



REPUBLIC OF KENYA



**Great Rift Express Shuttle Services Ltd v Wanjala (Civil Appeal
E188 of 2024) [2025] KEHC 596 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E188 OF 2024
E OMINDE, J
JANUARY 29, 2025**

BETWEEN

GREAT RIFT EXPRESS SHUTTLE SERVICES LTD APPELLANT

AND

CHARLES NAMISIKO WANJALA RESPONDENT

RULING

1. The Applicant was the defendant in Eldoret CMCC No. E529 of 2022 – Charles Namisiko Wanjala vs Great Rift Express Shuttle Limited where judgment was entered against it on 6th September 2024. The Applicant then approached this court vide a Notice of Motion Application dated 17/09/2024 seeking the following orders;
 - i. That this application be certified urgent and heard ex-parte in the first instance.
 - ii. Spent
 - iii. That there be a stay of execution of the judgment and decree of Ks. 189,550/- plus costs and interest pending the hearing and determination of Eldoret HCCA No. E188 Of 2024 *Great Rift Express Shuttle Limited v Charles Namisiko Wanjala* .
 - iv. That this Honourable Court allows the Appellants/ Applicants to furnish the Court with security in the form of a Bank Guarantee from the Family Bank.
 - v. That the costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the averments of the applicant in the supporting affidavit.



Applicants' Supporting Affidavit

3. The Applicants' supporting affidavit was sworn by Rachel Wambui, the applicants' director. She stated that judgment was delivered against the Applicant on 06/09/2024 for Ks. 189,550/- exclusive of costs and interest. Further, that being dissatisfied with the judgment, she instructed their advocates on record to lodge an appeal against the whole judgment. Her apprehension is that the orders of stay in force are about to lapse the respondent would likely execute the decree, which would be to the applicants' detriment. She stated that the respondents' financial ability is unknown and, the judgment being a substantial amount, he is unlikely to refund the decretal sum in the event that the applicant's appeal succeeds.
4. She deposed that the Applicants' insurer is ready and willing to furnish the court with a bank guarantee as security in due performance of the decree. Further, that the application was made without undue delay and, the respondent would not suffer any prejudice if the application was allowed.

Respondents' Case

5. The Respondent opposed the application vide a replying affidavit dated 01/10/2024 deposed by himself. He stated that the applicant has not come to court with clean hands and further, that the application is fatally defective. He urged that the applicant has not demonstrated the substantial loss that it would suffer and that the application is a ploy to delay him from enjoying the fruits of the judgment. He deposed that the applicant has not satisfied the conditions for grant of stay of execution as established under Order 42 Rule 6(2) of the *Civil Procedure Code*. Additionally, he stated that the applicant has not proved that he will not be able to refund sums paid in satisfaction of the decree.
6. According to the respondent, the applicant has failed to demonstrate that there exists an arguable appeal with high chances of success and further, has failed to satisfy the requirements under Order 42 of the *Civil Procedure Code*. He urged that if the court is inclined to grant stay, then it should direct that half of the decretal sum be paid to the appellant and the other half of the decretal sum be deposited in an interest earning account in the joint names of the advocates for the parties within thirty days of the order.

Hearing of the Application

The applicant filed submissions through the firm of Messrs. Kimondo Gachoka & Company Advocates whereas the Respondent filed submissions through the firm of G.K. Okara & Company Advocates.

Applicants' Submissions

7. Learned counsel for the applicant submitted that the Applicant has to satisfy the conditions set out under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. He laid out a summary of the conditions to be satisfied in order for the court to grant orders of stay of execution pending the hearing and determination of the appeal as follows;
 - (a) The Court ought to be satisfied that substantial loss may result to the applicant unless the order of stay is made.
 - (b) The application seeking orders of stay has been made without unreasonable delay.
 - (c) The applicant should be ready and willing to offer such security as the court offers for due performance of the decree.



