

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMA/E032/2021

THE ABILITY THERAPY PLACE LIMITED.....APPELLANT/APPLICANT

VS

CHARLES KIBANDI KAGUOYA.....1st RESPONDENT

JEREMIAH MUCHENDU T/A ICON AUCTIONEERS.....2ndRESPONDENT

RULING

1. Vide a Memorandum of Appeal dated 20th April 2021, the appellant/applicant seeks to overturn the decision of the learned Magistrate in Milimani CMCC No. 1965 of 2019 rendered on 19th April 2021 dismissing its application objecting to the attachment of goods pursuant to execution of the decree issued in the said suit.
2. The grounds of appeal cited in the Memorandum of Appeal are that the learned Magistrate erred in law and in fact in finding that the defendant in the lower court and the objector are one and the same persons; that the learned Magistrate erred in law and in fact in finding that the proclamation and attachment of its goods in satisfaction of the Plaintiff's decree against the defendant was legal and procedural and that the impugned decision is a miscarriage of justice.
3. Contemporaneous with the Appeal, the appellant filed a Notice of Motion of even date seeking a raft of prayers, but at the hearing of the application, the applicant's counsel informed the court that he was only pursuing prayers (2) which seeks stay of execution of the said decree; and prayer (8) which prays for costs of the application.
4. From Paragraphs 8 of the application to 42 and the jurat are essentially a replica of the supporting affidavit as opposed to concise grounds in support of the application. Nevertheless, I am able to discern the core grounds in support of the application for the supporting affidavit and the Certificate of Urgency. These are that the applicant who was the objector in the lower court is a separate legal entity from the defendant/judgment debtor and therefore it was not a party to the suit which led to the attachment of its goods. The applicant also states that the Respondent never served it with Notice of Judgment or the Proclamation prior to the attachment and that there is a discrepancy between the goods proclaimed and what was actually attached.
5. The Respondent filed grounds of opposition stating that the application is bereft of merit, it is frivolous and vexatious and only calculated at delaying and or stalling the realization of the decree-holder's fruits of his successful litigation. At the *ex-parte* stage, I directed that the application be served for *inter partes* hearing.
6. During the hearing of the application, the Respondent's counsel confirmed that the attached goods had since been sold, a position the applicant's counsel also attested. However, the applicant's counsel preferred to proceed with the application. This development raises a fundamental question which the parties did not address, that is the propriety or otherwise of proceeding with the application seeking stay yet the goods had already been sold. Put differently, the question that must be addressed is whether the issues raised in the instant application are moot.
7. The above scenario brings into sharp focus the law of mootness which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. Mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, and in which claims have been settled.
8. Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.^[1] Put differently, the presence of a "collateral" injury is an exception to mootness.^[2] As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.^[3] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.
9. In several previous decisions of this court I have stated that a matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. As a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain.^[4]
10. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on

academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.^[5]

11. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which an applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.^[6] Accordingly, a case is a moot one if it "...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy."^[7] Furthermore, a case will be moot "...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision."^[8]

12. A case or controversy requires present flesh and blood dispute that the courts can resolve.^[9] A case is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists.^[10] However, a court will decide a case despite the argument of mootness if to do so would be in the public interest.^[11]

13. The wisdom discernible from the above jurisprudence is that cases are determined on the basis of facts presented before the court and the evidence. There is no contest that the attached goods were sold. The import is that the execution is complete. There is nothing to stay. There remains no unresolved justiciable controversy in the present application. Courts only have subject-matter jurisdiction over live controversies. When a case or an application becomes moot during its pendency, the appropriate first step is a dismissal of the case.^[12] On this ground alone, the applicant's application collapses. Notwithstanding my finding, I will address the application on merits.

14. The applicant's counsel argued that no prejudice will be suffered by the Respondent if the prayers sought are allowed. He invoked Order 1 Rule 15 and Order 42 Rule 6 of the Civil Procedure Rules and relied on the affidavit filed.

15. The Respondent's counsel relied on the grounds of opposition filed and argued that the applicant failed to disclose material facts. He argued that the applicants filed three applications in the lower court and no review or appeals have been preferred, and that the applicant was an objector in the lower court.

16. This being an application for stay pending appeal, it is important to bear in mind the applicable tests which an applicant must surmount. Interestingly, none of the parties attempted to address the tests provided under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, 2010 which provides: -

(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 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 of stay 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 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.

