



REPUBLIC OF KENYA



**Maina v Maina (Civil Appeal 82 of 2023) [2023] KEHC 25113 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 82 OF 2023  
TA ODERA, J  
OCTOBER 5, 2023**

**BETWEEN**

**NICHOLAS MACHARIA MAINA ..... APPLICANT**

**AND**

**JOHN MACHARIA MAINA ..... RESPONDENT**

**RULING**

**RULING ON STAY OF EXECUTION PENDING APPEAL**

1. This Ruling determines the applicant's Notice of Motion dated 4<sup>th</sup> May, 2023 and filed on the 5<sup>th</sup> May, 2023 brought under the provisions of Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and Sections 1A, B and 3A of the *Civil Procedure Act*.
2. The applicant seeks the following orders:
  1. Spent
  2. Spent
  3. That there be an Order of Stay of execution of the Judgement together with all consequential orders emanating from the Judgement delivered on 6<sup>th</sup> April, 2023 pending the hearing and determination of the Appeal herein.
  4. That this Honourable Court grants such a further or other reliefs as it deems appropriate
  5. That the costs of this Application be provided for.
3. The Application is predicated on the grounds on its face and supported by an affidavit of Nicholas Macharia Maina sworn on 3<sup>rd</sup> May, 2023.



4. The applicants' case is that he was aggrieved by the decision of the Court in Nakuru SCCOMM Claim No. E630 of 2022 delivered on 6<sup>th</sup> April, 2023 in which the court entered judgement in favour of the Respondent in the sum of Ksh. 291,843.00 and also awarded him costs and interests of the suit.
5. According to the Applicant the trial court lacked jurisdiction in determining the claim since parties herein were members of Sheria Sacco and the root of the dispute arose from a loan advanced to him which the respondent alleged to have fallen in arrears resulting to the deduction from his account noting that he was his Guarantor.
6. He averred that the relationship between the parties was that of Debtor-Guarantor to a loan issued by a Sacco and it does not matter that the Sacco Recovered from the Respondent but what matters was that the dispute emanated from debtor-guarantee relationship and only the Co-operatives Tribunal can hear and determine such disputes in line with the provisions of the Cooperatives Act.
7. He believes the adjudicator ought to have down its tool as he had no jurisdiction to hear and determine the matter.
8. He deponed that he has filed an appeal against the aforesaid decision which he believes is not only arguable but raises serious issues for determination by this Honourable Court.
9. He averred that if stay is not granted, the Respondent may proceed with execution of the Decree thus occasioning him great prejudice as his appeal will be rendered nugatory.
10. He stated that in the circumstances, it is only fair and just that the orders prayed for be granted.
11. The respondent in opposition to the Application filed Grounds of opposition dated 22<sup>nd</sup> May,2023 and swore a replying affidavit on the even date
12. The grounds of opposition are premised on grounds that: -
  1. That the Application is misconceived, premature and a gross abuse of the process of the Honourable Court.
  2. That the Application is premised on an appeal that is time barred.
  3. The issue of whether the trial court had jurisdiction to entertain the suit was raised by the Applicant herein vide a Notice of Preliminary Objection dated 24<sup>th</sup> November, 2022 and determined on 13<sup>th</sup> February 2023 and no appeal was lodged against the said ruling to date.
  4. The Applicant has not sought for leave of the court to appeal out of time the ruling dated 13<sup>th</sup> February, 2023.
  5. The Applicant has not filed /annexed any notice of execution or warrants /proclamation documents served upon him to justify any threat of execution.
  6. The application cannot thus proceed in view of the stay orders.
  7. That the entire application is unmerited and just an attempt to abuse the process of court, deny the respondent an opportunity to enjoy the fruits of justice and hence should not be allowed.
13. In the replying affidavit, the respondent deposed that the application is bad in law, incompetent, non-starter, frivolous, vexatious and malicious, full of untruths and a gross abuse of the court process
14. He averred that the Application does not meet the minimum threshold for grant of the orders sought and thus fit for dismissal.



15. He asserted that the notice of preliminary objection challenging the trial's court Jurisdiction filed by the applicant was dismissed by the trial court vide a ruling delivered on 13<sup>th</sup> February, 2003 and that if the Applicant was dissatisfied with the same he ought to have appealed rather than proceeding with the hearing before the trial court which he now alleges was illegal.
16. He deponed that there is no evidence of imminent execution as alleged by the Applicant and that the Memorandum of Appeal filed on 4<sup>th</sup> May, 2023 by the Applicant is bad in law, filed out of time and is a waste of judicial time as it does not raise any arguable issue to be determined by this court.
17. He deponed that the applicant has not advanced any reason for either filing his appeal out of time or for failing to obtain leave of court to file the same out of time.
18. The Respondent asserted that this application lacks merit as it is grounded on a ruling delivered on 13<sup>th</sup> February, 2023 rather than judgement dated 6<sup>th</sup> April, 2023 and that the applicant cannot purport to appeal both the ruling and the judgement in one memorandum of appeal.
19. He averred that in the unlikely event that the court is inclined to grant an order of stay of execution, then court should direct the applicant to deposit in court the decretal amount and costs as tabulated by the court.
20. He prayed that the application be dismissed with costs.
21. The Applicant swore a further affidavit in response to the aforesaid grounds of Appeal and Replying Affidavit on 26<sup>th</sup> May, 2023.
22. He deponed that jurisdiction is a fundamental aspect of the trial and may be raised at any stage of the trial even on first instance during appeal.
23. He asserted that Annexure marked as JNL 4 by the respondent affirms his intention to recover the decretal sum.
24. It was his further deposition that having raised the question on jurisdiction, then the request to deposit the decretal amount or any part thereof does not apply herein.
25. The Application was canvassed through written submissions. The Appellant filed his submissions on 5<sup>th</sup> June, 2023 whereas the Respondent filed his on 22<sup>nd</sup> June, 2023.

### **Appellant's Submissions**

26. The Applicant submitted that the orders sought in the instant application are discretionary in nature and the court is thus guided by the principles of natural justice in arriving at its determination.
27. He submitted that in the exercise of this discretion, the court must be satisfied on twin principles which are that the Appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the Appeal will be rendered nugatory.
28. On whether the appeal is arguable, the applicant placed reliance on the cases of Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR where the court stated that "vi) on whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
  - vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008."



29. The applicant contended that he has raised a single issue on jurisdiction which according to him is arguable. He relied on the cases of *Jumbo North (E.A.) Limited v Wilder Wangira* [2020] eKLR where the court cited with authority the case of *Kenya Ports Authority vs Modern Holding [EA] Limited* [2017] eKLR and *Lemita Ole Lemein v Attorney General & 2 others* [2020] eKLR for the proposition that the issue of jurisdiction could be raised at any stage, even on appeal.
30. The applicant thus invited the court to look at the record of the trial court and confirm that from the averments therein, the parties were still members of the Sacco and as such any dispute between them should be referred to the Co-operative Tribunal in line with the provisions of the Cooperative Act.
31. He submitted that he has demonstrated an arguable appeal
32. On whether the Appeal will be rendered nugatory, the Applicant submitted that the judgement was entered in favour of the respondent who is keen on executing it and that in the event the orders sought are not granted, execution will ensue and his appeal will be rendered nugatory.
33. He contended that no prejudice will be occasioned to the Respondent in the event the orders sought are granted.
34. He urged this court in allowing the application not to attach any conditions to it as this matter is not one that warrants issuance of the conditional stay of execution.

### **Respondent's Submissions**

35. The Respondent submitted that the application herein does not meet the threshold for grant of stay of execution pending appeal provided for under Order 42 Rule 6 of the Civil Procedure Rules.
36. He submitted that the applicant has failed to demonstrate he will suffer substantial loss if orders sought are not granted considering there is no evidence that execution process has commenced. He cited the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the court stated that the fact that execution process has been put in motion or is likely to be put in motion, by itself, does not amount to substantial loss and even when execution has been levied and completed does not itself amount to substantial loss under order 42 rule 6 of the Civil Procedure Rules because execution is a lawful process.
37. The respondent then submitted that there are no justifiable grounds why he should be denied the right to enjoy the fruits of his judgement.
38. He also submitted that the applicant has not offered any security which is a condition precedent for grant of stay of execution pending appeal.
39. To further buttress his submissions the Respondent relied on the cases of *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR & *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR & *Civil Appeal No. E030 Of 2021 Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu*
40. In regards to whether the Appeal lodged is merited, the Respondent submitted in the negative for the reason that the appeal on issue of jurisdiction was heard and determined by the trial court and the applicant has never lodged an appeal against the trial court decision on the same to date, and that the appeal herein is not against the judgement delivered by the trial's court on 6<sup>th</sup> April 2023.



## Analysis & Determination

41. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the grounds of Opposition, replying affidavit and submissions together with case law cited by both counsel for their respective clients.
42. The main issue for determination is Whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
43. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:
  - “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.
44. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  - a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
45. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
  1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  2. Secondly, 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 the appeal court reverse the judge’s discretion.
  3. Thirdly, 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.
  4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.



46. Under the head of substantial loss, an applicant must clearly state what loss, if any, he/she stands to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410. Platt JA set out two different circumstances when substantial loss could arise as follows: -

“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 this 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....”

47. 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.

48. The Applicant in this matter contends that he will be greatly prejudiced and his appeal rendered nugatory if stay is not granted as the Respondent may proceed with execution.

49. In *James Wangalwa & Another vs Agnes Naliaka Cheseto* (supra) the Court held;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

50. The respondent is a valid decree holder and therefore entitled to execution. On the other side the applicant has also filed an appeal which he says is arguable. However, this is a money decree and the applicant has not shown that the respondent will be unable to refund the decretal sum in case the appeal succeeds. I find that the applicant has not shown that he is likely to suffer substantial loss.



51. On whether the application has been made without unreasonable delay, I find the same was filed within reasonable time as the trial court's Judgment was delivered on 6<sup>th</sup> April, 2023 and the present application was filed on 5<sup>th</sup> May, 2023.
52. Regarding the issue of security for performance of decree, the Applicant did not offer any security for the due performance of the decree. The security for performance of decree is an important condition to be considered before granting orders of stay of execution pending appeal and the duty of the court Under order 42 Rule 6 (2) (b) to issue a conditional stay of execution.
53. I have carefully considered the application, the able submissions by both Counsel together with the fact that the appeal challenges the jurisdiction of the trial court to hear and determine the matter and that the respondent is holding a valid decree. It is trite law that jurisdiction is everything and without it the court must down its tools. I have balanced the interest of the applicant and respondent and I find that it would be just and fair to grant a conditional stay of execution to allow the applicant to prosecute his appeal so that it is not rendered nugatory and the respondent will also have security for satisfaction of the decree.
54. In the upshot allow stay of execution of the decree in Nakuru Small Claims Court Commercial case no E630 of 2023 on condition that the applicant deposits that entire decretal sum in a joint interest earning account in the names of both Counsel for the parties herein within 14 days from today. Costs to respondents.

**TERESA A. ODERA**

**JUDGE**

**5.10.2023**

Delivered Virtually Via Microsoft Teams Platform in the presence of and CA Lorraine Njiru.

**TERESA A. ODERA**

**JUDGE**

**5.10.2023**

