



**Watunu & another v Wamutoro & another (Suing as the Legal
Representatives of the Estate of Khakoni Damary Lumbasi) (Civil Application
E030 of 2023) [2024] KECA 58 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 58 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E030 OF 2023
F SICHALE, P NYAMWEYA & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

MARGARET WATUNU 1ST APPLICANT

JOSEPH EDWARD WATUNU 2ND APPLICANT

AND

MOSES WAMUTORO 1ST RESPONDENT

DISMAS WAMUTORO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KHAKONI
DAMARY LUMBASI**

*(Being an Application for Stay of execution of the judgment of the High Court of Kenya
at Eldoret (Muhochi J, dated 26th May 2023.) IN (Eldoret Civil Case No. 38B of 2020)*

RULING

1. The motion before us is the one dated 23rd June 2023, brought pursuant to the provisions of Rules 1 (2) 5 (2) (b) and 42 of the [Court of Appeal Rules](#) (“The Rules”), in which Margaret Watunu and Joseph Edward Watunu (the applicants herein) seek the following orders;

- “ 1. Spent.
 - a). Spent.
 - b) An order of temporary stay of execution of the decree and judgment in Eldoret HCCA No. 38B of 2020 do issue ex-parte in the interim against the respondents or their servants, agents



or assigns from executing the same pending the hearing and determination of the intended appeal.

2. Costs of this application be in the course.”

2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Joseph Edward Watunu (the 2nd applicant herein,) who deposed inter alia that the impugned judgment was delivered on 26th May 2023, in which the High Court upheld the decision of the lower court in the award of Kshs 14, 154, 642/= to the respondents.
3. He further deposed that the interim order of stay was to lapse on 26th June, 2023 and the execution of the decree shall have dire and serious consequences as the insurer had partially settled the decretal amount by Kshs 3,000,000/= and they were yet to settle the deficit; that are exposed to a liability of over Kshs 12,000,000/= and are apprehensive that the respondents might proceed to take out warrants of attachment and proceed to execute the court’s decree to their detriment. Further that they have a good and triable appeal and that they would stand to suffer irreparable loss and damage if the instant application was not allowed since the decretal amount was enormous and cannot be paid at once.
4. The motion was opposed vide a replying affidavit sworn by Moses Wamutoro on 4th July 2023, who deposed inter alia that the damages awarded by the two courts below were not excessive as perceived by the applicants and were well within the law as the deceased was a lecturer; and that further the intended appeal is merely meant to deny them the fruits of their judgment. He further deposed that the mere fact that the applicant had preferred an appeal was not a guarantee for granting of stay orders and that the applicant ought to demonstrate that the appeal was merited and had very high chances of success.
5. When the matter came up for plenary hearing on 16th October 2023, Mr. Odour learned counsel appeared for the applicants whereas Ms. Mutai holding brief for Mr. Chepkwony appeared for the respondents. Both parties relied on their written submissions dated 13th July 2023 and 20th July 2023 respectively.
6. It was submitted for the applicants that the principles guiding a stay of execution pending appeal are well settled as provided for under Order 42 Rule 6 (2) of the *Civil Procedure Rules* 2010 and that the court in deciding whether or not to grant stay has to take into account the overriding objectives stipulated in Sections 1A and 1B of the *Civil Procedure Act*, and further that the applicants had satisfied the conditions set out under Order 42 namely; that substantial loss may result to the applicants, and that the application had been made without unreasonable delay.
7. On the other hand, it was submitted for the respondents that an order for stay of execution pending appeal could not be granted unless an applicant satisfies the conditions set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules* and that in the instant appeal, the applicants had not demonstrated the kind of loss they would suffer in the event the stay was denied; that they had not demonstrated that the respondents were not people of means hence unable to refund the decretal sum in the event of the intended appeal being successful. Consequently, we were urged to dismiss the motion with costs to the respondents.
8. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the respondent’s replying affidavit, the rival submissions by the parties, the cited authorities and the law.
9. The applicants’ motion is brought under Rule (5) (2) (b) of this *Court’s Rules*. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable



appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.

10. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by this Court (differently constituted), in the case of [Stanley Kangethe Kinyanjui vs. Tony Ketter & Others](#) [2013] eKLR as follows:

- “i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.
- v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
- v. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- viii. An applicant must satisfy the Court on both the twin principles.
- viii. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- ix. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.
- viii. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
- viii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- viii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

11. In our view, despite the applicants’ motion having been expressed to have been brought pursuant to the provisions of Rule 5 (2) (b) of this [Court’s Rules](#), no attempt was made by the applicants to demonstrate that they have satisfied the twin principles for consideration by this Court in applications of these nature as provided for under Rule (2) (b) of this Court’s Rules as laid out in [Stanley Kangethe case \(supra\)](#).

12. Regrettably, both parties in their submissions have sought to invoke the provisions of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) 2010 with the applicants on one hand contending that they had satisfied the guiding principles set thereunder, and the respondents on the other hand contending the same has not been satisfied.



13. In the instant case, it is evident that both parties have clearly broadly misinterpreted the law as the provisions of Order 42 of the *Civil Procedure Rules* 2010 are not applicable to appeals before this Court and are only applicable to appeals before the High Court.
14. Be that as it may, applying the tests laid out in the *Stanley Kangethe case (supra)*, to this case we are not satisfied at all that the applicants have made out a sufficient case to warrant issuance of stay orders as provided for under Rule 5 (2) (b) of this *Court's Rules* for the following reasons; first of all, there is no single averment by the applicants as to why their intended appeal is arguable.
15. Additionally, the applicants have not annexed a draft memorandum of appeal to the motion to enable us make a determination as to whether the intended appeal is arguable or not. Probed by the Court during the plenary hearing, the applicants through their counsel were not able to point out a single arguable point to enable us make a determination as to whether their intended appeal is arguable notwithstanding the fact that an arguable appeal is not necessarily one that succeeds.
16. A mere general assertion that the decretal amount is an enormous amount cannot in itself be said to be an arguable ground of appeal without laying a basis for the same.
17. Further, it was the applicants' contention that stay of execution was to lapse on 26th June 2023 and it is not clear from the record if execution has since taken place.
18. We think we have said enough to demonstrate that the applicants have not been able to show to the satisfaction of this Court that they have an arguable appeal worthy of consideration by this Court, it would be superfluous to consider the second limb namely; whether the applicant's intended appeal would be rendered nugatory if stay orders are not issued.
19. It is in view of the above that we find no merits in the applicants' motion dated 23rd June 2023, which motion we hereby dismiss in its entirety with costs to the respondents.
20. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar

