



Mwangi v Kimani (Civil Case E091 of 2022) [2024] KEMC 137 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEMC 137 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E091 OF 2022
PA NDEGE, SPM
JULY 4, 2024**

BETWEEN

MARGARET MUTHONI MWANGI PLAINTIFF

AND

DAVID NGIGI KIMANI DEFENDANT

RULING

1. The Applicant by Notice of Motion pursuant to Sections 1, 1A, and 3A of the *Civil Procedure Act*, Orders 22 Rule 22, Order 42 rules 4, 6 and 7, Order 50 rule 6 and Order 51 rules 1 and 3 of the Civil Procedure Rules moves this Court for the following Orders; that:-
 - i. Spent.
 - ii. The Court, be pleased to grant an order of stay of execution of the judgment delivered by this court on 30/05/2023 pending the hearing and determination of the Appeal Nakuru HCCA E144 of 2023
 - iii. Spent
 - iv. As a condition for stay of execution pending the hearing and determination of the Appeal, the Applicant be and is hereby ordered to provide/ issue security for the entire decretal sum/ amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - v. costs of this application abide the outcome of the Appeal.
2. The Application is supported by a sworn Affidavit of the Applicant dated 14th July 2023, and is based on the following grounds:
 - i. The judgment herein was delivered on 30/05/2023 and the plaintiff/ Respondent was awarded Liability 100%, General Damages at Kshs. 240,000/-, and Special Damages Kshs. 10,200/- plus costs and interests.



- ii. The Defendant/ Applicant being aggrieved and dissatisfied with the said judgment has preferred an Appeal Nakuru HCCA E144 of 2023
 - iii. The Defendant/ Applicant's Appeal has high chances of success
 - iv. The court did not consider the defendant's evidence and similar authorities with similar circumstances
 - v. The Application has been presented without inordinate delay.
 - vi. The plaintiff/ Respondent is a person of unknown means hence the Applicants are apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
 - vii. The Applicants have a strong arguable appeal which has high chance of success.
 - viii. The Applicant's insurer is ready, able and willing to provide security for the entire decretal sum/ amount in the form of a Bank Guarantee to be issued by Family Bank Limited which is a reputable bank in Kenya.
 - ix. To facilitate the issuance of the said Bank Guarantee as security, the Applicant's insurer, M/S Directline Assurance Company, have a long-standing agreement with Family Bank Limited, a copy of which is annexed to the Supporting Affidavit hereto, in which the said Bank has agreed to provide such security pending the hearing and determination of this Appeal.
 - x. It is in the interest of justice that the entire decretal sum be fully secured through a Bank Guarantee, without any partial payments/ settlements being made, as the Applicant's appeal is primarily on trial court's determination on the issue of quantum which determination is vehemently disputed by the Applicant as demonstrated on the Memorandum of Appeal annexed to the Supporting Affidavit hereto.
 - xi. The Applicants/ Appellant is reasonably and justifiably apprehensive that if any part payments are ordered to be made to the Respondent as a condition for stay of execution pending the hearing and determination of the appeal, then such payments will be utilized and alienated by the Respondent and recovery of the same will be arduous in the event that his appeal on the issue of quantum succeeds.
3. There was no response to the application. Be that as it may, it is not that every such unopposed application must be allowed as a matter of course. As a court of law, I still have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any ex parte or unopposed application, the court will as a matter of course grant the sought orders. As held by the Supreme Court of Kenya in *Gideon S. Konchellah Vrs Julius L. Sunkuli and 2 others (2018) e KLR*, it behoves the court to be satisfied that prima facie, with no objection, the application is meritorious and prayers may be granted.

Analysis & Determination

4. The principles upon which this Court may grant stay of execution pending appeal are well-settled as enshrined in Order 42 Rule 6 of the Civil Procedure Rules, which requires an applicant seeking a stay of execution pending appeal to demonstrate that: -
- a. Substantial loss may result to the applicant unless the order was made;
 - b. The application was made without unreasonable delay; and



- c. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.
5. A stay of execution of judgment/decreed should only be granted where sufficient cause is shown. In *Antoine VRS African Virtual University (2015) eKLR Gikonyo J* held that –

.... stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...
 6. An Order of stay of execution pending appeal is a discretion of the Court. In *Butt VRS Rent Restrictions Tribunal (1982) KLR* the Court gave guidance on how such discretion should be exercised and held that –
 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 that appeal Court reverse the judge’s discretion.
 3. 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. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. 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 for costs as ordered will cause the order for stay of execution to lapse.
 7. The Primary purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW VRS EKW [2019] eKLR*, it was observed that:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
 8. The above principles are brought to bear in mind in determining this application. The first consideration is whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on 30th May, 2023 and the memorandum of appeal filed with the High Court on the 06/07/2023. The Application was filed on the 18th July 2023, a cursory look indicates that the Applicant has moved this Court in a timely manner and without any delay.
 9. The Applicant contends that the appeal will be rendered nugatory if the application herein is disallowed as the plaintiff/Respondent is a man of unknown means, yet his appeal has high chances



of success. It is however the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates Vrs East African Standard (No 2) (2002) KLR 63* the Court of Appeal considered as to what amounts to substantial loss and held 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.

10. I have gone through the supporting affidavit herein and there is no demonstration of real substantial loss. The applicant has deposed that he is apprehensive that any payment made to the Respondent will be utilized and alienated by the Respondent and recovery of the same will be arduous in the event the appeal on the issue of quantum succeeds. That, going by the above decision, is not sufficient. He ought to have demonstrated his apprehension, rather than merely averring to the same.
11. The other consideration is security. In the case of *Arun C. Sharma Vrs Ashana Raikundalia t/a Rairundalia & Co. Advocates (2014) eKLR* the Court held 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.

12. The Applicant in this matter has offered security in the nature of a bank guarantee in the event that the appeal fails. The Court notes that the copy annexed to the Applicant's Supporting Affidavit dated 30/06/2023 marked as "DNK-2" is a copy of a bank guarantee dated 18th February 2022, referenced as FBL/003000033721 with a validity of twelve months with an option to renew. The security thus offered by the Applicant is unenforceable, is in the name of a non-party to the Appeal, it is expired and no explanation is offered as to whether the same was renewed? On this, reference be made to a decision of Justice Muhochi in *Njenga Vrs Njeri & 2 Others [2023] KEHC 23991 (KLR) (24 October 2023)*.
13. As held by Justice Muhochi, in *Njenga Vrs Njeri, supra*, the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though he brought this Application without undue delay has not adequately demonstrated the substantial loss that he would suffer and have failed to furnish security as stipulated by sub-rule 2b. However, this Court in dispensing justice is of the considered opinion that, the Applicant stands a disadvantage should stay orders be declined before hearing and determination of the Appeal.
14. In the upshot of the above, this Court in exercise of its discretion and in the interests of justice, grant the Applicant an Order for stay of execution of judgment – should be the decree - herein on the following condition;



- i. That the Applicant shall Pay to the Respondent Half (50%) the Decretal Amount in judgment/Decree, within the next thirty (30) days from the date hereof.
 - ii. That the Applicant shall deposit, half the decretal amount in a joint interest-earning bank account to be held in the Names of the Counsel for the Applicant and Counsel for the Respondent within the next thirty (30) days from the date hereof.
 - iii. The Costs of this Application is awarded to the Respondent.
15. A default of Order (I) above by the Applicant, shall automatically lapse the Order of Stay of Execution of Judgment/Decree granted.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 4TH DAY OF JULY 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's/ Respondent's Counsel: N/A

Defendant/ Applicant's Counsel: N/A

Plaintiff/ Respondent:

Defendant/ Applicant:

