



REPUBLIC OF KENYA



**KENYA LAW**  
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**Narok County Government & another v Mwavali (Civil Application  
E071 of 2023) [2024] KECA 1799 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1799 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E071 OF 2023  
MA WARSAME, JM MATIVO & PM GACHOKA, JJA  
NOVEMBER 15, 2024**

**BETWEEN**

**NAROK COUNTY GOVERNMENT ..... 1<sup>ST</sup> APPELLANT**

**KESIKE OLE WOTUNI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WYCLIFFE ONDARI MWAVALI ..... RESPONDENT**

*(Being an application for stay of execution of the judgment and orders of the High Court of Kenya at Narok (F. Gikonyo, J.) dated 16<sup>th</sup> March, 2023 in HCCC No. 2 of 2021)*

**RULING**

1. Before us is an application dated 15<sup>th</sup> August, 2023 brought by Narok County Government and Kesike Ole Wotuni, (the applicants) under Article 159 of *the Constitution*, Section 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rules 4, 33, 41(b), 43, 44, 45, 49 and 55 of the Court of Appeal Rules, 2022. In the main, the applicants pray for an order of stay of execution of the Judgment and decree delivered on 16<sup>th</sup> March, 2023 by Gikonyo, J. in Narok HCCC No. 2 of 2021 Wycliffe Ondari Mwavali vs Narok County Government & Kesike Ole Wotuni pending hearing and determination of their appeal.
2. The motion is supported by the grounds on its body and the supporting affidavit sworn on 15<sup>th</sup> August, 2023 by John Mayiani Tuya who was the 1st appellant's County Secretary, together with annexures thereto. It has been opposed by the respondent vide his replying affidavit sworn on 20<sup>th</sup> September, 2023 together with annexures thereto.
3. The application was canvassed through rival pleadings, oral and written submissions and legal authorities cited by advocates for the respective parties in support of their opposing positions. The applicants' submissions are dated 4<sup>th</sup> October, 2023 while the respondent's submissions are dated 19<sup>th</sup> October, 2023. When the application came up for hearing before us on 11<sup>th</sup> November, 2024, learned



counsel Mr. Osongo held brief for Mr. Ngaruiya for the applicants while learned counsel Ms. Muigai appeared for the respondent. Both counsel relied on their respective written submissions which they briefly highlighted.

4. A brief history of the litigation before the High Court is necessary in order to properly contextualize the issues urged in this application. Briefly, on 25<sup>th</sup> August, 2011, the respondent, an employee of the 1<sup>st</sup> appellant was travelling to Londiani aboard the motor vehicle registration number KBG 281 C owned by the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> appellant. The said vehicle was involved in an accident along Kaplong-Narok road as a result of which the respondent sustained serious injuries. By a plaint dated 23<sup>rd</sup> January, 2013, and amended on 11<sup>th</sup> June, 2013, the respondent sued the appellants at the Kericho High Court. Upon hearing the case, in a judgment delivered on 16<sup>th</sup> March, 2023, Gikonyo, J. found the appellants liable for the accident and awarded the respondent damages in the sum of Kshs.25,898,707.00 plus interests at court rates from the date of judgment, until payment in full.
5. Aggrieved by the above judgment, the applicants are before this Court pursuant to Rule 5 (2) (b) of the Court of Appeal Rules, 2022 seeking stay of execution of the judgment pending hearing of their appeal. Regarding whether their appeal is arguable, the applicants averred that their appeal has a high chance of success as demonstrated in grounds urged in their draft memorandum of appeal dated 15<sup>th</sup> August, 2023 annexed to the supporting affidavit of John Mayiani Tuya. The grounds are, inter alia, that: the learned judge erred in law and fact by failing to consider their evidence and making a determination that the accident was self-involving; the learned judge erred in law and fact by awarding the respondent a total of Kshs.25,140,000.00 as general damages.
6. On the nugatory aspect, the applicants averred that the respondent has already executed the decree issued on 26<sup>th</sup> April, 2023 and some properties have already been attached by auctioneers and if the execution of the decree is not stayed pending the determination of the intended appeal, huge public funds risk being lost.
7. Regarding the delay in filing their appeal, the applicants averred that they had obtained leave to file an appeal out of time and they requested for copies of typed proceedings and judgment on 27<sup>th</sup> March, 2023 and that the proceedings were collected on 23<sup>rd</sup> May, 2023 and began to prepare a record of appeal before the process was halted by issues of regularizing appearance of the advocates.
8. In opposition to the application, the respondent averred that the applicants' appeal is not arguable since the same is frivolous, vexatious and an abuse of the court process and that the application is purely intended to delay the respondent from enjoying the fruits of the judgment obtained after 10 years of litigation. It was also averred that if this Court is inclined to give the orders sought by the applicants then the applicants should be ordered to deposit the full decretal sum together with costs to court as security.
9. Counsel appearing for the applicant Mr. Osongo reiterated the contents of the applicants' affidavit in support of the application and submitted that it was in the interests of justice that the application be allowed since the applicants stand to suffer irreparable harm because the respondent has already attached the 1st appellant's two vehicles which risk being sold if there is no stay. Reliance was placed on the case of Jennifer Akinyi Osodo vs. Boniface Okumu Osodo & 3 Others (2020) eKLR where the ingredients for grant of stay of execution orders were explained.
10. Regarding depositing of security, Mr. Osongo submitted that Order 42 Rule 8 of the Civil Procedure (Amendment) Rules, 2020 clearly states that "no such security as is mentioned in Rule 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."



