**Ndiege v Machome (Civil Appeal E043 of 2022)**
**[2023] KEHC 20249 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20249 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAMIRA**

**CIVIL APPEAL E043 OF 2022**

**WA OKWANY, J**

**JULY 13, 2023**

**BETWEEN**

**JOHN ODHIAMBO NDIEGE ..... APPELLANT**

**AND**

**SHARON MORAA MACHOME ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Application dated October 13, 2022 wherein the Applicant seeks the following orders: -

    1. Spent.
    2. Spent.
    3. Upon prayer two above being granted, this Honourable court be pleased to order stay of execution of the ex-parte judgment delivered on June 30, 2022, vide Nyamira CMCC No 181 of 2021, pending hearing and determination of Nyamira Civil Appeal No 43 of 2022.
    4. That upon grant of prayer No 3 above, the Honourable Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the ex-parte judgment in Nyamira CMCC No 181 of 2021
    5. That the costs of the Application be provided for.

2. The Application is supported by the Applicant's affidavit and is premised on the grounds that: -

    1. The Applicant filed an Application dated August 4, 2022 vide Nyamira CMCC No 181 of 2021 under certificate of urgency seeking to set aside the

ex-parte judgment delivered on June 30, 2022 and to allow the defendant to defend the suit on merit.

2. The court, and by consent of the parties, issued directions that the Application be canvassed by way of written submissions.

3. The court proceeded to dismiss the Appellant's application and the Appellant being aggrieved by the ruling dismissing the Appellant's Application dated August 4, 2022 has lodged an appeal against the said ruling of the trial court vide Nyamira Civil Appeal No E43 of 2022.

4. The Appellant will suffer irreparable damage should the Respondent proceed to execute against the Appellant's moveable property without the benefit of defence being granted an opportunity to ventilate his case and to be heard on merit and cross-examining the witnesses thereby occasioning the Applicant irreparable loss and damage.

5. It is trite law that an appeal does not operate as a stay thus exposing the Appellant to irreparable loss and damage.

6. That there are no orders staying execution in the trial court and the Applicant is apprehensive that the Respondent will proceed to extract warrants in execution of the *ex-parte* judgment delivered on June 30, 2022, allowing the Respondent to proceed and proclaim the Applicant's goods and properties which will be detrimental.

7. In such event, the Appellant/Applicant herein stands to suffer irreparable loss and damage if the orders sought in the Application herein are not granted.

8. The Applicant implores this Honourable Court to adhere to natural justice, doctrines of equity and *the Constitution* in this matter as the Applicant will be condemned unheard if the Applicant is not granted an opportunity to defend the suit.

9. The Applicant is willing and ready to have the decretal amount in Nyamira CMCC No 181 of 2021 secured by way of a bank guarantee or any other security as the court deems fit.

10. The Applicant has come to court within a reasonable period of time and without undue delay.

11. The Application will not occasion any prejudice to the Respondent.

12. The Application is made in good faith, timeously and it will be in the interest of justice that the same be allowed.

3. The Respondent opposed the Application through the Replying Affidavit dated May 19, 2023 wherein she states that the Bank Guarantee attached to the Application has been overtaken by events and that the Applicant's intention was to deny her the fruits of her judgment. She further states that contended that she will be greatly prejudiced if the Application was allowed because the Applicant's actions were aimed at obstructing the course of justice.

4. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Applicant has made out a case for the granting of the orders for stay of execution pending appeal.

5. The law governing stay of execution pending Appeal is premised on Order 42 Rule 6 of the *Civil Procedure Rules* which states 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 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.
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> (2) No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.
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> (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.
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> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
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> (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
>
> (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

6. In the case of *Elena Doudoladova Korir v Kenyatta University* [2012] eKLR reference was made to the Court of Appeal case of *Halai & Another v Thorton & Turpin* (1963) Ltd [1990] KLR 365 where it was held that:-

> " The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without

unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo v Straman EA Ltd (2013) eKLR in which it was held thus: -

'In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.'"

7. From the above cited cases, an Applicant seeking to stay execution pending appeal must satisfy the following parameters:-

   i. That substantial loss may result unless the order sought for is granted by the Court;

   ii. That the Application had been brought without unreasonable delay; and

   iii. That the Applicant has given such security as the Court orders for the due performance of such a decree or order which may be binding on them.

