



**Ndirangu v Edang alias Susan Eden & another (Civil Appeal
E239 of 2024) [2025] KEHC 2304 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E239 OF 2024
H NAMISI, J
FEBRUARY 27, 2025**

BETWEEN

JANE WANJIRU NDIRANGU APPELLANT

AND

SUSAN EDANG ALIAS SUSAN EDEN 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The Appellant, being dissatisfied with the Ruling and Order delivered on 26 August 2024 by Hon. Milimu in Thika CM Civil Case No. 657 of 2007, lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact in failing to apply the rules of natural justice by failing to grant the Appellant an opportunity to be heard in the Appellant's Notice of Motion dated 6 June 2024;
 - ii. That the learned Magistrate erred in law and fact by allowing the 1st Respondent's Notice of Preliminary Objection dated 19 June 2024 against the evidence and proceedings on record;
 - iii. That the learned Magistrate erred in law by allowing the Interested Party's Notice of Motion dated 21 May 2024 against the lack of evidence adduced;
 - iv. That the Learned Magistrate erred in fact and in law by applying the wrong principles of law and in particular judicial discretion thereby arriving at a wrong decision.
2. The Appellant has filed Notice of Motion dated 4 October 2024 seeking the following orders:
 - i. (spent)
 - ii. That a stay of execution in Thika MCCC No. 657 of 2007 be granted pending the hearing and determination of this application;



- iii. The Court be pleased to grant a stay of execution on Thika MCCC No. 657 of 2007 pending hearing and determination of the appeal against the Ruling and order made by the Hon. D. Milimu, R.M on 27 August 2024;
 - iv. The costs of this Application be provided for
 3. The Application is supported by Affidavit sworn by the Applicant and premised on the following grounds:
 - a. That Hon. D. Milimu, R.M delivered a Ruling on a Notice of Preliminary Objection raised by the 1st Respondent herein and dismissed the Appellant's application dated 6 June 2024 seeking orders of stay of execution of decree arising from the judgement delivered on 24 March 2017;
 - b. That if a stay of execution is not granted substantial loss may result to the Appellant as once decree is executed, it may not be recoverable;
 - c. That the appeal herein has a reasonable chance of success and if execution is carried out it will render the appeal nugatory;
 - d. That there has been no delay in bringing this application;
 - e. That the Defendant is willing to abide by any conditions and terms as to security as the Court may deem fit to impose;
 - f. That the 1st Respondent are likely to execute the decree herein at any time;
 4. The Supporting Affidavit reiterates the grounds of the Application.
 5. In response, the 1st Respondent filed the following grounds of opposition:
 - i. That the application is an abuse of the Honourable Court's process as the Applicant ought to have at first instance filed the Application in the subordinate court which passed the decree as provided for under Order 42 Rule 6(1) of Civil Procedure Rules;
 - ii. That the Application is brought after inordinate delay as the Appeal was filed way back on 11 September 2024;
 - iii. That the Applicant has got no reasonable Appeal as it has no chances of success;
 - iv. That the Application is premature and should be dismissed with costs
 6. Additionally, the 1st Respondent filed a Replying Affidavit sworn on 11 October 2024. The 1st Respondent averred that the Applicant's application was an afterthought following service of the Notice to Show Cause. Further, the Appellant/Applicant is a vexatious litigant who had filed similar applications which had been dismissed. It was the 1st Respondent's contention that this appeal is only meant to delay the course of justice and deny the 1st Respondent the fruits of judgement, taking into account that judgement was delivered on 24 March 2017.

Notice of Motion dated 6 June 2024

7. I have had occasion to read the Application dated 6 June 2024 which is attached to the Appellant's Supporting Affidavit herein. The same sought stay of execution of the judgement dated 24 March 2017 and to review the Ruling and Order dated 27 August 2018. In the Supporting Affidavit, the Appellant averred that she had instructed the firm of Wambui Ngugi & Company Advocates to act on her behalf



and defend the suit. The matter was set down for hearing on 23 January 2017 but due to an inadvertent mistake on the part of the Appellant's Advocates, there was no appearance on the material date and the 1st Respondent's case was heard, closed and the matter set down for judgement.

8. The Appellant further averred that before the Court delivered its judgement, the Appellant's Advocates succeeded in setting aside the ex parte proceedings and judgement, which was based on condition that the Appellant pays throw away costs of Kshs 10,000/= within 14 days from 9 June 2017. The Appellant eventually paid the said costs but not within the stipulated time. Consequently, the Judgement of 24 March 2017 was reinstated.
9. What followed then was an application by the Appellant dated 27 October 2017 to enlarge time and deem the delayed payment as proper. The Application was dismissed on 10 November 2017 after the Appellant's Advocates failed to appear due to indisposition. The Appellant then moved to have the said application reinstated, but the same was dismissed, too. This is what led to the Application of 6 June 2024.
10. In response thereto, the 1st Respondent raised a Preliminary Objection. I have not had sight of the said Preliminary Objection, but I have read the Ruling dated 26 August 2024 which captures the grounds of the Objection as follows:
 - i. That the Application is res judicata as the Defendant/Applicant has filed a similar application which was dismissed by the Honourable Court and no appeal has ever been filed by the Defendant/Applicant against the previous court rulings especially the last Ruling of 27 August 2018;
 - ii. That the Application is made after inordinate delay;
 - iii. That the Application is only meant to defeat the course of justice and only meant to deny the Plaintiff/Respondent from enjoying the fruits of her judgement;
 - iv. That the Application is an afterthought as it was only brought after the Applicant was served with notice to show cause;
 - v. That the Application is an abuse of the Honourable Court's process and should be struck out
11. In its Ruling, the trial court noted that the issues raised by the Appellant in the application dated 6 June 2024 have been previously been canvassed and a determination rendered on the same. Secondly, the Application was dismissed way back in 2018 and the Appellant did not appeal against the said application nor judgement of the court. The court observed that the delay was inordinate and had not been explained. In upholding the Preliminary Objection, the court opined thus:

“As much as the doctrine of res judicata in itself is not an absolute rule where equity provides that in special circumstances the court has the liberty and authority to ensure that the overall interest of justice has been met upon examining the merits of the application and weigh it against the scales of justice. In the present case, no special circumstances have been table that will make this court divert from the said rule. The application has no merit and clearly the scales of justice would tilt in favour of the Plaintiff.”

Analysis and Determination

12. Parties were directed to canvass the Application herein by way of written submissions.
13. Under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 in an application for stay pending appeal, an applicant should satisfy the court that:



- a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
14. With respect to substantial loss, the Appellant submitted that she was served with a Notice to Show Cause seeking her committal to civil jail for failure to settle the amount of Kshs 1,084,595/=. She submitted that in the event she pays the same, the said action would render her appeal nugatory.
 15. With respect to unreasonable delay, the Appellant argued that there was no delay in approaching the court. The Ruling was delivered on 26 August 2024, the Appellant lodged the Memorandum of Appeal on 11 September 2024 and subsequently filed this Application on 4 October 2024.
 16. I have read the 1st Respondent's submissions which focus on whether the Appellant has a reasonable appeal to warrant a stay of execution.
 17. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt v Rent Restriction Tribunal* [1979]).
 18. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW v EKW* [2019] eKLR addressed itself on this as hereunder:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter 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 this 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 costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

19. As I consider whether or not to exercise my discretion in granting the orders sought, the chequered history of the matter in the trial court comes to mind. The myriads of applications filed by the Appellant in the trial court definitely do not lend any credence to her arguments herein. Furthermore, it is notable that the Appellant has not offered any terms of security. In fact, the Appellant submitted that no security would be required even if the Court exercises its own discretion.
20. The right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is



a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

21. I have weighed the Appellant’s rights as against the right of the 1st Respondent to enjoy the fruits of their judgement. It is my considered view that the Application dated 4 October 2024 lacks merit and the same is dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT THIKA THIS 27 DAY OF FEBRUARY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Mr. Njorogefor the Appellant/Applicant

Ms. Wainaina h/b Mr. Ngige.....for the 1st Respondent

N/A.....for the 2nd Respondent

Libertine AchiengCourt Assistant

