated replying Affidavit on the 28<sup>th</sup> March 2023.
13. The Applicant appears to have submitted that their Application was uncontested and should thus be allowed. No effort was made to satisfy the conditions for grant of the prayers.



14. Stay of Execution pending appeal is governed by Order 42, Rule 6 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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

15. The power of a Court to grant stay of execution is discretionary as correctly submitted by the Respondents. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial Court’s decision. (see [Butt vs. Rent Restriction Tribunal](#) [1979]).

16. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in [RWW vs. EKW](#) (2019) eKLR addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. The Court of Appeal in [Visbram Ravji Halai vs. Thornton & Turpin](#) Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the



High Court’s jurisdiction to do so under Order 41 rule 6 (as it then was) of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

18. The first requirement is that the intended appeal must be arguable. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. This first ground is therefore met. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate Court overturn that of the trial Court.
19. The second aspect is to consider whether the Application before Court had been filed without undue delay. I noted that the Interlocutory Judgment was entered 4<sup>th</sup> February 2022 and formal judgment delivered on the 22<sup>nd</sup> July 2022, while the present application is dated 22<sup>nd</sup> October 2022. The Memorandum of Appeal is undated. Thus, there is no undue delay.
20. Thirdly, this Court must determine whether not granting the order will occasion substantial loss to the Applicant. Substantial loss was explained in the case of *James Wangalwa & Another vs. 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.”

21. The Court is unpersuaded on the substantial loss test as the Appellant only states that the Respondent has issued execution notice. Issuance of judicial notices is a normal occurrence and the same cannot be evidence of suffering substantial loss test. Further evidence would be required to show how such a notice would occasion or lead to occasioning of substantial loss.
22. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation...”

23. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail and where a party seeks stay, such an application must still be weighed against the parameters under Order 46 Rule (2).



24. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court stated: -

“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.”

25. It is my finding that the Applicant herein, though they brought this Application with undue delay and never adequately demonstrated the substantial loss that they would suffer and they failed to furnish security as stipulated by sub-Rule (b) as the same has never been demanded of him.

26. In the result, I grant the order for stay of execution on condition that the Applicants shall furnish security equivalent to the outstanding amounts in contention being Kshs. 723,296/=.

27. The Applicants shall provide a Bank guarantee of Kshs. 723,296/= from a reputable Bank within 15 days of today. The applicants shall take all necessary steps to ensure that the Appeal is properly filed and admitted within 45 days of today.

28. The Stay Order granted shall lapse upon default of any condition set by this Court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 19<sup>TH</sup> DAY OF MAY, 2023**

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**MOHOCHI S.M**

**JUDGE**

