



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL SUIT NO.543 OF 2013

DAVID MBURU GIBSON
NELSON MWANGI
BOTH t/a NEMKA COMMERCIAL
AGENCIES.....PLAINTIFFS
=VERSUS=

NATIONAL SOCIAL SECURITY FUND (NSSF)
DEFENDANT

AND

ELIZABETH NJOKI CHEGE1ST
INTERESTED PARTY

DANSON N. MUKURURO2ND INTERESTED
PARTY

RUTH KAREITHI3RD INTERESTED
PARTY

ANTHONY MAINA MUHORO4TH
INTERESTED PARTY

CHARLES MUHIA5TH
INTERESTED PARTY

JOHN N. WAITHAKA6TH INTERESTED
PARTY

WHITE SKY INVESTMENT LTD7TH
INTERESTED PARTY

MAGIC HOLDINGS LTD	.....	8 TH
INTERESTED PARTY		
MICRO-DOT ENGINEERING	.....	9 TH
INTERESTED PARTY		
FELICITUS GATHONI WARURU	.....	10 TH
IINTERESTED PARTY		
HILDA WANG'ITHI MURIITHI	.....	11 TH
INTERESTED PARTY		
SAMUEL NG'ANG'A MUNGAI	.....	12 TH
INTERESTED PARTY		
ERASTUS KARIMI	.....	13 TH
INTERESTED PARTY		

RULING

1. By a Notice of Motion dated 12th July 2024, brought under Order 42 Rule 6 of the Civil Procedure Rules, the Applicants seek the following orders:
 - a) ***THAT there be a stay of execution of the judgment delivered on 1st March 2023 pending the hearing and final determination of an Appeal against the said judgment, namely Nairobi Court of Appeal CA No. 488 of 2023 - David Gibson Mburu & Ano. -vs- National Social Security Fund (NSSF) & Others.***
 - b) ***THAT the cost of this application do abide the outcome of the pending Appeal.***
2. The application is based on the grounds appearing on its face together with the supporting affidavit of David Mburu Gibson, sworn on even date. **THE APPLICANT'S CASE.**

3. The deponent averred that, being dissatisfied with the judgment delivered on 1st March 2023, they filed Nairobi Civil Appeal No. 486 of 2023, which appeal is pending for hearing and determination.
4. He explained that the Interested Parties had previously been represented by Nyandoro & Co. Advocates, who had filed a Notice of Appeal, and that it was mutually understood that execution would await the outcome of the appellate process.
5. He argued that following the coming on record of Odeng-Ray & Co. Advocates for the Interested Parties, there had been an indication of intent to execute the judgment despite the pending appeal.
6. The deponent contends that the appeal is arguable and that, without a stay, they will suffer irreparable harm, rendering the appeal nugatory.

THE DEFENDANT'S CASE

7. The Defendant filed a replying affidavit sworn on 23rd October 2024 by Lillian Kemunto Maugo, the 1st Defendant's Legal Officer. The deponent averred that judgment was delivered on 1st March 2023, directing, inter alia, the release of Kshs. 16,400,000/= to the Plaintiffs forthwith, the refund of a 10% deposit amounting to Kshs. 1,640,000 within 90 days, and interest on that sum at court rates from the date of judgment until payment in full.
8. She further averred that the parties executed a consent before the judgment was delivered, which provided for the

refund of Kshs. 16,400,000/=, the agreed purchase price for L.R. No. 11895/24. She stated that this consent was adopted as an order of the court. She averred that the said sum was refunded to the Plaintiffs through their advocates, M/s JM Njenga & Co. Advocates, as evidenced by an acknowledgment annexed to the affidavit.

9. In light of the foregoing, the 1st Defendant contends that the decretal sum has been satisfied, rendering the present application untenable. She argued that the application was brought approximately one year and six months after the delivery of judgment, when execution proceedings were initiated.
10. The 1st Defendant contends that the application lacks merit, fails to satisfy the criteria for a stay, and should be dismissed with costs.

THE INTERESTED PARTIES' CASE

11. The Interested Parties filed a replying affidavit sworn by Anthony Maina Muhoro in opposition to the application. The deponent contends that the application is an abuse of the court process and is intended to delay them from enjoying the fruits of their judgment.
12. He averred that the Interested Parties had filed this suit against the Plaintiffs and the Defendant for breach of contract in the sale of land. The suit was determined by a judgment delivered on 1st March 2023, and a decree was subsequently issued on 13th July 2024. Although the

Plaintiffs lodged an appeal, Nairobi Civil Appeal No. E488 of 2023, they did not seek a stay of execution before the appellate court or engage the Interested Parties regarding the maintenance of the status quo.

13. The deponent explained that after their previous advocate, Nyandoro Yabesh Kambi of Nyandoro & Company Advocates, passed away, they appointed Ondeng Ray & Company Advocates, who came on record by consent after judgment. Upon confirming that the Plaintiffs had executed the decree in their favour against the Defendant but had not satisfied the decretal sum due to the Interested Parties, instructions were issued to execute the decree. Warrants of attachment were obtained on 12th October 2024 and issued to Betico Auctioneers, who proclaimed the Plaintiffs' movable assets.
14. The deponent states that the Plaintiffs have withheld funds refunded by the Defendant, failed to provide proof of an escrow arrangement, and continue to benefit from those funds while resisting enforcement of the decree.
15. The deponent asserts that the application for a stay was brought in bad faith, with undue delay, and without any offer of security. He argued that, should a stay be granted, the outstanding decretal sum should be deposited in a joint interest-earning account as security, and that the Plaintiffs be directed to settle the auctioneers' costs.
16. The application was canvassed by way of written submissions.

THE PLAINTIFFS SUBMISSIONS

17. The Plaintiffs filed their submissions dated 1st November, 2024. On behalf of the Plaintiffs, Counsel addressed the applicable principles under Order 42, Rule 6 of the Civil Procedure Rules.
18. On substantial loss, Counsel submitted that execution has already been initiated and may culminate in the attachment and sale of the Applicants' assets, thereby rendering the pending appeal nugatory and causing irreparable harm.
19. To support this argument, Counsel relied on **Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] eKLR**, where the Court of Appeal held that substantial loss is the cornerstone of the jurisdiction to grant a stay. Counsel also relied on **Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (In Liquidation) Misc. Application No. 379 of 2003 [2003] UGHC 80**.
20. On delay, Counsel submitted that the Interested Parties had initially supported the appeal and had filed a Notice of Appeal. Reference is made to the correspondence dated 5th April 2024, which indicated that they did not oppose the appeal. It was argued that time began to run only in June 2024, when the Interested Parties allegedly changed position, and therefore the application was brought without unreasonable delay.
21. With respect to security, Counsel urged the Court to grant an unconditional stay of execution. It was submitted that the

dispute concerns land and that, if the appeal succeeds, the Interested Parties would recover the subject property. It was further contended that the Interested Parties have not demonstrated their financial capacity to refund the decretal sum if the appeal succeeds.

22. To support this point, Counsel relied on **University of Nairobi v Ricatti Business of East Africa [2020] eKLR, which cited International Laboratory for Research on Animal Diseases v Kinyua [1990] KLR 403** to support the proposition that when impecunity is alleged, the evidential burden shifts to the respondent to rebut the claim.
23. Counsel also relied on **Asher v Kuria & 6 Others, Civil Application No. Nai. E0157 of 2023 [2023] KECA 528 (KLR)**, in which the Court of Appeal held that arguability should not be precluded at the interlocutory stage and that a respondent's failure to demonstrate the ability to refund a decretal sum may render an appeal nugatory.
24. Further reliance was placed on **Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR and Nduhiu Gitahi v Warugongo [1988] KLR 621**, in which the Court of Appeal emphasized that security is intended to preserve the rights of both parties pending appeal and may take various forms, provided it adequately protects the decree holder.
25. In conclusion, Counsel maintained that the Applicants have met the threshold for the grant of the orders sought.