8. In considering whether or not to grant stay pending appeal, the court must also balance the rights of an Appellant to appeal and the interests of a decree-holder who should not be prejudicially precluded from enjoying the fruits of their judgment. In *RWW v EKW* [2019] eKLR, it was held thus:-

> " 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.
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> 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."

(See also Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat (2013) eKLR.)

9. In this Application, the Applicant argued that he will suffer substantial loss as he was apprehensive that the Respondent will proceed and attach his property to recover the decretal sum should the order of stay of execution not be granted. He further argued that the Respondent will not be able to refund the decretal sum should the appeal be successful.

10. What amounts to substantial loss was discussed in *Kenya Shell Limited v Kibiru & Another* [1986] KLR, 410 where Platt Ag. JA. (as he then was) stated as follows: -

> " 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."

11. It thus follows that once a question as to the Respondent's financial capability has been raised in an Application for Stay, the burden of proof shifts to the Respondent to show that she has the financial

muscle to refund the decretal sum should she be unsuccessful on the Appeal. This position was explained by the Court of Appeal in *ABN Amro Bank v Lemond Foods Limited* Civil Application No15 of 2002 where it was held that: -

> " The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on."

12. In the present case, the Respondent did not controvert the Applicant's assertion that she was unlikely to refund the decretal amount should the appeal succeed and neither did she tender any evidence to show her financial standing. I therefore find that the Applicant is justified in his claim that he stands to suffer substantial loss if the stay is not granted.

13. On whether the application was filed without undue delay, I note that trial court delivered its judgment on June 30, 2022 after which an application seeking to set aside the *ex parte* judgment was filed an Application on August 4, 2022. The said application was dismissed vide Ruling rendered on October 13, 2022. The present Application is also dated October 13, 2022 and filed on October 14, 2022. It is my finding that the same was brought timeously. I find that the second parameter therefore succeeds.

14. On the third parameter which requires the Applicant to furnish security for the due performance of the decree, I find guidance in the decision in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court observed thus: -

> "... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.
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> Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

15. In the instant case the Applicant provided a bank guarantee by Directline Insurance Company from Family Bank which I have considered. I note that the validity of the bank guarantee is questionable as its validity has since lapsed as submitted by the Respondent. The Applicant however submitted that he is willing to deposit the full decretal amount in a joint account or release to the Respondent the

undisputed sums. On her part, the Respondent proposed that three-quarters of the decretal sum and costs be paid to her, and the balance be deposited in an interest earning account.

16. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was held thus:-

> " ... 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."

17. It is my view that since the Applicant is ready and willing to deposit the decretal amount in a joint account, this Court should consider the same as adequate security.

18. I find that the parameters under Order 42, Rule 6 have been met. I therefore make a final consideration of whether the intended appeal is arguable and whether failure to grant stay will impede it. In so doing, I refer to *Butt v Rent Restriction Tribunal* (1979) e KLR, where Madan JA stated that: -

> " If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another remedy, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.
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> It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:
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> "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 nugatory."
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> Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59."

19. I have considered the grounds of appeal in the Memorandum of Appeal and I find that they indeed raise arguable points of law that ought to be considered on appeal. Arguability means that the appeal raises valid points of law and is not frivolous. It means that such an appeal may result in either the judgment of the trial court being upheld or set aside by the appellate court. It would be superfluous to hear and determine the merits and demerits of an appeal where a party has already proceeded and executed the decree, thus rendering it nugatory.

20. In *Chris Mungai N Bichage v Richard Nyagaka Tongi & 2 Others* (2013) eKLR, the Court of Appeal pronounced itself as follows: -

> "..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated....."

21. Having regard to the findings and observations that I have made in this ruling and balancing the Applicant's right to appeal with the Respondent's right to enjoy the fruits of her decree, I find that the interests of justice will be served by allowing the Application for stay of execution.

22. In the end, I find that this Application is merited and is thus allowed in the following terms: -

    a. That the Applicant shall within 30 days from the date of this ruling deposit the full decretal sum in Nyamira CMCC No 181 of 2021 in a joint interest earning account to be held in a bank of repute in the names of counsel for both parties.

    b. That in the event of failure to comply with the order in a) hereinabove, the stay orders issued herein shall automatically stand vacated and the Respondent will be at liberty to proceed with the execution.

    c. That the costs of this application shall abide the outcome of the appeal.

23. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.**

**W. A. OKWANY**

**JUDGE**