Afyare Enterprises Company Ltd v Nyaribo t/a I.N. Nyaribo & Co. Advocates (Civil Appeal 501 of 2019) [2025] KECA 1819 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1819 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 501 OF 2019

DK MUSINGA, PO KIAGE & SG KAIRU, JJA

NOVEMBER 7, 2025

BETWEEN

AFYARE ENTERPRISES COMPANY LTD ..... APPELLANT

AND

ISHMAEL NYARIBO T/A I. N. NYARIBO & CO. ADVOCATES .. RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (J. N. Onyiego, J.) dated 7th December 2018 in Misc. Cause No. 112 of 2017)

JUDGMENT

1. By this appeal the appellant, Afyare Enterprises Company Ltd, seeks to reverse the decision of the High Court dated 7th December, 2018, granting the respondent's application for stay of execution pending the hearing and determination of his intended reference.

2. The gist of the grounds on the face of the application and in the supporting affidavit sworn on 24th April, 2018 by the respondent, is that the Deputy Registrar delivered a ruling on 11th April 2018, capping the respondent's advocate client costs at Kshs.861,213. Dissatisfied with the ruling, the respondent issued a notice of intention to have the matter placed before a Judge on a reference. The respondent was particularly challenging item 1 of the bill of costs which, in his view, the learned Judge got wrong by failing to take into account the complexity of the case, the value of the estate, and the amount of time and resources expended. The respondent contended that he had a prima facie case with high chances of success. Further, he was afraid that the appellant would proceed to execute the ruling, in which case he would suffer immensely.

3. The appellant responded to the application through a replying affidavit sworn on 10th May, 2018, by Hassan Abdi Warsame, one of its directors. It was averred that the application was an abuse of court process, frivolous and lacked merit for the reason that it is settled law that a stay of execution order cannot be granted on a challenge to costs. There was also no substantial loss that could be occasioned

to the respondent as stipulated under the provisions of Order 42 rule 6(2) (a) of the Civil Procedure Rules, since, if he succeeded in the reference, he would be issued with a certificate of taxation for the realisation of the amount awarded, for which he could execute against the appellant. Further, the intended reference lacked merit as the Deputy Registrar had taxed reasonably the items that the respondent objected to. The appellant went on to recount the background of the dispute, stating that the respondent was joined to Nairobi HCCC No. 9 of 2005 as an interested party to watch over proceedings on behalf of his client, the appellant. The matter concerned contested properties for which the appellant had paid a deposit of Kshs.10.4 million for one of the properties. The money was eventually refunded to the appellant through his advocate, the respondent. However, when the appellant asked for the money, the respondent retained Kshs.2.4 million under lien. It was averred that retention of some of the money caused the appellant to lodge a complaint with the Law Society of Kenya, which prompted the respondent to lodge the bill of costs in issue.

4. In reply to the appellant's averments, the respondent filed a further affidavit sworn on 3rd July, 2018, in which he reiterated the assertions in his application. Upon considering the application and the rival arguments, the learned Judge (Onyiego, J.), as earlier stated, granted the application for stay of execution.

5. Aggrieved by that decision, the appellant has filed a memorandum of appeal before this Court containing six (6) grounds, which, in summary, are that the learned Judge erred by;

   a. Circumventing provisions of Order 42 rule 6(2)(a) of the Civil Procedure Rules.

   b. Granting a stay of execution order when the respondent never stated that the appellant was a person of straw who would not be able to pay back the decretal sum.

   c. Delivering an ambiguous, contradictory and irreconcilable ruling.

   d. Allowing the application without ordering the respondent to deposit security in court or in a joint interest earning account.

   e. Failing to appreciate and apply relevant provisions of the law and precedent setting decisions.

6. The appellant prayed that we set aside the impugned ruling and substitute it with an order dismissing the notice of motion dated 24th April 2018. Further, the appellant be awarded the costs of the appeal and of the motion.

7. During the hearing of the appeal, learned counsel Mr. Musumba and Mr. Nyaribo appeared for the appellant and the respondent, respectively. Counsel highlighted their written submissions which they had filed prior.

