



REPUBLIC OF KENYA



**Mutiso & another v Ngoma (Civil Appeal E109 of 2021)
[2021] KEHC 344 (KLR) (14 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E109 OF 2021
MW MUIGAI, J
DECEMBER 14, 2021**

BETWEEN

MARY MBULWA MUTISO 1ST APPELLANT

JONATHAN MUTISO WAMBUA 2ND APPELLANT

AND

BETH MUENI NGOMA RESPONDENT

RULING

1. By a Notice of Motion dated 9th July 2021 filed under Certificate of Urgency on 15th July, 2021, the Applicants/Appellants seek the following orders:-
 1. (Spent)
 2. THAT the Court grant stay of execution of the Judgment/Decree issued by the Honourable A.W Nyoike Principal Magistrate pending the hearing and determination of this application and the appeal.
 4. THAT the application be heard inter parties on such date and time as this Court may direct.
 5. THAT the costs of this application be provided for.
2. The application is based on grounds that the Trial Magistrate in CMCC No. 822 of 2019 on 17th June, 2021 apportioned 100% liability against the Defendant and awarded general damages in the sum of Kshs. 200,000/-, special damages of Kshs. 2,100/- plus costs and interest at court rates in favour of the Plaintiff. According to the Applicant, the judgment sum is substantial hence if the Respondent is paid, the Applicant may be unable to recover back the amount in the event the appeal succeeds since the Respondent has not tendered any documentary evidence to show her financial standing.



3. According to the Appellants, he is apprehensive that the Respondent may levy execution against them based on the judgment sum if the orders sought herein are not granted, they will suffer substantial loss and the appeal will be rendered nugatory. The Applicants state that the appeal has high chances of success.
4. The Appellants state that they are ready and willing to provide a reasonable security in the form of a Bank Guarantee. According to the Applicant, the application was filed without unreasonable delay, in good faith and the Respondent will not suffer any prejudice.
5. The application is supported by the Appellant's insurer, Direct Assurance Company Limited, Deputy Claims Manager Kelvin Ngure whose averments the court has considered. The supporting affidavit was sworn on 9th July, 2021.

REPLYING AFFIDAVIT

6. In opposition to the application, the Respondent swore a replying affidavit on 22nd July, 2021. Based on the advice of their advocate, she deposed that application is frivolous, vexatious, abuse of the court process and an afterthought. According to the Respondent, the application does not satisfy the conditions laid down in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
7. She deposed that the application has been brought with the sole intention of denying him from enjoying the fruits of the judgment. According to the Respondent, she is a woman of means, capable and willing to refund the decretal sum should the appeal succeed. She deposed that the sufferance of substantial loss is personal hence the Appellants insurer Claims Manager who is not a party to the suit has not demonstrated the loss to be suffered by the Appellants if stay is not granted. She deposed that the Claims Manager has not shown whether the insurance is facing any financial problems and it will collapse if it settles the decretal sum.
8. The Respondent is opposed to the provision of a Bank Guarantee since it is valid for one year and the appeal may take more than one year to conclude. It is averred that the Bank Guarantee should be for the decretal sum herein so that in case of default it can be enforce. According to the Respondent, it should be addressed to the court not the insurance Directors. According to the Respondent, the Bank Guarantee is being used in all applications for stay of execution pending appeal all over the country hence untenable. It is averred that the Bank Guarantee is not prove of availability of funds, it is subject to approval of Applicants title securities with the bank.
9. She deposed that if the orders sought by the Appellants are granted, the Appellants should pay her half of the decretal sum of Kshs. 161,543/- and the balance deposited in court or joint account in the names of both advocates.

APPLICANT'S SUBMISSIONS

10. In support of the application, it is submitted by Applicant's advocate that the Applicant in this case filed an application for stay of execution and leave to appeal out of time dated 9th July, 2021 under Certificate of Urgency. According to the advocate parties took direction to canvass the application by way of written submissions and this matter was set down for mention to confirm filing of written submissions on 14th October, 2021.
11. It is submitted that the Trial Court declined to grant stay of execution pending appeal under Order 42 Rule 6 which has precipitated the filing of the application before this court.



12. According to the advocate, the right of appeal is a constitutional right guaranteed under Article 48 and 50(1) of the *Constitution*. It is submitted that the right to fair hearing under Article 50 (1) cannot be limited under Article 25 of the Constitution.
13. As to whether the Applicant has an arguable appeal, it is submitted that the appeal is against the quantum being excessive hence arguable and raises points of law to warrant this court's intervention as per the draft Memorandum of Appeal filed on 29th June, 2021. Reliance was placed on the case of *Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR*. It is submitted that the grounds of appeal have high chances of success hence the Applicant should be given an opportunity to ventilate their appeal on merit.
14. As regards whether the Applicant will suffer substantial loss in the event the orders sought are not granted, it is submitted that the Respondent has not tendered in court an affidavit of means. According to Applicant's advocate, it is the Respondent who can specifically show that she has means to repay the decretal amount. Reliance was placed on the case of *Edward Kamau & Another vs. Hannah Mukui Gichuki & Another (2015) eKLR* and in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike, CA Civil Application No. 238 of 2005*. Further reliance is placed on Section 112 of the [Evidence Act](#).
15. As to whether the application was filed without unreasonable delay, it is submitted that the Application was filed within time hence not an afterthought. It is submitted that this court has unfettered jurisdiction to hear and determine an application for stay pending appeal regardless of whether the application was granted or refused.
16. It is submitted that the Applicant is ready and willing to furnish security in the form of a Bank Guarantee pending the hearing and determination of the appeal. Reliance was placed on the case of *Selestica Limited vs. Global Rock Development (2015) eKLR*.
17. According to the Applicant, he has satisfied all the conditions set under Order 2 Rule 6 of the Civil Procedure Rules, 2010 hence the application dated 29th June, 2021 should be allowed with costs to abide by the outcome of the appeal.

