



**Mark Holdings Limited v Wairimu & 2 others (Civil Appeal
E235 of 2022) [2023] KEHC 19218 (KLR) (Civ) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19218 (KLR)

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

CIVIL

CIVIL APPEAL E235 OF 2022

CW MEOLI, J

JUNE 22, 2023

BETWEEN

MARK HOLDINGS LIMITED APPLICANT

AND

VIRGINIA WANJIKU WAIRIMU 1ST RESPONDENT

AUTO INDUSTRIES LIMITED 2ND RESPONDENT

DAVID NG'ANG'A 3RD RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated April 14, 2022 taken out by Mark Holdings Limited (hereafter the applicant) and seeking an order to stay execution of the judgment delivered on March 29, 2022 in SCCC No. 32 of 2022 involving the applicant and Virginia Wanjiku Wairimu, Auto Industries Limited and David Nganga (hereafter the 1st, 2nd and 3rd respondent/ respondents respectively), pending the hearing and determination of the appeal herein. It is based on the grounds set out on its body and supported by the depositions in the affidavit of John Thamara Mwangi, described as a salesman and supervisor in the applicant. The Motion is expressed to have been brought under the provisions of section 79G of the *Civil Procedure Act* (CPA); Order 22, Rule 22, Order 50, Rule 6 and Order 51 of the *Civil Procedure Rules* (CPR).
2. The application is premised on grounds that there is a likelihood of execution of the decree proceeding against the applicant and that the intended appeal raises arguable issues. The deponent further deposed that the trial court found the applicant vicariously liable for an accident which occurred on October 7, 2018 involving the motorcycle registration number KMD 949N (the subject motor cycle) which was being ridden by David Ng'ang'a (hereafter the 3rd respondent) and that the applicant being aggrieved thereby intends to challenge the decision on appeal.



3. Kinyanjui Theuri, counsel for the 3rd respondent swore the replying affidavit in opposition to the motion. Stating therein that the Motion is defective in law and substance by the legal provisions invoked therein do not support the orders sought and that both the grounds and affidavit supporting the Motion equally do not support the orders sought. The advocate further defended the trial court's decision and asserted that the 3rd respondent will be gravely prejudiced if the order to stay execution is granted, the 3rd respondent having already satisfied his share of the decretal sum by making the requisite payments to the 1st respondent.
4. On behalf of the 1st respondent, her advocate David Nyareru Bosire swore a replying affidavit on May 19, 2022 essentially associating himself with the position taken by the 3rd respondent.
5. The Motion was canvassed by way of written submissions. On his part, the applicant's counsel anchored his submissions on the provisions of Order 42, Rule 6(2) of the CPR on the conditions to be met in an application of this nature, which conditions were echoed in Butt v Rent Restriction Tribunal [1979] eKLR. Counsel argued that unless an order to stay execution is granted, the applicant stands to suffer substantial loss. Because it runs the risk of its goods being attached in execution whereas it did not own the subject motorcycle at the time of the material accident hence could not be liable for the accident.
6. Counsel submitted that in any event, the 1st respondent has not shown her capacity to refund any decretal sums paid out to her in the event of the appeal succeeding. On the condition pertaining to the provision of security, it was argued that the applicant already complied with the interim order issued on May 11, 2022 requiring it to deposit the sum of Kshs. 300,000/- in court. Counsel therefore urged the court to find the deposited sum to be sufficient security and to allow the Motion.
7. On behalf of the 1st respondent, it was contended that for the Motion to succeed, the applicant would be required to meet the threshold set out in Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR namely, that an applicant would be required to show that the intended appeal is arguable in nature and that the appeal would be rendered nugatory if the stay order is denied. It was further contended that the intended appeal in the present instance does not raise any arguable issues and hence there is no merit in the Motion. The court was urged to dismiss the Motion with costs.
8. Counsel for the 3rd respondent reiterated the contents of his replying affidavit, and citing Order 42, Rule 6(2) of the CPR as well as the principles reaffirmed in Butt v Rent Restriction Tribunal [1979] eKLR asserted that the question whether or not to grant an order to stay execution is a matter of exercise of the discretion of the court. Counsel submitted that the applicant has not demonstrated the manner in which it stands to suffer substantial loss and stated that a successful party is entitled to the fruits of his/her judgment, citing Antoine Ndiaye v African Virtual University [2015] eKLR and Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR. For the foregoing reasons, counsel urged the court to dismiss the Motion and to award costs thereof to the 3rd respondent.
9. From the record, it is apparent that the 2nd respondent did not participate in the hearing of the Motion or put in any documents in that respect.
10. The court has considered the grounds laid out on the body of the Motion, the rival affidavit material, and submissions of the parties. Before addressing the merits, the court notes that both the 1st and 3rd respondent challenged the competency of the Motion on the premise that it was brought under the wrong provisions of law.
11. As earlier mentioned, the substantive prayer in the Motion is for stay of execution. The motion invokes section 79G of the Civil Procedure Act (CPA); Order 22, Rule 22, Order 50, Rule 6 and Order 51 of the



CPR. Section 79G sets out the timelines for lodging an appeal to the High Court against a decision by a subordinate court and also makes provision for the admission of an appeal out of time upon a party giving sufficient reason. Order 22, Rule 22 provides for instances where a court may stay execution of a decree; while Order 50, Rule 6 provides for the enlargement of time. Order 51 on its part generally provides for the procedure for making applications to the court.

12. That said, the applicable provisions enabling applications for stay of execution pending appeal such as the instant Motion, is Order 42, Rule 6(2) of the CPR. The question therefore remains whether the failure by the applicant to cite the correct legal provision would render its Motion fatally defective. The provisions of article 159 (2) (d) of the Constitution inuncts courts to administer justice without undue regard to technicalities. Based on the provision, the court is satisfied that notwithstanding the omission by the applicant to cite the correct provisions, the Motion is not necessarily rendered fatally defective. To the court's mind, such lapse is cured by article 159(2) (d) (supra). On that basis, the court will consider the merits of the Motion
13. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary and which discretion ought to be exercised judicially. See Butt v Rent Restriction Tribunal (supra).
14. The applicant's key prayer is for stay of execution pending appeal, and the applicable provision, Order 42, Rule 6 of the CPR , stipulates that:
 - “(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”
15. Concerning the condition on whether the application has been brought without unreasonable delay, it is apparent from the record that the impugned judgment was delivered on 31st March, 2022 whereas the instant Motion was brought less than one (1) month thereafter. In my view, the Motion has been brought within a reasonable time.



16. On the second condition, the relevance of demonstrating substantial loss in any application for stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410 when it held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

17. The court proceeded to set out the following concerning substantial loss:

- “1.
2. In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

18. In the present instance, the applicant’s argument on substantial loss is essentially that unless an order for a stay of execution is granted, the 1st respondent will proceed to execute the decree against it. And that any monies paid to the 1st respondent in respect of the decree may be irrecoverable should the appeal succeed. From their respective responses, the 1st and 3rd respondents disagree that substantial loss has been demonstrated here, in the absence of material to indicate that the decretal sum once paid will not be refunded to the applicant if the appeal proves successful.

19. Upon the court’s consideration of the rival arguments, the court is of the view that execution is a lawful process and hence a successful party is entitled to the fruits of his or her judgment. It seemed that the parties argued the motion as if it was one brought under Rule 5(2) (b) of the *Court of Appeal Rules* therefore emphasized the twin considerations whether the appeal is arguable and the likelihood of it being rendered nugatory.

20. For their part the applicants highlighted their contention regarding the ownership of the accident motorcycle at the material time and hence liability for the accident to demonstrate the former consideration. In an application for stay of execution brought before this court under Order 42 Rule 6 of the *CPR*, the Court does not concern itself with the merits of the appeal, but with the key considerations whether substantial loss has been demonstrated and security offered by the applicant. Here, beyond obtuse allusions, there was no definite deposition, in the affidavit of the applicant directly addressing the issue of substantial loss.

21. Be that as it may, the court is willing to accept that sufficient reason has been demonstrated and acknowledges that it must exercise its discretion in balancing the competing interests of the parties so as not to prejudice the matter pending appeal. As stated in *Nduhiu Gitahi & another v Anna Wambui*



Warugongo [1988] 2 KAR, with reference to the decision in Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 that:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal...”

22. On the provision of security, the law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution. From the averments made by the parties, it is apparent that a portion of the decretal sum of Kshs. 450,000/- was paid to the 1st respondent by the 3rd respondent. It is also not disputed that the applicant deposited some money in court pursuant to the grant of an interim order for a stay of execution.
23. In view of all the foregoing circumstances, the court is persuaded to grant the motion dated April 14, 2022 on condition that the sum of Kes. 300,000/- deposited in court pursuant to earlier orders herein is retained as security for the due performance of the decree. The costs of the motion shall abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the 2nd Respondent: Mr. Karanja

For the 3rd Respondent: Mr. Kamau h/b or Mr. Kinyanjui

C/A: Carol

