



**Ndaruga v Theuri & 2 others (Civil Appeal E072 of 2021)  
[2023] KEHC 3920 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E072 OF 2021  
FN MUCHEMI, J  
MAY 4, 2023**

**BETWEEN**

**PHILIP MURURI NDARUGA ..... APPELLANT**

**AND**

**PETERSON NDEGWA THEURI ..... 1<sup>ST</sup> RESPONDENT**

**HERMAN NDERITU KING'ORI ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Application for stay of execution of the judgement and decree  
in Nyeri CMCC No 304 of 2018 rendered on June 3, 2021.)*

**RULING**

**Brief Facts**

1. This application dated July 18, 2022 seeks for orders for stay of execution of the decree in Nyeri CMCC No 304 of 2018 pending the hearing and determination of the appeal.
2. In opposition to the application, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a Replying Affidavit dated October 4, 2022 as well as Grounds of Opposition dated March 20, 2023 respectively.

**Applicant's Case**

3. The applicant states that he instituted a suit being Nyeri CMCC No 304 of 2018 against the respondents for an award of damages for malicious arrest, unlawful detention and malicious prosecution. The court rendered its judgment on June 3, 2021 and the applicant states that the court dismissed his case with costs to the respondents. Being aggrieved with the decision of the trial court, the applicant appealed against the decision and filed his memorandum of appeal on November 9, 2021.



4. The applicant states that the 1<sup>st</sup> & 2<sup>nd</sup> respondents have filed a Notice to Show Cause for him to show cause why he should not be committed to civil jail for failure to pay costs in the sum of Kshs 93,000/-.
5. The applicant contends that the 1<sup>st</sup> & 2<sup>nd</sup> respondents had instituted a suit against him earlier being Nyeri CMCC No 13 of 2002 for the sum of Kshs 371,853.70. The respondents later withdrew their claim. The appellant thereafter sued the respondents for salary underpayments and unpaid house allowance in the sum of Kshs 252,972/-. The applicant contends that he was awarded Kshs 252, 972/- plus costs and interest at court rates from the date of filing the counterclaim till payment in full.
6. The applicant further contends that the respondents lodged an appeal but they have not paid half the decretal sum as ordered by the court. Further, he states that the respondents proceeded with the trial ex parte in 2013 and he was imprisoned for 6 months while the appeal was in place and thereafter the judgment was overturned on appeal. The applicant thus argues that the respondents intend to repeat the same process and have him imprisoned while the appeal is yet to be determined.

### **The 2<sup>nd</sup> Respondent's Case**

7. The 2<sup>nd</sup> respondent states that the application is fatally and incurably defective, misconceived, scandalous, frivolous, vexatious and an abuse of the court process. The 2<sup>nd</sup> respondent further states that an appeal in itself does not operate as automatic stay of execution. He further argues that the applicant has not demonstrated what substantial loss he stands to suffer or how his appeal may be rendered nugatory if the orders sought are not granted. The 2<sup>nd</sup> respondent further argues that the applicant has not demonstrated that he is willing to furnish security for the due performance of the decree pending the outcome of the appeal.
8. The 2<sup>nd</sup> respondent states that he is entitled to costs of the suit which were awarded by the trial court. He further avers that the instant application is a tactic to delay him from recovering the costs awarded to him.
9. The 2<sup>nd</sup> respondent further states that the applicant has not shown that he is a man of straw and he will not be in a financial position to repay the said sums as awarded in costs in the event the appeal succeeds.

### **The 3<sup>rd</sup> Respondent's Case**

10. The 3<sup>rd</sup> respondent states that the application is ill conceived, frivolous, without merit and an abuse of the court process. The 3<sup>rd</sup> respondent argues that the applicant has not demonstrated that he stands to suffer substantial loss if the orders sought are not granted. Further, the 3<sup>rd</sup> respondent contends that the appeal does not raise any serious issues for consideration by this court as the trial court's decision was well reasoned and the applicant did not adduce any evidence. Thus, the 3<sup>rd</sup> respondent states that the appeal is meant to frustrate the realization of the fruits of litigation.
11. The 3<sup>rd</sup> respondent contends that the application is a delaying tactic, made in bad faith and is intended to delay justice.
12. Parties hereby disposed of the application by way of written submissions.

