



**Kawira v Redeemed Gospel Church (Civil Appeal E728 of 2022)
[2023] KEHC 20019 (KLR) (Civ) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20019 (KLR)

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

CIVIL

CIVIL APPEAL E728 OF 2022

CW MEOLI, J

JULY 6, 2023

BETWEEN

JOSEPHINE KAWIRA APPLICANT

AND

REDEEMED GOSPEL CHURCH RESPONDENT

RULING

1. The motion dated September 12, 2022 by Josephine Kawira (hereafter the Applicant) seeks *inter alia* that pending the hearing and determination of the appeal herein there be an order to stay execution of the judgment in Nairobi Milimani Small Claims Court Case No E109 of 2021 (hereafter the lower court suit) in favour of the Redeemed Gospel Church (hereafter the Respondent). The motion is expressed to be brought under Section 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#), *inter alia*, on grounds on the face of the motion as amplified in the supporting sworn by Applicant.
2. To the effect that being aggrieved and dissatisfied with the judgment of the lower court delivered on September 07, 2022, the Applicant has preferred an appeal that has an overwhelming chance of success, and which will be rendered nugatory unless the motion is allowed. That the Respondent will not hesitate to proceed with execution unless this court grants stay of execution pending hearing and determination of the appeal. She concludes by asserting that she stands to suffer great loss if execution proceeds before the hearing of the appeal.
3. The Respondent opposes the motion by way of grounds of opposition dated 30.09.2022. It takes issue with the motion on grounds that the application is incompetent, frivolous, vexatious, lacks merit and is a gross abuse of the court process; that the Applicant has not offered any security as required by Order 42 of the Civil Procedure Rules; that the Applicant should deposit the judgment sum of Kshs



360,000/= into a joint escrow bank account in the names of both advocates as a condition for stay of execution; and that no prejudice will be occasioned to the Applicant in that event.

4. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Section 1A of the Civil Procedure Act on the prerequisites to be fulfilled in an application of this nature. Addressing the court on the issue of substantial loss, counsel reiterated the material in the supporting affidavit and called to aid the decision in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR to contend that the Applicant lacks the means to furnish the decretal sum while she has a meritorious appeal that ought to be ventilated.
5. It was argued that the Respondent by electing to file grounds of opposition in response to the motion has failed to controvert the averments in the Applicant's affidavit concerning her apprehension that if any monies are paid out in satisfaction of the decree, the Respondent will not be unable to refund the same having failed to disclose its means to refund the decretal sum should the appeal succeed. The decision in Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR was called to aid. Concerning whether the motion was filed without unreasonable delay, counsel cited the decision in Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another [2014] eKLR to submit that instant motion was filed exactly seven (7) days upon the delivery of the impugned decision.
6. Regarding security, it was argued that despite the court's directions for parties to consider compromising on the nature of security to be provided, the Respondent had spurned efforts in that regard; that the Applicant being currently unemployed had no means to satisfy the decretal amount. It was further asserted that no prejudice will be suffered by the Respondent should stay be granted. The court was thus urged to allow the motion in the interest of justice.
7. On the part of the Respondent, in summarily addressing the motion, counsel relied on this court's decision in Jubilee Insurance Co Ltd v Nyamu (Civil Appeal E576 of 2021) [2022] KEHC 10069 (KLR) (Civ) and the decision in Jamii Bora Bank Limited & Another v Samuel Wambugu Ndirangu [2022] eKLR to contend that the Applicant has not offered any form of security including deposit of the decretal amount in a joint interest earning account. Hence, the motion lacks merit and ought to be dismissed with costs.
8. The court has considered the material canvassed in respect of the motion. This court notes that from the Applicant's affidavit material and submissions that she has prematurely attempted to address issues relating to the substantive appeal, which are a preserve of the appellate court. At this stage the court is not concerned with the merits of the appeal.
9. It is apt at this juncture to address a preliminary concern raised in the submissions of the Applicant. Counsel argued that the Respondent in electing to file grounds of opposition in response to the motion had failed to controvert the averments in the Applicant's affidavit. Order 51 Rule 14 (1) of the Civil Procedure Rules prescribes the different ways of opposing a motion presented before the High Court as follows; -

“(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

- (a) a notice preliminary objection: and/or;
- (b) replying affidavit; and/or
- (c) a statement of grounds of opposition;”



10. Recently the Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited* (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) addressed the effect of filing only grounds of opposition in response to a motion by stating that; -

“Be that as may, it is notable that a statement of Grounds of Opposition is provided for in Order 51 Rule 14 of the Civil Procedure Rules as a recognized pleading opposing an application in the High Court, but is not expressly provided for in the Court of Appeal Rules.

What then is the import of filing Grounds of Opposition in response to an application filed in the Court of Appeal? A “ground” is in this regard defined in Black’s Law Dictionary, Ninth Edition at page 772 as “the reason or point that something, (as a legal claim or argument), relies on for validity”. An affidavit on the other hand is defined at page 66 as “a voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths”. Therefore, any facts sought to be introduced in an application before this Court can only be done by way of an affidavit, and cannot be by way of Grounds of Opposition, and any attempt to do so through the Respondent’s Ground of Opposition will be incompetent. In essence, the Respondent is therefore restricted to only raising issues of law and to making legal arguments in this application.” (sic)

11. Hence the court takes the view regarding the Respondent’s election that while it was within its rights, the election confined the opposition to issues of law only, not facts. The granting of stay pending appeal involves judicial discretion fettered by certain conditions usually hinged upon factual material. However, the absence of a replying affidavit by the adverse party does not necessarily give free rein to the Applicant.
12. Moving on to the substantive question for determination, it is trite the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Applicant’s prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules which provides 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”.

13. The cornerstone consideration in the exercise of the discretion is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of the superior courts including some of those cited by the parties in their submissions. Holdings 2, 3 and 4 of the Kenya Shell Ltd Case are especially pertinent. These are that:

- “ 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.”

14. The decision of Platt Ag JA, in the Kenya Shell Ltd Case, in my humble view sets out two (2) different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”

15. The learned Judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added)



16. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] 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. This is shown by the following passage of Cotton LJ in *Wilson v Church (No 2)* [1879] 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

17. The Applicant has claimed that her appeal has an overwhelming chance of success and the same will be rendered nugatory unless the motion is allowed. The Applicant was duty bound to demonstrate through her affidavit depositions how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to it under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. She has not discharged this duty by her affidavit and only belatedly raised these matters in her submissions.
18. The question of substantial loss is a matter of fact that ought to have been contained in the affidavit sworn in support of the motion. Raising these matters in submissions appears to be an afterthought effectively denying the Respondent a chance of rebuttal. Submissions cannot be used as a substitute for affidavit evidence as attempted here. As stated in the *Shell* case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money.
19. It is not enough for the Applicant to causally aver that execution will render the appeal nugatory without demonstrating how that will arise. The Respondent is entitled to commence the lawful process of execution and will not be barred by the court save where a lawful cause is demonstrated. And as held in the *Shell* case, substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay. That is what must be prevented. Therefore, the court is not persuaded that the Applicant has established the likelihood of substantial loss and hence of the appeal being rendered nugatory. Without this evidence, it is difficult to see why the execution process should be stayed. In the circumstances, the motion dated September 12, 2022 is devoid of merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF JULY 2023.

C MEOLI

JUDGE

In the presence of:

For the Applicant: Ms Tuwei h/b for Mr Kirimi

For the Respondent: Mr Thuku

C/A: Carol

