



**Magembe v Joseph Muchiri Kariuki t/a Bluenet Ventures (Civil Miscellaneous E157 of 2024) [2024] KEHC 15305 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL MISCELLANEOUS E157 OF 2024  
JM NANG'EA, J  
DECEMBER 4, 2024**

**BETWEEN**

**JOSEPH MAGEMBE ..... APPLICANT**

**AND**

**JOSEPH MUCHIRI KARIUKI T/A BLUENET VENTURES ..... RESPONDENT**

**RULING**

1. Vide Notice of Motion dated 7<sup>th</sup> June 2024 the applicant craves the following reliefs;-
  1. Spent
  2. Spent
  3. That this honourable court be pleased to issue orders for stay of Execution of the orders arising out of the Judgement of Hon. Edward Obwage delivered on 21<sup>st</sup> May 2024 in Nakuru Small Claims SCCOMM NO. E1149 OF 2023 Joseph Muchiri Kariuki T/A Blue Net Ventures vs Joseph Magembe pending the hearing and determination of the Intended Appeal.(sic)
  4. That the costs of this application be in the intended Appeal.
2. The Application arises from the judgement of the lower court (Hon. Edward Obwage (RM) in Nakuru Small Claims Court Case (SCCOMM NO. E1149 OF 2024) in which the respondent's claim for Kshs. 449,000/= against the applicant was allowed. Aggrieved by the decision, the applicant intends to lodge an appeal in this court and exhibits a draft of Memorandum of Appeal as evidence of his intent.
3. By Affidavit in Support of the Motion, the applicant inter alia expresses his willingness and readiness to deposit security for the due performance of the decree of the lower court. He laments that if stay of execution of the impugned judgement and/or decree is not granted he will be prejudiced, hence his application.



4. Through affidavit evidence in reply, the respondent opposes the application. He attacks the application as frivolous, vexatious, scandalous, prejudicial and an abuse of the court's process. It is averred that the application is a calculated attempt to further delay the applicant's enjoyment of the fruits of his judgement.
5. The respondent further avers that no reasonable security for costs has been offered and that the applicant may not have the means or willingness to satisfy the decree. The respondent nevertheless proposes that the applicant does deposit the entire decretal sum into court pending hearing and determination of the intended Appeal.
6. Among other contentions, the respondent states that the balance of convenience tilts in his favour in light of the decree granted to him by the lower court. He urges the court to exercise its discretion in his favour.
7. Learned Counsel for the parties filed Written Submissions which the court has perused against the application, the respondent's reply and all annexures to the parties' affidavits.
8. Order 42 rule 6(1) (2) of the Civil Procedure Rules 2010 governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
  - a. unless 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. Citing the Judicial determination in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, Counsel for the applicant states the definition of "Substantial Loss" as;-

".....what has to be prevented by preserving the status quo because such loss would render the appeal nugatory or of no consequence."

The applicant further places reliance on *RWW vs EKW* [2019] eKLR in which it was stated that the relief of stay of execution pending appeal is discretionary, and that the court has the duty of balancing the interest of the applicant who has a right of appeal and that of the respondent who has a judgement in his favour that he should ordinarily be allowed to enjoy.
10. The applicant also submits that he had brought the Motion without unreasonable delay and he is willing to give security. Reference is made to the case of *John Odungo vs Joyce Irungu Muhatia* [2014] eKLR where the court observed that an applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows "preparedness as well as readiness to provide security should one be called upon to do so."
11. Learned Counsel for the respondent restate the same legal position in their submissions. They, however, contend that the applicant has not demonstrated the loss he would suffer if execution is not stayed. The case of *Nyatera vs Nyakundi (Civil Appeal E033 of 2022)* [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is quoted for the proposition that the applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the respondent intends to proceed with execution,



he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties' interests.

12. The respondent further insists that security for costs must be deposited to cushion him in the event the intended appeal fails (see Case Law in *Ena Investment Limited vs Bernard Ochau Mose & 2 Others* (2022) eKLR among other judicial authorities cited in the respondent's submissions).
13. The impugned judgement was delivered on 21/5/2024 while this application was filed on 7/6/2024, about 2 weeks later. This delay has not been explained. It is trite law that even delay of one day, if unexplained, is bad enough. The applicant has not therefore satisfied the condition requiring that the application be brought without unreasonable delay.
14. The appellant has shown willingness and readiness to deposit such security for costs as may be ordered by the court.
15. Determination of the application turns on the question of substantial loss, if any, the applicant might suffer if stay of execution is not ordered. It has been held in many decided cases that this is the cornerstone of the court's discretion to grant or refuse stay of execution pending appeal. The onus is on the applicant to show on a balance of probability that the respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. In *Tropical Commodities Ltd. International (in liquidation)* (2004) 2 EA 331 my brother Ogolla J explained that substantial loss is a qualitative concept. It refers to:-

“any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
16. In *Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd*, this court again explained 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 when, 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.”
17. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited vs Aquinas Francis Wasike & Another* [2006] eKLR that:-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
18. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including [\*Matata & Another vs Rono & Another \(Civil Appeal No. E034 of 2024\)\*](#) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).
19. Based on the affidavit evidence of the parties neither of them has stated their financial position. The applicant has not made out a prima facie case of the respondent's inability to pay back the decretal sum to warrant the respondent to debunk the claim.



20. In the final analysis, the court grants the application on the following terms;-

a. The applicant gets stay of execution pending appeal on condition that he deposits the entire decretal sum into court within 21 days from the date hereof failure to which the respondent will be at liberty to levy execution.

b. The costs of the application will abide the appeal.

Ruling accordingly.

**J. M. NANG'EA, JUDGE.**

**RULING DELIVERED THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024 IN THE PRESENCE OF:**

Mr. Kurgat Advocate for Mr. Lang'at Advocate for the Applicant

Mr. Bomet Advocate for the Respondent

Court Assistant, Lepikas