17. A useful starting point is to state that the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. A reading of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 shows that the corner stone of the jurisdiction of the court under the said Rule is three-fold. *One*, that substantial loss would result to the applicant unless a stay of execution is granted.^[13] *Two*, that the application has been made without unreasonable delay. *Three*, that 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.

18. Discussing what constitutes substantial loss, the court in *James Wangalwa & Another v Agnes Naliaka Cheseto*^[14] stated: -

"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... 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 v Chesoni*,^[15]...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”

19. Also relevant is *Equity Bank Ltd v Taiga Adams Company Ltd*,^[16] which held: -

“... The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

20. In *Elena D. Korir v Kenyatta University*^[17] the court had this to say: -

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd*^[18] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- **Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.**

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*^[19](2013) as follows:-

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. **These twin principles go hand in hand and failure to prove one dislodges the other”.**

21. Perhaps the best definition of substantial loss was enunciated in *Bansidhar v Pribhu Dayal*^[20] which held that substantial loss should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances. The applicant should go a step further to lay the basis upon which the court can make a finding that it will suffer substantial loss. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted. It is not merely enough to repeat the words of the Civil Procedure Act and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensue.^[21] It is not sufficient for the applicant to claim that his operations will be adversely affected if it satisfies the decree.

22. An applicant is required to place before the court sufficient evidential support, establishing substantial loss. The words "substantial loss" cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.^[22] 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 and different from that.^[23] The applicant did not address this pertinent ground nor do I find any from the material before me. On this ground, the applicant’s application fails.

23. The other ground is whether the appeal if successful will be rendered nugatory, I find guidance in *Hassan Guyo Wakalo vs Straman EA Ltd* which held: -^[24]

“... the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. **These twin principles go hand in hand and failure to prove one dislodges the other”.**

24. The applicant never attempted to address this ground nor do I find anything to suggest that the application meets this test.

25. The other ground is whether the appeal has good chances of success. Again, there was no attempt to address this ground. In any event, the mere fact that an appeal has a good chance of success is not sufficient to obtain a stay unless an applicant satisfies the court that if successful, the appeal would be nugatory. I find support in *Chang-Tave v Chang-Tave*^[25] which held that under the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the court that he will be ruined without a stay of execution. This requirement finds emphasis in *Atkins v. Great Western Railway Co*^[26] where court held thus as a general rule, the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds.

26. Additionally, an applicant is enjoined to provide security.^[27] Again, there was no attempt to address this test nor did the applicant offer security. The offer for security must come from the applicant as a price for stay. (See *Carter & Sons Ltd. v Deposit Protection Fund Board & 2 Others*.^[28]) In *Equity Bank Ltd v Taiga Adams Company Ltd*^[29] it was held: -

“...of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” This proposition of the law was applied in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*.^[30]

27. As was held in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others*^[31] that: -

“... 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.”

28. The above position was reiterated in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates* that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

29. Order 42 Rule 6 (2) is explicit that no order for stay of execution shall be made unless the conditions in paragraphs (a) & (b) of the said provision are complied with. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.^[32]

30. Next is the question whether the applicant has demonstrated grounds for this court to exercise its discretion in his favour. Again, there was no attempt to address this ground nor do I find any basis to unleash this courts discretion in favour of the applicant.

31. In conclusion, preferring an appeal does not operate as stay of the decree or order appealed against. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on an appellant. A court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the court, while passing an order of stay, must try and put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

32. The court must take into account all the circumstances of the case. A stay is the exception rather than the general rule. The party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. In exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.^[33]

33. The proper approach is to make the order which best accords with the interest of justice.^[34] If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.^[35] Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.^[36] This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.^[37]

34. The grant of the order of stay pending hearing of an appeal is not as a matter of course, though a discretionary remedy^[38] which must be exercised both judiciously and judicially.^[39] The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do. There must therefore, in order to succeed in an application for stay pending appeal, be a cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.^[40]

35. The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by special circumstances which render it inequitable for him to enjoy the benefit of his victory.^[41] The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances which have received judicial approval are when execution would: -^[42] **(a).** Destroy the subject matter of the proceedings. **(b).** Foist upon the court a situation of complete helplessness. **(c).** Render nugatory any order or orders of the appeal Court. **(d).** Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal. **(e).** Provide a situation in which even if the appellant succeeds in his appeal there could be no return to the status quo.

36. Considering the circumstances of this case, it is my finding that the applicant has not met any of the tests to warrant stay. In fact, there was no attempt at all to address any of the tests. In any event, I had earlier, concluded that the application before me is moot. On all these grounds, the application is fit for dismissal. The upshot is that the applicant’s Notice of Motion dated 23rd April 2021 is totally unmerited. Accordingly, I dismiss the said application with costs to the Respondent.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 2ND DAY OF JULY, 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail and uploaded into the e-filing system

- [1] In *Chafin vs. Chafin*, 133 S. Ct. 1017 (2013).
- [2] *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).
- [3] *Board of Pardons vs. Allen*, 482 U.S. 369, 370 n.1 (1987).
- [4] *Political Parties Forum Coalition & 3 others v s Registrar of Political Parties & 8 others* [2016] e KLR
- [5] See *Plateau State vs. A.G.F.* {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms
- [6] *Osmeña III vs. Social Security System of the Philippines* G.R. No. 165272, 13 September 2007, 533 SCRA 313, citing *Province of Batangas vs. Romulo*, G.R. No. 152774, 27 May 2004, 429 SCRA 736, 754; *Olanolan v. Comelec*, 494 Phil. 749,759 (2005); *Paloma v. CA*, 461 Phil. 269, 276-277 (2003).
- [7] *Diamond* 1946 *U Pa L Rev* 125. See also Brilmayer 1979 *Harv L Rev* 297; Fountaine 1998 *Am U L Rev* 1053; Peter and John *Federal Courts*. For a recent critical discussion of the mootness doctrine see Hall 2008 works.bepress.com.
- [8] *Diamond* 1946 *U Pa L Rev* 125.
- [9] Barron and Dienes (eds) *Constitutional Law* 44.
- [10] Loots "Standing, Ripeness and Mootness" 18.
- [11] See *S v Manamela* 2000 5 BCLR 491 (CC) para 12. See also *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC) para 11; *AAA Investments Pty (Ltd) v Micro Finance Regulatory Council* 2006 11 BCLR 1255 (CC) para 27.
- [12] *Mills vs. Green*, 159 U.S. 651, 653 (1895)
- [13] See Gikonyo J in HCC No. 28 of 2014, *Trans world & Accessories (K) Ltd v Commissioner of Investigations & Enforcement*
- [14] HC Misc. No. 42 of 2012, {2012} e KLR
- [15] {2002} 1 KLR 867
- [16] {2006} e KLR
- [17] {2012} e KLR
- [18] {1993} KLR 365
- [19] {2013} e KLR
- [20] AIR 1954 Raj 1, Learned Judge Dave
- [21] Ibid.
- [22] See *Anandi Prashad v. Govinda Bapu*, AIR 1934 Nag 160 (D), Judge Vivian Bose A. J. C.
- [23] Ibid.
- [24] {2013} e KLR
- [25]{2003} SLR 74, the Supreme Court
- [26] {1886} 2 T.L.R 400.
- [27] See *Republic vs Commissioner for Investigations & Enforcement*, Misc. App no 51 of 2015 (NBI),
- [28] Civil Appeal No. 291 of 1997

[29] Supra

[30] Supra note 14

[31] {2015} e KLR.

[32] Ibid

[33]{2011} EWHC 3544 (Fam)

[34]*Philips LJ in Linotype-Hell Finance Limited v Baker* [1992] 4 All ER 887, at page 3

[35] Ibid

[36] Ibid

[37] Ibid

[38] *Vas wani Trading Company v Savalak & Co* (1972) 12 SC. 77

[39] *Mobil Oil (Nig) Ltd. v Agadowagbo* (1988) 12 NWLR (Pt 77) 383, *Marina v Niconnar Food Co. Ltd.* (1988) 2 NWLR (Pt 74) 75, *Balogun v Balogun* (1969) 1 All NLR 349, *Olunloyo v Adeniran* (2001) 14 NWLR (pt 734) 699, *Okafor v Nnaife* (1987) (1987) 4 NWLR (pt. 64) 129

[40]*Onzulobe v Commissioner for Special Duties Anambra State* (1990) 7 NWLR (pt 161) 252.

[41] *Fawehinmi vs. Akilu* (1990) 1 NWLR (Pt. 127) 450 @ 460.

[42] *UNIPOINT vs. Kraus Thompson Organization Ltd.* (1999) 11 NWLR