



Kagiri & another v Ndula aka Felix Chigadi Ndula aka Felix Chikandi (Miscellaneous Civil Application 181 of 2023) [2023] KEHC 22620 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION 181 OF 2023
HM NYAGA, J
SEPTEMBER 20, 2023**

BETWEEN

DAMARIS NJERI KAGIRI 1ST APPLICANT

RODGERS MUNYASI 2ND APPLICANT

AND

**FELIX NDULA AKA FELIX CHIGADI NDULA AKA FELIX
CHIKANDI RESPONDENT**

RULING

1. The Application for determination is the Notice of Motion dated May 30, 2023. The Application seeks the following orders;
 1. Spent.
 2. This Honourable Court be pleased to grant the Applicants leave to appeal out of time in respect to the judgment/decree delivered in Nakuru CMCC No 1014 of 2019 by Hon M Kyalo (SRM).
 3. This Honourable Court be pleased to grant a temporary order of stay of execution of the judgment and/or the decree delivered on March 24, 2023 and all consequential orders arising therefrom pending the hearing and determination of this application interpartes.
 4. This Honourable Court be pleased to grant a stay of execution of the judgment and/or the decree delivered on or about March 24, 2023 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein.
 5. This Honourable Court be pleased to issue an order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs 1,163,299/= only as security pending hearing and determination of the intended Appeal herein.



6. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
7. Costs of this application be provided for.
2. The Application is propped by the grounds set out on the face of it and is supported by the Affidavit of Sheikh Wanjiru sworn on May 30, 2023.
3. In a nutshell, the applicants state that they are aggrieved by the Judgment delivered by Hon M Kyalo (SRM) in CMCC No. 104 of 2019 and are desirous of appealing against the same, albeit out of time. That the delay in filing the Appeal was due to non-receipt of their client's instructions within the time set out by the law. That if execution proceeds, then the applicants will suffer substantial loss and damage, hence the prayer for stay. The applicants further state that the intended appeal raises triable issues and ought to be canvassed fully. They further state that they are ready to deposit security in the form of a Banker's Guarantee from Family Bank Limited.
4. The respondent filed a response in the shape of a Replying Affidavit sworn on June 16, 2023. It is averred that the application is tainted with non-disclosure of material facts. That there are no good reasons adduced to explain why the applicants did not file an appeal out of time.
5. The respondent further argues that if the Application is allowed, then the applicants should be ordered to pay 50% of the decretal sum to him and the balance be paid into a joint interest earning account in the joint names of the advocates for the parties herein. That way it is argued, the court will have struck a balance between the interests of both parties. He points out the security offered is inequitable, unsuitable, oppressive for the reason that it is only for one year, yet the appeal may take long to be determined. That the bank is not a party to these proceedings, hence it will be difficult to enforce any orders against it. That the guarantee is purely a contract between the Insurance Company and the Bank which he is not privy to and thus he has no locus to enforce it.
6. When the matter came up for directions on July 24, 2023, Mr Njuguna, counsel for the respondent, informed the court that all he needed was for the court to address the issue of the security to be offered.
7. If I understand him correctly, then counsel is not really objected to the other prayers sought in the Application.
8. That being the case, I proceed to allow prayer 2 of the Application. The applicant is to file the Appeal within 14 days of the delivery of this Ruling.

1. I will now deal with the disputed issue, how to treat the decretal sum. Order 42 Rule 6(1) (2) of the Civil Procedure Rules. The said rule provides as follows;

“Stay in case of appeal [Order 42, rule 6.]

- (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.

(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 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.”

9. In compliance with the above, the Applicants have offered a Bank’s Guarantee from Family Bank Limited. The Respondents pray that half of the decretal sum be paid and the balance be paid to a joint account.
10. As has been correctly stated by the respondent, the court has to strike a balance between the interests of the respondent who have a Judgment in their favour, and the applicants who are exercising their right to appeal.
11. I have noted that Bank Guarantee exhibited by the applicants is a general guarantee between the Bank and Directline Assurance Company to the extent of Kshs 100 million. There is no way of telling how many claims that guarantee is to cover and if the same is sufficient since it is well known that there are thousands of claims involving the said insurer. That being the case, that guarantee may not be of much assistance to the respondent herein. I think that each claim must be dealt with individually.



12. Having considered the matter, I am of the view that the nature of the security offered is not sufficient. I make the following orders in respect to the security;
- a. The applicants to pay Kshs 300,000/= to the respondent as part of the decretal sum in the next 30 days.
 - b. The applicants to provide a specific bank guarantee for the remainder of the decretal sum in the next 30 days.
 - c. In default of the above, the stay orders in force will lapse automatically and the respondents be at liberty to execute for the outstanding amount.
 - d. Each party to bear its own costs of this Application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Kurere for Respondent

Ms Ketta for Applicant

