



Planet Motors Mombasa Ltd & 3 others v Ronoh (Suing as the Legal Representative of the Estate of Alfred Kibet Ronoh aka Ronoh Bosinia - Deceased) (Miscellaneous Civil Application E170 of 2023) [2023] KEHC 22577 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E170 OF 2023
HM NYAGA, J
SEPTEMBER 25, 2023**

BETWEEN

**PLANET MOTORS MOMBASA LTD 1ST APPLICANT
SOUTH RIFT SACCO 2ND APPLICANT
BERNARD KIPKEMOI KAPTICH 3RD APPLICANT
PAUL KIPKEMOI ROTICH 4TH APPLICANT**

AND

PURITY MAKENA RONO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ALFRED KIBET RONO AKA RONO BOSINIA - DECEASED) RESPONDENT

RULING

1. Vide a Notice of Motion dated 17th May, 2023, the Applicants herein seek orders that the court grants them leave to appeal out of time, stays the execution of the judgment in Molo CMCC No. E066 of 2020 delivered on 14th February, 2023 by Hon. E. G. Nderitu (CM) and further order for provision of a Bank Guarantee of the entire decretal sum of Kshs.2,283,971.60/= only as security pending the hearing and determination of the intended appeal.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by Paul Kipkemoi Rotich who is an advocate of the Applicants on 19th May, 2023. He averred that the lower court issued directions on 7th February, 2023 that the Judgment would be delivered on notice however the same was delivered without notice to the Applicants and no stay of execution was granted.
3. He deponed that they learnt about delivery of the said judgment when their clerk was following up on pending Judgments and Rulings on 21st April, 2023. According to the deponent, the Applicants



- are dissatisfied with the Trial Magistrate's judgment and intend to appeal against the same vide their annexed Draft Memorandum of Appeal which intended appeal, they believe has high chances of success.
4. He averred that the Applicants are apprehensive that following the delivery of the Judgment and considering no stay of execution is in force, the Respondent is likely to commence execution of the said Judgment against them.
 5. It was his averment that the Respondent's income is unknown hence there is high propensity that he may not be able to refund the decretal sum in the likely event the intended appeal succeeds.
 6. He deposed that the Applicants are ready and willing to furnish a bank guarantee for the entire decretal sum awarded by the trial court pending the determination of the Appeal. It was therefore his view that it is in the interest of justice and fairness that the prayers sought in the application be granted.
 7. In response to the application, the Respondent through her replying affidavit sworn on 12th June, 2023, averred that the net judgement sum payable to her is Kshs. 1,141,985/- and not Kshs. 2,283,971.60/= as postulated by the Applicants.
 8. She proposed that stay pending appeal be granted on condition that 50% of the decretal sum i.e. Kshs. 666,991.90/= be paid to her within 30 days and the remaining 50% be deposited in court or in a joint interest earning account in the names of both advocates for parties herein within the same period and in default execution to ensue.
 9. According to the Respondent the bank guarantee proposed by the applicants as security is inadequate for reasons that it is bad in law and factually untenable; subject herein being money decree, applicants should furnish monetary security; bank guarantee is for one year only and thus unable to cover the entire period the appeal herein will be concluded as it cannot be heard within the said period; the guaranteeing bank has the sole and unilateral right to recall/invalidate/alter the facility any time without giving reasons or consulting anyone hence she stands to be greatly prejudiced upon the bank taking such steps; the guaranteeing bank is not a party to this suit hence not bound by any orders issued by this Honourable court thus making it difficult to enforce any orders she may get regarding the said bank guarantee if need be; the undertaking herein is a private contract signed between Direct line Assurance and the respective bank and does not recognize any third party; the bank guarantee amounts to improperly denying and delaying the enjoyment of her judgement despite it being in her favour; & no good reasons have been given as to why Direct line Assurance should not give monetary security considering the decretal sum herein is minimal .
 10. She stated that she is a person of reasonable means as exhibited by her attached payslip and hence she would not have any challenge whatsoever in refunding any sum that might have been paid to her if need arises.
 11. The Application was canvassed through written submissions.

Applicants submissions

12. The Applicants citing the provisions of Section 79 G of the *Civil Procedure Act* and the Supreme Court case of County Executive of Kisumu vs County Government of Kisumu & 8 others [2017]eKLR which cited with approval the case of Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others, [2014] eKLR on the threshold to be met by an applicant for the court to extend time to file appeal, submitted that this court is clothed with unfettered discretion to grant leave to appeal out of time .



13. The Applicants contended that their intended appeal is meritorious and that considering the security proposed no prejudice will be occasioned to the respondent.
14. According to the applicants they have met the threshold for grant of stay of execution as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.
15. The Applicants submitted that the delay of 4 months is not inordinate and was caused by an unforeseeable circumstance that should not be meted on them. They relied on the case of MFI Document Solutions Ltd vs Paretto Printing Works Limited [2021] eKLR in support of this proposition.
16. To further support their submissions, the applicants relied on the cases of Charles N. Ngugi vs ASL Credit Limited [2022] eKLR & Bernard Ontita Zebedeo vs Julius Nyamwega Ontere [2022] eKLR.
17. They prayed that their application be allowed as prayed.

Respondent's Submissions

18. On Security pending Appeal, the respondent submitted that appropriateness of security pending appeal is purely a matter at the discretion of court. To support this position reliance was placed on the case of Nyamwaya vs Ondera (Civil Appeal E071 of 2021) [2022] KEHC 619 (KLR)
19. The Respondent submitted that the court's discretion has to be exercised within the requisite parameters while taking into consideration the overriding objective litigation as was held in Samuel Ndungu Mukunya vs Nation Media Group Limited & another [2016] eKLR.
20. The Respondent thus argued that security ordered by the court must accord with the principle of proportionality and the need to create a level playing ground for all the parties by reconciling and striking to balance between their respective and compelling interest and rights. In support of this proposition reliance was placed on the case of Mutiso & another vs Ngoma (Civil Appeal E109 of 2021) [2021] KEHC 344 (KLR).
21. She submitted that security has to be fair to all parties as was held in the cases of James Wanganga vs Wilberforce Situma Mulati [2021] eKLR & Peter Osoro Omagwa & another vs Bathseba Mwango Maikini [2021] eKLR.
22. In support of her averment that bank guarantee is not adequate security. The respondent relied on the cases of Mutiso & another vs Ngoma (supra); Nobel Trading Co. Ltd & 2 others vs Peter Odhiambo Marega [2022] eKLR; & Peter Osoro Omagwa & another v Bathseba Mwango Maikini and Joel Mutuma Kirimi & another v The Standard Digital & another [2020] eKLR.
23. The Respondent submitted that the Applicants averment that she is not a person of means is unsupported by concrete evidence and hence they have not established a prima facie case to warrant shifting of burden to her to prove otherwise. To support this position reliance was placed on the cases of Antoine Ndiaye vs African Virtual University [2015] eKLR & Delina General Enterprises Limited vs Monica Kilonzo Nzuki (Suing as the ... of the estate of Elizabeth Mutheu Paul (Deceased) [2018] eKLR.
24. She contended that being an instructor at Lamu Vocational Training Centre she is a person of means which deals a fatal blow to the applicants' proposal for security by way of a bank guarantee or any other form that will keep away the entire decretal sum herein from her. In support of her submissions, she relied on the case of Joseph Mwinzi Mututa vs Jane Wanza Mwangangi [2008] eKLR; Niti Distributors Limited vs Occidental Insurance Company Limited [2019] eKLR;



25. The Respondent submitted that the appeal herein does not preclude this honourable court from ordering that she be paid half of the decretal sum pending determination of the Appeal. To support her submissions, she relied on the cases of Silpak Industries Limited vs Nicholas Muthoka Musyoka [2017] eKLR; Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] EKLR; James Wanganga vs Wilberforce Situma Mulati ; & Scania East Africa Ltd & 2 others vs Patrick Mutisya Kioko [2022] eKLR.
26. The respondent further prayed for costs as provided for under Section 27 of the [Civil Procedure Act](#).

Analysis & determination

27. Having considered the application, grounds, affidavits, submissions and authorities cited, it is my considered view that the following issues fall for determination: -
 1. Whether the Applicant should be granted leave to file an appeal out of time.
 2. Whether the Applicant has met the threshold for grant of stay pending appeal
 3. What would be the most appropriate security to grant under the circumstance?

Issue No.1 - Whether the Applicant should be granted leave to file an appeal out of time

28. Section 79G of the [Civil Procedure Act](#) provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

29. The supreme court of Kenya sitting at Kisumu in the case of County Executive of Kisumu vs County Government of Kisumu & others [2017] eKLR while relying to its decision in the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



30. The discretion to extend time must be exercised within the principles of the law and factors to be considered when determining such an application. The principles were set out in the Court of Appeal case of Omar Shurie vs Marian Rashe Yafar (Civil Application No. 107 OF 2020) UR where it was held:
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
31. It is not disputed that the matter before the lower court was slated for judgment on 22nd November, 2022 but the same was deferred to 17th January, 2023 since the same was not ready. Again on 17th January 2023 the judgement was not ready and it was deferred to 7th February, 2023 on which date the court was not sitting and directions issued to the effect that the judgment would be delivered on notice.
32. It is also not disputed that the judgment was eventually delivered on 14th February, 2023 in the absence of the applicants and their counsel.
33. The applicants have explained that they learnt of the delivery of judgment on 21st April, 2023 when their Counsel’s clerk visited the registry. By then the 30 days within which an appeal should have been filed had lapsed. Subsequently, the instant Application was filed on 19th May, 2023.
34. In light of the above, I find the Applicants acted diligently upon learning of the delivery of the Judgement. The explanation offered is satisfactory and I therefore equally find that the delay by the applicants is not so inordinate as to make this court deny them the opportunity to challenge the judgment by the trial court. I will allow prayer 2 of the application. I will give specific directions at the end of this judgment.

Issue No.2- Whether the Applicant has met the threshold for grant of stay pending appeal

35. Order 42 Rule 6(2) of the Civil Procedure Rules provides:
- “(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.”
36. In the case of Butt vs Rent Restriction Tribunal [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:
- “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

37. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
38. With the above in mind, the Court must then determine what substantial loss the appellants will suffer if stay of enforcement of the judgment of the subordinate court is not made in their favour.
39. On whether the Appellants will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in *Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

40. In the instant case the Applicants claim that they will suffer substantial loss should execution proceedings commence against them as their right to appeal will be curtailed and they may not be able to recover the decretal sum from the respondent as her means of income is unknown. The applicants have merely stated that the Respondent income is unknown and may not be able to refund the decretal sum herein without exhibiting the proceedings and judgement alluded to. On the Respondent part, she deposed that she is an instructor at Lamu Vocational Training Centre and has means to refund the said sum. She attached a letter of offer from Lamu Vocational Training Center dated 15th October 2021 showing she was given the three year contract appointment as an instructor with a monthly salary



of Kshs.20,000/=. Going by the offer letter her contract will lapse in the month of October 2023 and from there, no proof has been shown on how she would defray the decretal sum. In the circumstances therefore the two positions advanced by the parties are at par.

41. However as was held by Ringera, J (as he then was) in *Gandhi Brothers vs H K Njage T/A H K Enterprises Nairobi (Milimani)* HCCC No. 1330 of 2001, in those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the *Evidence Act* Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.
42. In *Stephen Wanjohi vs Central Glass Industries Ltd. Nairobi* HCCC No. 6726 of 1991 the court held that financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.
43. In view of the foregoing, the Applicants have not successfully demonstrated what substantial loss they will suffer if stay is not granted.
44. In regards to whether this Application has been filed without unreasonable delay, I have already noted the Applicants learnt of the delivery of judgment on 21st April, 2023. They subsequently filed this Application on 19th May, 2023. The application herein was therefore filed timeously.
45. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree.
46. Whether the Appellants, have an arguable appeal? Clearly this is a question to be answered by the appellate court. However, having perused the Draft Memorandum of Appeal it raises some legal issues. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before court; one which is not frivolous.
47. The three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. In the case of *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 the court stated that;

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 it without merit.”

48. In the instant case the Applicants have satisfied two conditions. However, noting that the respondent is not opposed to the Applicants being granted stay, I will invoke the unfettered discretion of this court and grant the same.

Issue no.3- What would be the most appropriate security to grant under the circumstance?

49. The Applicants proposes a provision of a bank guarantee of the entire decretal sum while the Respondent proposes that half of the decretal sum be paid to her and the other half to be deposited in the joint interest earning account in the name of both advocates for the parties herein.
50. The Respondent avers that the bank guarantee offered as security is inadequate. I have considered her averments and submissions in that regard. The Applicants have neither advanced any grounds in support of their proposal nor controverted the Respondent’s averments thereof.



51. In determining the security, the court has to strike a balance on the interests of the appellant and those of the respondent. In striking such a balance the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.

52. In the case of Henry Sakwa Maloba vs Bonface Papando Tsabuko (2020) eKLR the High Court reiterated the finding in the case of Century Oil Trading Company Limited vs Kenya Shell Limited Nairobi (2008) eKLR, where the court stated:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”.

53. In conclusion, I find that the application dated 17th May, 2023 meets the threshold for the grant of stay of execution. I therefore order as follows;

1. The appellant/ applicant is allowed to file the appeal out of time. If they have done so the appeal shall be deemed as duly filed if the requisite fees have been paid. If they have not done so the appellants are to file their appeal within 14 days from the date hereof.
2. That execution of the judgment and the ensuing Decree in Molo CMCC No. E066 of 2020 be and is hereby stayed pending the hearing and determination of the intended appeal on condition that the entire decretal sum be deposited by the Applicants in an interest earning account in the joint names of Counsel for the parties within 30 days of the date hereof;
3. In default the stay orders shall lapse automatically without further reference to the court.
4. Costs of the subject application shall abide the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

N/A for Applicant

Ms Kurere for Njuguna for Respondent