THE DEFENDANTS SUBMISSIONS

26. The Defendant filed its submissions dated 7th November, 2024. On behalf of the Defendant, Counsel submitted that the only issue for determination is whether the Applicants met the threshold for granting a stay of execution under Order 42, Rule 6(2) of the Civil Procedure Rules.
27. Regarding whether the Applicants will suffer substantial loss if a stay is not granted, Counsel contended that the Applicants have not demonstrated any loss that would arise if a stay is denied. To support this point, reliance was placed on **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, where the Court held that the mere commencement or completion of execution does not, of itself, amount to substantial loss, as execution is a lawful process. It was submitted that an applicant must demonstrate circumstances showing that execution would irreparably affect the core of the appeal or render it nugatory.
28. Counsel further submitted that the decretal sum of Kshs. 16,400,000/= awarded to the Applicants was paid pursuant to a consent order dated 12th November 2014, which was acknowledged by their advocates. Consequently, no substantial prejudice arises.
29. Regarding security, Counsel argued that the Applicants have not expressed their willingness to furnish security for the due performance of the decree. Reliance was placed on

Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd [2019] eKLR, where the Court emphasized that an applicant seeking a stay of a money decree must satisfy the security condition, bearing in mind that a successful litigant ought not be deprived of the fruits of judgment.

30. Regarding the delay, Counsel submitted that the present application was filed approximately one year and four months after delivery of judgment, constituting inordinate and unexplained delay contrary to the requirements of Order 42 Rule 6(2).
31. In conclusion, Counsel submitted that the Applicants have failed to meet the threshold for granting a stay pending appeal and that the application should be dismissed with costs.

THE INTERESTED PARTIES' SUBMISSIONS

32. The Interested Parties filed their submissions dated 24th October, 2024. On their behalf, Counsel submitted that the only issue for determination is whether the application meets the threshold for granting the orders sought. Counsel further submitted that the application lacks merit, constitutes an abuse of the court process, and is intended to delay enjoyment of the fruits of judgment. Counsel also submitted that the Applicants had not satisfied the conditions set out in Order 42, Rule 6(2) of the Civil Procedure Rules.

33. On substantial loss, Counsel relied on **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, to argue that the Applicants have not shown the loss they are likely to suffer if a stay of execution is not granted. Counsel emphasized that execution, being a lawful process, does not by itself constitute substantial loss. Counsel further argued that the Applicant must demonstrate circumstances showing that execution would irreparably affect the core of the appeal.
34. Counsel submitted that the decree herein is monetary and that the Applicants have not demonstrated any specific substantial loss. Reliance was placed on **Machira t/a Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63** and **Kenya Shell Ltd v Kibiru [1986] KLR 410**, where the Court underscored that substantial loss must be proved, not merely asserted, and that the absence of evidence of inability to recover sums paid negates the claim that an appeal would be rendered nugatory. Counsel further contended that the Interested Parties are financially capable of refunding the decretal sum should the appeal succeed.
35. On delay, Counsel submitted that judgment was delivered on 1st March 2023, while the present application was filed on 12th July 2024, a delay of approximately one year and four months. Counsel relied on **Nyatera v Nyakundi Civil Appeal E033 of 2022 [2023] KEHC 3086 (KLR)** and **Francis K. Chabari & Another v Mwarania Gaichura**

- Kairubi [2022] eKLR**, where applications filed after comparatively shorter delays were found not to have been made timeously. It was contended that the Applicants were indolent and had offered no plausible explanation for the delay.
36. Regarding security, Counsel relied on **Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** to support the proposition that security is a guarantee for the due performance of the decree and is not intended as a punitive measure. Counsel submitted that the Applicants have neither offered nor proposed any security despite an outstanding decretal sum of Kshs. 10,440,000.
 37. Further reliance was placed on **Mbogoh & Another v Shah [1968] EA 93** and on **Njagi Kanyunguti & 4 Others v David Njeru Njogu CA No. 181 of 1994**.
 38. Counsel relied on **Section 6** of the **Civil Procedure Act** and the Supreme Court decision in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others [2020] eKLR**, to argue that the issues raised in the present application are substantially in issue before the Court of Appeal and that this Court should decline to entertain the application.
 39. Counsel also referenced **SOC Finac Company Limited v Nephath Kimotho Mutua [2013] eKLR** to support the

argument that without proof of substantial loss, the greater risk of injustice lies in denying a successful litigant the benefits of judgment.

40. In conclusion, Counsel urged the court to dismiss the application with costs, or, in the alternative, to grant a stay on the condition that the Applicants deposit the decretal sum into a joint interest-earning account as security pending appeal.

ANALYSIS AND DETERMINATION

41. Having considered the application, the respective affidavits, and the rival submissions, the issue for determination is whether the Applicants have met the threshold for the grant of a stay of execution pending appeal under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.
42. **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules** state as follows:

(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 to 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 for stay of execution shall be made under subrule (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.

43. The power to grant or deny an application for stay of execution is discretionary. In **Butt v Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal set out the following guidelines on how a court should exercise its discretion;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or

refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's decision. 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 Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."

44. Similarly, in **RWW vs EKW (2019) eKLR**, the Court held that;

"...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages."

45. This Court is therefore called upon to balance both the rights of the successful party, so as not to hinder it from the fruits of its judgment, and those of the Appellant, whose Appeal may succeed and be rendered nugatory if a stay of execution is not granted.

46. The purpose of a stay of execution is to preserve the substratum of the case. In **Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi)**, the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal is safeguarded and the appeal, if successful, is not rendered nugatory.”

47. The Court will now determine whether the Applicants have satisfied the conditions upon which the orders can be granted.

Regarding the first condition, that substantial loss may result unless stay orders are granted, the Applicants should not only state that they are likely to suffer substantial loss but must prove that they will suffer such loss if stay orders are not granted.

48. In **Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR**, the Court of Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and

they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent executes the decree in this suit against them.”

49. What constitutes substantial loss was addressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR**, where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.

50. In the matter at hand, the Plaintiffs contend that execution by attachment and the possible sale of their assets would cause irreparable harm. It is common ground that the decree in issue is essentially monetary. The judgment directed the Defendant to refund to the Plaintiffs the sum of Kshs. 16,400,000/- together with Kshs. 1,640,000/-, being 10% of the purchase price. It further directed the Plaintiffs to refund to the Interested Parties sums amounting to Kshs. 10,440,000/-.

51. The Defendant asserts that the sum of Kshs. 16,400,000/- was refunded to the Plaintiffs and relies on a letter dated 9th December 2014 from the Plaintiffs’ advocates acknowledging receipt of that amount.

52. The Interested Parties state that warrants of attachment were lawfully issued on 12th August, 2024, to Betico Auctioneers, and that notice of the warrants was served on

the Plaintiffs. Copies of these documents were annexed to their affidavit. There is no material before the Court indicating that the execution process was irregular.

53. The Applicants have not presented any material showing that the Interested Parties lack the financial capacity to make restitution. The apprehension that attachment may issue or that assets may be sold in execution does not, in itself, constitute substantial loss under Order 42 Rule 6(2) of the Civil Procedure Rules. Execution is a lawful process. The Applicants have offered no audited accounts, no affidavit of means, and no other evidence to support the claim that recovery would be impossible or impracticable. Bare assertions are insufficient.
54. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that judgment was delivered on 1st March 2023. The present application was filed in Court on 29th July, 2024.
55. The explanation offered is that there was an understanding between counsel, and that the Interested Parties subsequently changed their position. However, no formal stay order was sought or obtained when judgment was delivered, nor within a reasonable period thereafter. An

informal understanding between counsel, even if assumed, cannot substitute for compliance with the clear requirements of Order 42 Rule 6. The explanation offered does not satisfactorily account for the entire period of delay. A delay of this magnitude, in the absence of a cogent and documented justification, is inordinate. I find that the application was filed without undue delay.

56. Regarding the last condition on the provision of security for costs, Order 42, Rule 6(2)(b) of the Civil Procedure Rules is couched in mandatory terms, requiring the Applicant to furnish security for the performance of the order or decree.

In **Arun C Sharma vs Ashana Rakundalia T/A**

Raikundalia & Co. Advocates & 2 Others (2014) eKLR,

the court held that;

“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”

57. The Applicants have not expressed their willingness to provide security for the due performance of the decree.

58. In the end, I find that the Applicants have not met the threshold for the grant of a stay of execution pending appeal.

59. The upshot of the foregoing is that the application dated 12th July 2024 is without merit and is hereby dismissed with costs.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF FEBRUARY, 2026.

.....
HON. T. MURIGI
JUDGE

IN THE PRESENCE OF:

Ms Kimani holding brief for Njenga for the Applicant

Ms Chet for the Defendants

ORIGINAL