



**Mutunga v St Catherine Schools Limited & another (Civil Case
23 of 2017) [2024] KEHC 13762 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE 23 OF 2017
MW MUIGAI, J
NOVEMBER 5, 2024**

BETWEEN

SHADRACK MUASYA MUTUNGA PLAINTIFF

AND

ST CATHERINE SCHOOLS LIMITED 1ST DEFENDANT

JACKSON MUASYA 2ND DEFENDANT

RULING

Notice of Motion Application

1. Vide application dated 14.06.2024 brought under Article 50 of the *Constitution*, section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 the Applicant seeks the following orders, that;
 - a. Spent
 - b. The Honourable Court do order stay the execution of the judgment/ decree delivered on 30th April 2024 pending the hearing and determination of the Application herein
 - c. The Honourable Court do order stay the execution of the judgment/ decree delivered on 30th April 2024 pending the hearing and determination of the intended appeal
 - d. The costs of this Application be in the cause
2. The Application is supported by an affidavit sworn by JAMES MUSYOKI on 14.06.2024 in which he deposes that judgment of Kshs 63,308,793 was entered in favour of the plaintiff and that they intend to appeal the said judgement. There was risk of execution of the judgment by the Plaintiff to recover the decretal sum from the defendants. That the defendants will suffer substantial loss and financial ruin if stay is not granted.



3. He further averred that the defendants did not have the financial capacity to meet the judgment and that the application had been brought without undue delay

Replying Affidavit

4. The Respondent opposed the Application through Replying Affidavit dated 28.06.2024 and deposed that the mere statement that the Applicant will suffer substantial loss if stay is not granted is not sufficient cause for the court to exercise its discretion and grant stay.
5. That having perused the applicant's financial statements and being an accountant by profession and training, it was his professional opinion that the applicant is financially capable of settling the award without suffering liquidity difficulties.
6. That the applicants have not demonstrated the relationship between the financial statements and their claim that the 1st applicant will suffer substantial loss and there was no evidence that the applicant will suffer substantial loss and on the contrary the respondent will be prejudiced if stay of execution is granted as he cannot meet his medical and family's expenditure.
7. That any delay in payment of the award will not only delay the enjoyment of the judgement but will also strain the respondent's income, alter his family's lifestyle and cause great psychological stress to him.
8. The respondent further deposed that the applicants had not met the threshold for stay of execution to be granted as they have not demonstrated how they will suffer substantial loss, they had not offered nor undertaken to supply any security as a condition for grant of stay and has therefore failed to demonstrate why the court should exercise its discretion
9. It was his final averment that the application had been brought in bad faith and an abuse of the court process as it lacks the necessary elements and appears to be buying the applicants time to settle the judgement and he urged that the application be thus dismissed with costs.
10. The Application was canvassed by way of written submissions.

Respondent Submissions

11. Vide submissions filed on 24.07.2024, the Respondent relied on Order 42 Rule 6(2) of the Civil Procedure Rules which provides for the conditions to be satisfied for grant of stay of execution and the case of *Mediratta v Kenya Commercial Bank and others*[2006] 2 EA 194 which reiterated this elements.
12. On substantial loss reliance was placed in the case of *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil case No. 368 of 2001* and case of *Antoine Ndiaye v African Virtual University* [2015] eKLR on the definition of substantial loss.
13. It was submitted that the person seeking stay of execution has to demonstrate the damage he will suffer and not a mere claim of financial burden. Reliance was made to the case of *Kenya Shell Limited vs Kibiru* [1986] KLR 410 and the case of *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited*(2014).
14. It was submitted that the applicants had not demonstrated the substantial loss they would suffer as it was a mere claim with no explanation on the other hand the respondent stated that he suffered paralysis due to the accident which then interfered with his income



15. On security for due performance, he relied on the case of Arun C . Sharma v Ashana Raikundalia [2014] which buttressed the purpose of security. He further submitted that the applicants had not offered any security nor demonstrated willingness to furnish security
16. It was their final issue that he had demonstrated that the applicant's applicant does not satisfy the principles necessary for grant of stay of execution pending appeal and that the application be dismissed with costs.

Determination

17. I have considered the Application, the grounds of opposition and the submissions of parties on record and I find that the issue for determination is whether this court should issue orders of stay of execution.
18. On the issue of stay, Order 42 Rule 6(1) and (2) of the Civil Procedure Rules,2010 provides as follows:

“(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 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.”

19. The first issue is whether the application has been filed without unreasonable delay. I note that the Appellant has not attached the judgment in its application. However this court has perused the Trial Court record and it shows that the Judgment was delivered on 30.04.2024 in the presence of advocates for Parties and the court granted stay of 30 days. This application was filed on 16.06. 2024 thus I find that there is no inordinate delay in filing.
20. Secondly, the Applicant has stated that they stand to suffer loss if the orders sought are not granted but has not demonstrated how exactly it will suffer. Substantial loss was discussed in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, as:

“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 ... 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.”

21. Similarly in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was observed that:

“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 ... 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.”

22. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The Applicant has not stated or demonstrated its willingness to offer security for due performance. The Court has a duty to balance the rights of both parties.

23. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

24. It follows therefore that it is the discretion of court to determine the security

25. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

Disposition

1. The Court granted 60 days of execution after judgment was delivered on 30/04/2024.



2. In the circumstances, I hereby grant stay of execution pending the hearing and determination of the Appeal on condition that the Applicant pays the Respondent through Advocate on record half the decretal sum within 90 days from the date hereof and in default, the application for stay shall stand dismissed.

3. The costs of this application abide the outcome of the appeal.

It is so ordered.

RULING DELIVERED, DATED & SIGNED IN OPEN COURT ON 5TH NOVEMBER, 2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