8. Counsel urged that the Applicant is cognisant of the fact that to grant or refuse an application for stay of execution is a discretionary power. However, he urged that the discretion ought to be exercised in a manner that does not prevent an Appeal. Counsel submitted that the Judgment which is subject to an Appeal was delivered on 6th September, 2024 and the Memorandum of Appeal was lodged within the required timelines. The Application seeking orders for stay of execution was filed on 17th September, 2024, which, according to the applicant, is timely and without unreasonable delay. Counsel cited the decision of Odero J. in [Bibija All Sempa & Another v Bakari Mohamed Motte](#) [2014] eKLR in support of this submission.
9. Counsel cited the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR on substantial loss and additionally cited the case of [Century Oil Trading Company Limited vs. Kenya Shell Limited](#) Nairobi [2008] eKLR. He urged that if orders for stay of execution are not granted, the Respondent will execute the decree in his favour and the Applicant shall be forced to settle the decretal sum despite there being an appeal. He reiterated that the Respondent's financial standing is unknown and, the judgment being of a substantial amount, he is unlikely to refund the decretal sum if paid. Further, in order to protect the substratum of the appeal, it would be in the interest of justice to grant an order for stay of execution.
10. Counsel urged that the Applicant having expressed concerns that the Respondent will be unable to refund the decretal sum should the appeal succeed, the Respondent is under the obligation to prove that should the decretal sum be paid to him, he would be in a position to refund the decretal sum should the appeal succeed. Counsel cited the case of [National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Anor](#) (UR) C.A. 238/2005 in support of this submission.
11. Counsel submitted that the Respondent has not averred if he is a person of means and would be in a position to refund the decretal sum should the appeal succeed. Consequently, the averments of the Applicant that the Respondent will not be in a position to refund the decretal sum remain uncontroverted. Counsel stated that the Respondent has not annexed statements of accounts nor has he annexed any ownership documents in respect to any properties to prove he is a man of means.
12. Additionally, that the Respondent has not revealed if at all he has a source of income. He urged that the evidential burden squarely lies with the Respondent to prove that he will be in a position to refund the decretal sum, which burden he has failed to discharge. Counsel submitted that it is for the aforementioned reasons that the Applicant averred that should the decretal sum be paid to the Respondent, he will not be in a position to refund the same should the appeal succeed. Counsel cited the case of [Jairus Momanyi Buranda & another v Ojwang Emmanuel Ochieng](#) [2021] eKLR.
13. Counsel reiterated that the applicant will suffer substantial loss in the event the order of stay of execution of the Appeal is not granted and thus, the second requirement so as orders of stay is granted has been met.
14. Counsel urged that the Applicant has proposed to furnish this Court with a Bank Guarantee from Diamond Trust Bank, Family Bank, Equity Bank or any other bank of good repute. That by offering to furnish security, it shows good faith on the part of the Applicant as the Application for stay is not only meant to deny the Respondent the fruits of the judgment, as the form of security will ensure that the interests of both the Applicant and the Respondent will be secured pending the hearing and determination of the appeal.
15. Counsel cited the case of [Ogola vs Mary Waithe Kibiu](#) [2021] eKLR where the Court allowed an application for stay of execution pending the hearing and determination of the appeal on condition



that the Applicant furnishes a Bank Guarantee in support of the submission that a Bank Guarantee is thus an appropriate form of security. He urged the court to allow the application as it has merit.

Respondents' Submissions

16. Counsel for the respondent submitted that this was a self-involved accident and the Applicant did not offer any evidence in the trial court. Further, that the appeal does not raise strong grounds and it is actually not arguable. He pointed out that the finding of 100% liability cannot be easily challenged as the Applicant did not call any witness in the trial court.
17. Counsel cited the case of *Hyder Nthenya Musili & Another (Suing as the Legal Representative of the Estate of Collins Mumo Mbindyo) vs China Wu Yi & Another* [2019], where it was held that where the defendant had not called any witness on the issue of liability, to succeed on appeal would be an uphill task. Additionally, he stated that even if the applicant had strong grounds of appeal that was neither here nor there. He cited the case of *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others*, Civil Appeal No. 291 of 1997 in support of this submission.
18. Counsel submitted that the applicant has offered a bank guarantee as security for due performance of the decree and further, that this was not a suitable security. He relied on the case of *Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates* (2014) eKLR and the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Limited* (2019) eKLR in support of this submission.
19. Counsel maintained that the application is not meritorious and urged that the same be dismissed with costs. Additionally, counsel submitted that if the court is inclined to grant the orders for stay then it should be directed that half of the decretal sum plus full costs be paid by the applicant and the other half of the decretal sum be deposited in a joint interest earning account in the joint names of the advocates for the parties.

Analysis & Determination

20. Issues for determination
 1. Whether the Application for Stay of execution pending appeal is merited
 2. Whether a Bank Guarantee is sufficient security
 3. Whether the Respondent will be able to refund the decretal sum

Stay of execution

21. The Principles governing Stay of Execution are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“No order for stay of execution shall be made under sub rule (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.



22. In *Antoine Ndiaye v 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*...
23. In *Butt v Rent Restriction Tribunal* (1982) KLR the Court gave guidance on the exercise of discretion when granting stay orders as follows:-
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.

Substantial loss

24. In *Machira t/a Machira & Co. Advocates v East African Standard* (No 2) (2002) KLR 63 the Court of Appeal considered what amounts to substantial loss and held as follows: –

“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.”

Whether there was unreasonable delay

25. The Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 *M'ndaka Mbiuki v James Mbaabu Mugwiria* [2016] eKLR held that,

“This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern



inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed.”

Security

26. In the case of *Arun C. Sharma v 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.”

Whether a Bank Guarantee is a suitable form of security

27. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

28. The Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to



tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

Whether the Respondent will be able to refund the decretal sum

29. In *Boniface Kariuki Wabome v Peter Nziki Nyamai & another* [2019] eKLR J. R. Nyakundi held that:

“The evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove.”

30. In addressing my mind to the various legal expositions of the Courts on the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules* as is evidenced by the corpus of case law from different courts with different jurisdictions across the country as I have herein above summarised, and having considered and addressed my mind at length to the issues raised by Counsel in their submissions on behalf of each of the parties, my findings are as follows;
31. I note from the record of the Court that the impugned judgement was entered on 6th September 2024 and the Appellant moved the Court on 17th September 2024. This period was well within the 30-day appeal window. In this regard, I am satisfied that there was no delay and/or inordinate delay at all on the part of the Applicant in appealing the decision of the lower court. Further, having perused Memorandum of Appeal filed I am satisfied that the Applicant has established sufficient cause to warrant the order of stay of execution pending appeal
32. On the issue of the security, I have addressed my mind to the Banks whose guarantee the applicant has offered to furnish so as to satisfy the decretal sum in the event that their appeal is not successful. As a matter of public notoriety, I am satisfied that these are reputable banks who will be able to honour any guarantee that they furnish in the event that the appeal is not successful.
33. Lastly, I have considered the respondents response to the applicant assertion that he is a man of straw and that he may not be able to pay back to the applicants the decretal sum in the event that their appeal is successful if the same is released to him pending the hearing and determination of the appeal.
34. From the said response it is my considered opinion that the respondent has not addressed the issue in any meaningful way or at all. Contrary to the holding of the Court in the case of *Boniface Kariuki Wahome* (Supra) which states that the onus is on the respondent to controvert any such assertion if made, the respondent has not at all made any attempts to substantially or at all rebut this assertion to warrant the court making a finding in his favour. I am therefore persuaded on a balance of probabilities that he may not be able to refund any monies that may be released to him in the event that the appeal is successful.
35. Given my above findings, I am satisfied that the appellant’s Application has merit and the same is therefore allowed in the following terms;
- i. That an order of stay of execution of the judgment and decree of the Hon B. K. Kiptoo PM in Eldoret CMCC NO. E529 of 2022 is now hereby issued pending the hearing and



determination of the Appeal filed in Eldoret HCCA No. E188 of 2024 - *Great Rift Express Shuttle Limited v Charles Namisiko Wanjala*.

- ii. That the Appellants/ Applicants to furnish the Court with security for the entire decretal sum of Ks. 189,550/- together with costs and interest to be determined at court rates in the form of a Bank Guarantee from Family Bank within 14 days from the date of this Ruling.
- iii. That the costs of the Application shall await the outcome of the appeal.

READ DATED AND SIGNED AT ELDORET ON 29TH JANUARY 2025

E. OMINDE

JUDGE