RESPONDENT'S SUBMISSIONS

18. On behalf of the Respondent, it is submitted that the application is defective as it is sworn by a person not a party to this suit. It is submitted that no authority from the Appellant to his advocate to swear the affidavit.
19. It is submitted that the Claims Manager has not averred whether the insurance is facing any financial problems and will fold up if it settles the decretal amount of Kshs. 323,085/-. According to the Respondent's advocate, it is the Appellant who will suffer substantial loss and not the insurance Claims Manager. It is submitted that the Appellant ought to have sworn the supporting affidavit to demonstrate the loss they would suffer if stay is not granted and execution ensues. Reliance was placed on the case of *Mutua Kilonzo vs. Kioko David, Machakos HCCC No. 62 of 2008* and in *Godfrey Wainaina Kinynajui & Another vs. Joseph Mwikya Musaa Machakos HCCA No. 43 of 2020*.
20. As regards provision of security, it is submitted that the Bank Guarantee is not proof of availability of funds and it is valid for only one year when the appeal may take more than year to conclude. According to the Respondent's advocate, the Bank Guarantee does not amount to provision of security.
21. It is urged that half of the decretal sum of Kshs.161,543 be paid to the Respondent through her advocate and the balance be deposited in court or in a joint account within 30 days in the event court is inclined to allow the application.



DETERMINATION

22. I have considered the application, affidavits in support and in opposition to and the written submissions.

23. Order 42 rule 6(2) of the Civil Procedure Rules, 2010 provides that:

“(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.

24. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, defined substantial loss in the sense of Order 42 Rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it 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...”

25. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated as follows: -

“...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.”

26. However Odunga J. in [*George Kimotho Ilewe Anastacia Wanza Muthuka & Joseph Mutuku Ngewa \(suing as legal representatives of the estate of Judy Kioo Wanza – deceased\)*](#) stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another vs. Agnes Naliaka Cheseto* and *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR.

27. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, 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.”

28. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.

29. The court’s view is that the evidential burden then shifted to the Respondents once the Appellants insurer averred that they are apprehensive of the non-payment by the Respondents if the decretal sum is paid and the appeal is successful. The Respondent averred at paragraph 9 of her replying affidavit that she was a woman of means capable of refunding the decretal sum but the court notes that no evidence was tendered either documentary or through the averments of her means.

30. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another [2006] eKLR* Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant’s dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant’s intended appeal were to succeed, that success would be rendered nugatory.

31. On the other hand the court notes that the Appellants insurer has not demonstrated the substantial loss that it would suffer if the decretal amount is paid to the Respondents. It has not been averred or submitted whether the insurance business will be ruined.

32. However despite the court noticing the lack of proof of the substantial loss, the court is called upon to strike a balance between the interests of parties in such applications.

33. It was held in the case of *Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR*, that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

34. On the second condition, the Trial Court Judgment was delivered on 17th June, 2021 while the application seeking stay of execution of the judgement was filed on 15th July, 2021. The court’s view is that a period of 1 month is not undue delay. It was filed within the 30 days stay of execution.



35. The Appellant has offered security for the due performance of the decree in the form of a Bank Guarantee of Kshs.30,000,000.00/. A copy of the same dated 6th November, 2020 is attached as ‘KN4’.
36. Indeed 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.”

37. The Respondent contends that the Bank Guarantee is being used in other matters all over the country. However the court notes that no documentary evidence has been furnished to court by the Respondent on the same. It is trite that he who alleges must prove.
38. On the other hand the court notes that the Bank Guarantee at Clause 3, its validity shall not exceed one (1) year from the date of issuance or until such time that the said guarantee is cancelled or becomes void hence the argument by the Respondent that the appeal may take more than one year to conclude hence not appropriate to provide a Bank Guarantee. Despite the court’s discretion to determine the security, the court is in agreement that the Bank Guarantee may not be a suitable form of security in the circumstances.
39. The court in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, stated:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

40. The Respondent has urged the court to order the Appellants to pay her half the decretal amount of Kshs. 161,543/-. The appeal is only against the Trial Court awarded quantum hence the Respondent will still be awarded some damages even if not the entire awarded quantum by the Trial Magistrate.
41. The court’s view that this is a case where a stay ought to be granted but on conditions.

DISPOSITION

42. The commendable orders to issue shall be:-
- a. There be a stay of execution of the judgment and decree of the Senior Resident Magistrate Hon. A.W Nyoike, Principal Magistrate at Machakos in CMCC No. 822 of 2019 pending the hearing of the appeal.
 - b. The Appellants to pay the Respondent half the decretal sum of Kshs.161,543/- and the balance of Kshs. 161,543/- be deposited within Sixty (60) in a joint earning interest account in the name of the advocates for the respective parties on record.
 - c. In default of (b), the application shall stand dismissed.



- d. The right of appeal vacated.
- e. Costs shall abide in the appeal.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF DECEMBER, 2021.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Sila for the Respondent – present in court

Ms Achoki for the Appellant/Applicant – present

Geoffrey - Court Assistant

M. W. MUIGAI

JUDGE

Mr. Sila: The decretal amount in Machakos CMCC 822 of 2019 is fully paid – Kshs.258,085/- has been paid to our law firm.

Ms Achoki: We confirm that the decretal amount has been paid. We abandon the appeal without costs.

COURT: The matter is settled, the Appeal withdrawn and court file closed.

Mr. Sila: I am asking for the costs for this application.

Ms Achoki: The matter is to be discussed with Counsel on costs.

COURT*: The issue of costs to be discussed accordingly by counsel for both parties. Court file is closed.

M. W. MUIGAI

JUDGE