8. Mr. Musumba submitted that while Order 42 rule 6 of the Civil Procedure Rules, the provision of law upon which the application for stay was premised, is couched in mandatory terms, the respondent never alleged in his application that he would suffer any substantial loss and/or that the appellant was a person of straw who would not pay him the taxed sum of Kshs.1,838,787, if he succeeded in his reference. Moreover, the respondent never deposed in his supporting affidavit that he would provide security for the due performance of the decree, and the learned Judge noted as much. Counsel drew our attention to paragraph 34 of the respondent's submissions where he stated that the appellant is not a person of straw. Mr. Musumba questioned why the learned Judge allowed the application when it was obvious that it did not meet the mandatory requirements under the Civil Procedure Rules. The learned Judge was faulted for delivering a ruling which is ambiguous, contradictory and irreconcilable. Further, he was castigated for referring to an authority of this Court being FRANCIS KABAA v NANCY

WAMBUI & ANOTHER [1996] eKLR, where it was decided that an order of stay of execution cannot be granted in respect of costs, but proceeding to make a finding that contradicted that decision.

9. Mr. Musumba relied on the holding in GOVERNORS BALLOON SAFARIS LTD v SKYSHIP COMPANY LTD & ANOTHER [2015] KECA 652 (KLR), for the submission that there has to be an averment by the applicant substantiating the loss he would suffer if he were to pay the costs before the appeal is heard. Counsel contended that it had not been alleged that the appellant would be unable to pay the Ksh.1,838,787 in the event the respondent's appeal succeeded, and neither was there the remotest averment that substantial loss would be occasioned to him. In the end we were urged to allow the appeal.

10. In opposition to the appeal, Mr. Nyaribo began by narrating the history of the matter. He contended that the reference dated 17th January 2019, in Nairobi High Court Miscellaneous Application No. 112 of 2017; Ishmael Nyaribo T/A I. N. Nyaribo Advocates v Afyare Enterprises Limited, nullifies the necessity of the instant appeal in its entirety. Just like counsel for the appellant, Mr. Nyaribo similarly argued that it had not been shown that he was a man of straw so that should the decision of the taxing master be affirmed in the filed reference, he would be unable to release any lien withheld by him. Citing the decisions in KENYA COMMERCIAL BANK LTD v SUN CITY PROPERTIES LTD & 5 OTHERS [2012] eKLR and BUTT v RENT RESTRICTION TRIBUNAL [1979] eKLR, counsel contended that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. Counsel further relied on Order 52 rule 4(3) of the Civil Procedure Rules which provides for the protection of an advocates lien in the event the advocate alleges that he has a claim for costs. He contended that an order of security for costs under Order 42 rule 6(2) does not apply in this case due to the higher competing interest for an advocate's lien pursuant to Order 52 rule 4(3). Moreover, the appellant never urged the High Court for security of costs.

11. Mr. Nyaribo argued that the learned Judge exercised his discretion rightly in allowing the prayer for stay of execution and ordering the filing of a reference. Referring to the decision in NATIONAL BANK OF KENYA LTD v EDWARD MAINA NJANGA T/A MAINA NJANGA & CO. ADVOCATES [2005] eKLR, it was urged that a court can depart from the interpretation of Order 42 rule 6 in matters taxation where a party seeks stay of execution on certificates of taxation because a reference has not been heard and determined. Counsel further placed reliance on MBOGO AND__ ANOTHER v__ SHAH__ [1968] EA 93, where the Court outlined circumstances under which it can interfere with the exercise of discretion by the court below. He submitted that the appellant had not demonstrated that the learned Judge misdirected himself in any way and, therefore, we should affirm the learned Judge's decision as proper. Mr. Nyaribo in the end urged us to allow the High Court to determine the pending reference before parties can be allowed to come to this Court on appeal.

12. We drew Mr. Nyaribo's attention to the fact that upon analysing the requirements for stay of execution as prescribed under Order 42 rule 6, the learned Judge found that the application had not satisfied those requirements. Counsel agreed that indeed that was the position. We further inquired whether, in the circumstances, the learned Judge had a basis on which he could still go ahead and grant the stay. In reply, counsel contended that Article 159 of *the Constitution* allowed the learned Judge to grant the application and that without the order of stay he would be left to do an academic exercise at the High Court.

13. In reply to the respondent's submissions, counsel for the appellant lodged further submissions dated 9th October 2020, in which he reiterated his earlier submissions.

14. It is trite that when a court is called upon to exercise its discretion, it ought to do so judiciously. That is because discretional power is derived from the law and must be exercised upon certain legal principles

and according to the circumstances of each case, to the end of doing substantial justice to the parties. See PATRIOTIC GUARDS LTD v JAMES KIPCHIRCHIR SAMBU [2018] eKLR.

15. The appellant is inviting this Court to interfere with the discretion of the learned Judge. As rightly stated by the respondent, this Court clearly delineated the purview of our interference with the exercise of discretionary powers by the courts below in MBOGO & ANOR v SHAH [1968] (supra). To restate, we can only interfere with the judicial discretion of the learned Judge if satisfied that he misapprehended the facts; or misdirected himself on law; or that he took into account matters of which he should not have; or failed to take into account considerations which he should have; or that his decision was plainly wrong.

16. Before we proceed to address the merits of this appeal, we noted that in the filed submissions, parties considerably and improperly argued the reference which is yet to be heard and determined by the High Court. We have as much as possible avoided referring to those matters and restricted ourselves to issues that arose in the application for stay of execution, which is the subject of the appeal herein. We also noticed, to our dismay, that part of the submissions were merely mutual personal attacks by parties, conduct which we do not countenance and must decry. We think that the sole issue that emerges for our consideration is whether the learned Judge exercised his discretion appropriately, insofar as interpretation of Order 42 rule 6 of the Civil Procedure Rules is concerned. The provision provides as follows, in relevant part;

> " (2) No order for stay of execution shall be made under subrule (1) unless-
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> 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
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> 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. Counsel for the appellant contended that the respondent never demonstrated that substantial loss would be occasioned to him if the application for stay was not granted and neither was it alleged that the appellant would be unable to pay him the taxed amount if he succeeded in his reference. Further, the respondent never deposed in his supporting affidavit that he would provide security for the due performance of the decree. As was pointed out to the respondent during the hearing, upon evaluating the application the learned Judge observed as much, that the application for stay did not meet the mandatory requirements of Order 42 rule 6. The learned Judge rendered himself as follows;

> " 9. The first condition is whether the applicant has demonstrated substantial loss. I note that no attempt has been made to show the nature of loss the applicant stands to suffer if the application is not granted. It has not for example been alleged that the amount involved is such that it the applicant is made to pay it up it will bring the applicant's operation to a standstill. (see Reliance Bank Ltd v. Norlake Investments Ltd EALR [2002] 1EA 227 (CAK). It has also not been contended that the respondent is unlikely to refund the said amount if the same is paid over to the respondent. Accordingly, I am not satisfied that the applicant stands to suffer substantial loss unless the stay sought is granted.
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> 10. However, considering the unique circumstances surrounding this case, in that the respondent had already paid legal fees in excess of what was taxed in

favour of the applicant culminating to the order for release of the balance, the applicant's intended reference would most likely be rendered nugatory if the refund is executed before the reference is heard and determined. On account of that ground, the court can grant stay orders.

11. On whether the applicant's counsel has offered some form of security in the submissions, no such security has been offered in the supporting affidavit. However, the form of security is in the discretion of the court and the mere fact that there is no offer of security may not necessarily lead to the dismissal of the application although the court is perfectly entitled to take it into account."

18. Our respectful view is that the learned Judge having satisfied himself that the respondent had not demonstrated substantial loss, and that it had not been shown that the appellant was unlikely to refund the said amount if the same was paid over to it, there was no justification for allowing the application for stay of execution. Indeed, the learned Judge even proceeded to note that the applicant had not offered any form of security in his supporting affidavit. Even so, he went ahead and granted the application on the premise that it was in the interest of justice to do so. While we agree that ordinarily it would be in the interest of justice to allow an application for stay of execution, on a case by case basis, the same has to be done within the parameters of the applicable law. As rightly asserted by the appellant, in sum, the learned Judge's decision was contradictory and irreconcilable. The provisions of Order 42 rule 6 being in mandatory terms, it was not open to the learned Judge to circumvent them and allow the application. He impermissibly disregarded principle to grant a stay that was unwarranted. Ultimately, we are persuaded that the learned Judge erred and misdirected himself in exercising his discretion, and we must interfere.

19. In consequence, we allow the appeal and set aside the impugned ruling, substituting therefor an order dismissing with costs the motion for stay of execution dated 24th April, 2018.

20. The respondent shall bear the costs on this appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2025.

D. K. MUSINGA, (PRESIDENT)

JUDGE OF APPEAL

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O. KIAGE

JUDGE OF APPEAL

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S. GATEMBU KAIRU, C.Arb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR