



**Mbulu v Skynotch Capital Limited (Civil Appeal E056 of 2023)  
[2023] KEHC 23912 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E056 OF 2023  
MW MUIGAI, J  
OCTOBER 12, 2023**

**BETWEEN**

**BERNARD KISILU MBULU ..... APPLICANT**

**AND**

**SKYNOTCH CAPITAL LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. By Notice of Motion dated 23rd May, 2023 and filed in court on 29<sup>th</sup> May, 2023 brought under Sections 3A, 79G and 95 of the *Civil Procedure Act* Cap 21; Order 22 Rules 22 Order 42 Rules 4, 6 and 7, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the *Civil Procedure Rules*, 2010.
2. The Applicant sought the following orders that:
  - a. The Court to order a stay of execution of the orders issued on 23<sup>rd</sup> May, 2023 intended to arrest the Applicant herein issued by Hon. Thibaru pending hearing and determination of this application.
  - b. The application be heard *inter partes* on such date and time as this Court may direct.
  - c. The cost of this application abide the outcome of the appeal.

**Supporting Affidavit**

3. The application is supported by the affidavit dated 23<sup>rd</sup> May, 2023 and filed in court on 29<sup>th</sup> May, 2023 sworn by one Bernard Kisilu Mbulu the applicant herein.
4. It is deposed *inter alia* that the Respondent has proceeded and obtained the orders of the arrest against him which were issued on 23<sup>rd</sup> May, 2023 regardless of his consideration of his plea that he has appealed



the entire judgment delivered on 20<sup>th</sup> February,2023 (annexed and marked copy of the notice to show cause dated 25<sup>th</sup> April,2023); deposing that the application is presented without inordinate delay and he is willing and ready to comply with conditions of this Court; it is averred that the Respondent is a registered company with unknown address and he is apprehensive if the decretal sum is paid out, the Appeal will be rendered an academic exercise since the Company will be in a position to refund the amount. It deposed that the appeal has high chances of successes and unless he is granted stay of execution as prayed, he stands to suffer irreparable loss and damage; further, unless this application is heard and stay granted as prayed, Respondent will proceed to arrest him thus rendering this application and appeal nugatory.

### Replying Affidavit

5. Opposing the application for stay of execution pending appeal, the respondent through one of its Directors Charles Kyalo Kimiti, and *vide* a Replying Affidavit dated 10<sup>th</sup> July,2023 and filed in court on the 12<sup>th</sup> July,2023 contends that the judgment in Machakos Small Claims Court Commercial Suit No. E335 of 2022 was delivered on 20/4/2023 and the Appellant was granted thirty (30) days stay of execution; deposing that he is informed by his advocate that the Memorandum of Appeal was in this matter was filed on 24/3/2023 which date is outside the thirty (30) days period within which the appeal ought to have been filed; it is averred that the allegation by the Applicant that the Respondent is company with unknown address is false as the Respondent is a registered company with office in Nairobi which the Appellant visited at the time of taking the loan and severally thereafter when renegotiating the payment of the loan; he contends that he is advised by his advocate that for an order of stay of execution pending Appeal to be issued, the Applicant must provide Security for payment of the decretal sum and costs and that the Appellant has not demonstrated and/ or stated his willingness and ability to provide security for payment of the decretal sum as required by law; he urged the court to dismiss the Application with costs.
6. The matter was canvassed by written submissions and while the Applicants filed their submissions the Respondent indicated that they had filed Replying Affidavit and did not intend to file written submissions.

### Submissions

#### Applicant's Written Submissions

7. In his submissions dated and filed in court on 10<sup>th</sup> July,2023, Bernard Kisilu Mbulu the Applicant herein relies on the case of *Geilla vs Cassman Brown Ltd* (1973) EA 358 which case laid down the principles that court considers in issuing injunctive orders.
8. On the issue of *prima facie* case with probability of success, reliance is placed on the cases of [\*Philes Nyokabi vs Industrial & Commercial Development Corporation\*](#) (2017) eKLR and [\*Mrao Limited Vs First American Bank of Kenya Ltd & 2 Others\*](#) (2003) KLR 125, to buttress his point of *prima facie* case.
9. He avers that he has demonstrated pursuant to notice to show cause which was effected upon him and the orders of arrest issued against him on 23<sup>rd</sup> May,2023 hence satisfied the important ingredient of *prima facie* case.
10. On whether he demonstrated that he will suffer irreparable injury if the temporary injunction is not granted, the Applicant submits that the money he remitted to the Respondent were not considered in the lower court determination regardless of filing counter claim and that if the orders of arrest are



going to be effected he will suffer irreparable loss since he is the only bread winner in the family hence the entire family will suffer if committed to civil jail.

11. Regarding the balance of convenience, he opines that in his application dated 9<sup>th</sup> June 2023, the balance of convenience tilts to his favor as the Respondent will not suffer any loss as it will be compensated in this appeal if the same is dismissed.

### **Determination**

12. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by both counsel for their respective clients.

13. The main issues for determination in my view are:

- a. whether there is demonstration by the Applicant that the orders of stay of execution pending appeal are merited.
- b. What is the nature of security pending Appeal?

14. In my considered view the principles for grant of stay of execution pending appeal are well enumerated in the [Civil Procedure Rules](#), 2010 under Order 42 rule 6 (1) (2), which provides:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

15. The Court of Appeal in *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, 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. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its



powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A (2) of the *Civil Procedure Act*:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

16. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

17. Further, the Court of Appeal in *Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union* Civil Application No. Nai. 85 of 2010, Nyamu JA held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”

18. The Court is to ensure that the aims and intendment of the overriding objective as espoused in Section 1A as read with section 1B of the *Civil Procedure Act* Cap 21 are attained. The Court takes into account the likely effect of granting the stay on the proceedings in question, be alert in weighing the likely consequences of granting the stay or not doing so considering the circumstances and uniqueness of each case as the Court may be faced with to reach a fair determination. This Court shall observe the overriding principles and align them within the scale of justice.

19. In *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997, Warsame J (as he then was) expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/ defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...



At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

20. In this present case the Applicant in his supporting affidavit averred that the respondent is registered company with unknown address and he is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise since he will not be in a position to refund of the amount and that he will suffer irreparable loss and damage if stay is not granted. The Respondent on the other hand vide its replying affidavit opined that it's a registered company with an office in Nairobi which the Applicant visited at time of taking a loan. Respondent further argued that for an order of stay of execution pending appeal to be issued, the applicant must provide security for payment of the decretal sum and costs.

21. In *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 Platt, Ag. JA (as he then was) observed 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 corner stone of both jurisdictions for granting a 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”.

22. On the part of Gachuhi, Ag. JA (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

23. The upshot of the above authorities and in the circumstance of this case, the Applicant has not proved which substantial loss he is likely to suffer a part from saying that he is a breadwinner and if put in civil jail his entire family including his wife will suffer. I therefore find that in the absence of the evidence there is no reason why the Respondent should not be entitled to half the decretal sum as security pending the appeal being heard and determined.

24. As to the contention that the Respondent is a registered company with unknown address hence the Applicant herein is apprehensive that if the decretal sum is paid out he will not be in a position to refund the amount, the Court of Appeal decision in *Kenya Shell Limited vs. Kibiru* [*supra*], where Hancox, JA (as he then was) stated as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered



nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”

25. The Court finds Respondent is a registered company with unknown address and the Applicant’s apprehensiveness that if the decretal sum is paid out he will not be refunded does not necessarily justify that the Respondent should not benefit from the fruits of its judgement.
26. In *Michael Tooth Mitheu v Abraham Kivondo Musau* [2021] eKLR, Odunga J (as he then was) stated that:

“Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree.”
27. This Court therefore finds that the Applicant’s apprehensiveness is unfounded the same not being proved by the Applicant.
28. As to the issue of security, as per Order 42 rule 6 aforesaid, it is incumbent upon the Applicant to offer and/ or provide security so that the decree can be performed and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I associate myself with the position in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where 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.”
29. Similarly, I am guided by the decision in *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court observed that:

“... 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.
30. Further, Order 42 accords with the fact that there is debt owed the question is that the Applicant is seeking some time by way of stay of that debt pending the appeal against the said Judgment. Ultimately should the Appeal fail the Applicant has no option but to pay the decretal sum unless the Applicant decides to appeal to Court of Appeal.



31. The Court would order for the release of the deposited decretal amount to the respondent in the appeal in the event that appeal succeeds. Hence, this is the objective of the legal provisions on security. Security does not exist to fetter the intended right of Appeal. Security is in place to ensure that parties do not approach courts with an intention delay executions of Trial Court's decrees by filing appeal proceedings. The issue of security is on the Court discretion to judicially decide what and how the said security is to be paid to the Respondent pending the hearing and determination of appeal.
32. In the present case, judgment was entered in favor of the Respondent to the tune of Kshs 766,963 being the judgment sum, costs and interest. On the face of the pleadings, the applicant has not offered which security he is offering to deposit. On the other hand, the Respondent in its Replying Affidavit stated that for an order of stay of execution pending Appeal to issue, the Applicant must provide security for payment of the decretal sum and costs. I am guided by the Court of Appeal in *Ndubiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

33. Accordingly, the Applicant herein did not disclose his basis for believing that the Respondents would not refund the decretal sum, neither did he disclose that he is ready, willing and able to provide security. On the other hand, the Respondent did not even attempt to controvert that contention, apart from saying that it is a registered company with an office in Nairobi. The expectation is that the Applicant ought to state that he is willing to provide a particular form of security. The Respondent also ought to argue that it can pay back the security provided by the Applicant in the event that the appeal succeeds. In my view the aforesaid should have been the argument of both parties which was apparently not done.

## **Disposition**

1. Considering the above authorities and circumstances of the present case and while taking into account that an appeal is a right enshrined in the *Constitution* and with regard to the fact the intended appeal



should not as a matter of law be rendered illusory and/ or nugatory, and while at the same time securing the interests of the successful Plaintiff.

2. This Court grants a stay of execution of the decree herein on condition that the Applicant within 90 days from the date of this Ruling pay to the Respondent half of the decretal sum and file the Record of Appeal and serve.
3. In default of the said deposit within the period specified the application and intended appeal shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
4. The costs of the application to abide the outcome of the Appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023  
(PHYSICAL/VIRTUAL CONFERENCE)**

**M.W MUIGAI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