### **The Applicant's Submissions**

13. It is evident that the applicant did not submit on his application but on the merits of the appeal and laid out how the various suits between him and the respondents came about. The applicant submits that he ought to be paid the sums owed to him from CMCC No. 13 of 2002 so that he can furnish security for due performance of the decree in the instant suit.



## The 2<sup>nd</sup> Respondent's Submissions

14. The 2<sup>nd</sup> respondent relies on order 42 rule 6(2) of the Civil Procedure Rules and submits that the applicant has not met the threshold for granting of stay orders pending appeal. The 2<sup>nd</sup> respondent cites that case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and submits that the applicant has not demonstrated that he stands to suffer substantial loss. The applicant merely states that he stands to suffer irreparably as the respondents are likely to attach his property. Furthermore, the 2<sup>nd</sup> respondent submits that the applicant has not challenged his ability to repay the decretal sum in the event the appeal succeeds.
15. The 2<sup>nd</sup> respondent contends that the trial suit was instituted in 2018 and it came to conclusion on January 28, 2022. Thus he states that he would be deeply prejudiced by any further delay as he has patiently waited for four (4) years to enjoy the fruits of his judgment. The 2<sup>nd</sup> respondent further argues that execution is a lawful process and the fact that the process has been put in motion does not by itself amount to substantial loss to the applicant.
16. The 2<sup>nd</sup> respondent further submits that the applicant has not offered any security for the due performance of the decree and further that a successful litigant is entitled to the fruits of his judgment and therefore he ought to be protected by the court. The 2<sup>nd</sup> respondent states that in the event the court is inclined to grant stay of execution, the applicant ought to deposit the entire decretal amount in an interest earning account in the names of the appellant and respondents' advocates.
17. On the issue of whether the appeal raises triable issues, the 2<sup>nd</sup> respondent submits that the trial court correctly dismissed the applicant's claim for malicious prosecution and the appeal herein does not raise any triable issues.
18. The 2<sup>nd</sup> respondent further submits that save for the instant application and filing the appeal, the applicant has not taken any steps in proceeding with the appeal. The 2<sup>nd</sup> respondent cites the cases of *Seyani Brothers & Co (K) Ltd v Jeremiah Chabenza Muloma* [2021] eKLR and *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR in support of his submissions.

## The Law Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

19. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 rule 6 of the *Civil Procedure Rules* stipulates:-
  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 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 orders set aside.
  2. 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 1<sup>st</sup> 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.

20. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

21. Substantial loss was clearly explained in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR:-

“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.

22. The applicant argues that he stands to suffer irreparably if the respondents levy execution against him. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents submit that the applicant has not demonstrated substantial loss. He has not demonstrated that he will face any hardships in recovering the decretal sum. On perusal of the applicant’s affidavit, it is event that he has not demonstrated substantial loss should the orders sought be granted. He merely states that he shall suffer irreparably as execution is underway and he is likely to be committed to civil jail. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant has an obligation to demonstrate that execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The applicant in my view has not discharged this duty herein.

#### **Has the application has been made without unreasonable delay.**

23. Judgment was delivered on June 3, 2021 and the applicant filed this application on July 18, 2022. It took the applicant over one year between the date judgement was delivered to the time of filing this application. No explanations for the delay has been given by the applicant in his affidavit. In my considered view, delay of over one year is inordinate and inexcusable. The applicant has failed to explain delay which is a requirement in an application of this nature.

#### **Security of costs.**

24. The purpose of security was explained in the case of [Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others](#) [2014] eKLR 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 the 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. The applicant has not offered any form of security for the due performance of the decree. What he said is that the 1<sup>st</sup> & 2<sup>nd</sup> respondents ought to pay him his decretal sum in CMCC No 13 of 2002 so that he can furnish security in the suit herein. The suit the appellant is talking about is different on from the suit that forms the basis of this appeal. This argument does not make sense in this application.
26. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
27. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue herein is whether there is just cause for depriving the respondents their right of enjoying their judgement. I have perused the grounds of appeal and without going into the merits of the appeal, noted that they do not raise arguable points thus reducing chances of a successful appeal.
28. In my considered view, the applicant has failed to demonstrate substantial loss. He has also failed to explain delay in filing this application. The balance of convenience does not favour him either. These considerations leads this court to the conclusion that this application cannot succeed.
29. I find no merit in this application and dismiss it accordingly.
30. Costs to abide in the appeal.
31. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 4<sup>TH</sup> DAY OF MAY, 2023.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through videolink this 4<sup>th</sup> day of May, 2023**