Nevertheless, counsel maintained that the applicants are willing to abide by this Court's directions and orders on the issue of security.

11. In opposition to the application, Ms. Mary Muigai learned counsel for the respondent reiterated the contents of the respondent's replying affidavit and submitted that the Court's power to grant stay of execution is discretionary. However, that discretion must not be exercised capriciously or whimsically since the court when granting stay of execution must balance the interests of the applicants with those of the respondent to ensure no party suffers prejudice that cannot be compensated by an award of costs while at the same time recognizing that the decree holder has a right to the decree which includes full benefits under the decree as was enunciated in *Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR.
12. Counsel further submitted that sections 3A and 3B of the *Appellate Jurisdiction Act* cited by the applicants are not available to them because inherent jurisdiction cannot be invoked where procedure has been laid down by statute. Further, rules of procedure are meant to aid in just expedient determination of cases with finality.
13. We have given due consideration to the application, the parties' affidavits and submissions and the authorities cited. Our invitation to intervene on behalf of the applicants has been invoked under Rule 5(2)(b) of the Court of Appeal Rules, 2022. The principles for granting a stay of execution, injunction or stay of proceedings under the said rule are well settled. (See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR). The Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, stated that an applicant must satisfy the Court that; the appeal or intended appeal is arguable and not frivolous; and that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. Moreover, in the context of the dictates and public spiritedness of our Constitution, it added a third limb for consideration which is the public interest in matters that affect members of the public at large.
14. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants warranting ventilation before this Court on appeal. In *Kenya Medical Lab Technicians & Technologists Boards vs. Prime Communications Limited* [2014] eKLR this Court stated that in considering whether an appeal is arguable, it is not a requirement that the appeal will necessarily succeed, rather, it is sufficient if the appeal appears to be one that deserves to be fully argued before the Court and besides, an appeal is considered arguable even if it raises a single bona fide ground.
15. In satisfaction of the first prerequisite, the applicants have raised 6 grounds in their memorandum of appeal dated 15<sup>th</sup> August, 2023. One of the grounds is that the learned Judge erred in law and in fact by awarding the respondent a total of Kshs.25,140,000.00 as general damages. In response the respondent has maintained that the instant application is a ploy by the applicants to prevent him from realizing the fruits of judgment. At this stage we are not required to make definitive findings of fact or law. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
16. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, we note that the respondent has already attached some assets belonging to the 1st applicant. It is not lost to us that we are dealing with a money decree and therefore the amount of money involved is one factor to be considered



by this Court. This Court in *Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application Nai. No. 322 of 2006* (UR 17806) stated thus:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

17. It is also noteworthy that in considering whether it is just to grant an order of stay of execution, the Court must weigh the competing claims of each party, and make orders as appropriate for the ends of justice. (*Oraro and Rachier Advocates vs. Co-operative Bank of Kenya EALR [1999] 1 EA 236*).
18. We are also reminded of the provisions of Sections 3A and B of the *appellate jurisdiction Act* which compel this Court in exercising any power to take into account the overriding objective as underscored in the said provisions which include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. (See *Youth Agenda vs. Rita Kijala Shako [2013] KECA 12 (KLR)*).
19. We find no contest that the 1<sup>st</sup> appellant being a County Government entity funded by tax payers will be in a position to honour the decree in the event that the appeal is unsuccessful. No argument was urged before us to suggest that the respondent will be in a position to refund the colossal decretal sum in the event the appeal succeeds. However, as we seek to balance the interests of the respective parties, the approach we prefer in determining whether or not to grant the stay of execution is to ensure that applicants are not denied their opportunity to ventilate their appeal while at the same time, respondent is not denied the fruits of his judgment. It is noteworthy that the judgment was entered against the appellant after nearly 10 years of protracted litigation. We also note that the respondent sustained extremely severe injuries and is now confined in a wheelchair. It is also disturbing that there has been a delay in filing the appeal. Upon considering the respective parties’ positions, we find that the interests of justice tilts in favour of placing the parties on an equal footing as far as practicable pending the hearing of the appeal.
20. Accordingly, we allow the notice of motion dated 15<sup>th</sup> August, 2023 subject to the conditions that: (a) the applicants shall file their record of appeal within 30 days from the date hereof, (b) the applicants to pay the respondent a sum of Kshs.5 million within 45 days from the date hereof, (c) upon payment as aforesaid, the attached goods shall be released to the applicant, (d) in the event the applicant fails to comply with conditions (a) and (b) above, the application shall stand dismissed with costs and execution shall proceed, (e) the costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb**

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**JUDGE OF APPEAL**

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

Signed.

**DEPUTY REGISTRAR.**

