



**Wandere v H Young & Company [E] Limited (Civil Appeal
63 of 2020) [2025] KEHC 2721 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 63 OF 2020
HM NYAGA, J
FEBRUARY 27, 2025**

BETWEEN

BERNARD NDERITU WANDERE APPELLANT

AND

H YOUNG & COMPANY [E] LIMITED RESPONDENT

*(Appeal to stay execution of the Judgement delivered
on 8th February 2024 by Hon Justice T. W. Cherere)*

RULING

1. The appeal herein was determined by Hon Justice T. W. Cherere where she issued the following orders:-
 - a. The award for special damages remains as by the Learned Trial magistrate
 - b. General damages in the sum at Ksh 150,000/- is substituted with Ksh 1,000,000/-
 - c. Appellant is awarded costs of the appeal.
2. Aggrieved by the said Judgement the Respondent filed a Notice of Appeal on 20th February 2024.
3. The Applicant then moved the court with an application dated 7th March 2024. The only outstanding prayer is:-
 - d. Pending hearing and determination of the appeal this honourable could be pleased to stay execution of the Judgement delivered n 8th February 2024.
 - e. Costs of the application be provided for.
4. In response, the Respondent filed a replying affidavit sworn on 3rd June 2024.



5. In a nutshell, the respondent avers that the applicant was granted 30 days stay of execution. That although notice of appeal was duly filed, there was no memorandum of appeal filed in the lower court, now has being an application for extension of time to do so. As such, there is no appeal. That there is no draft memorandum of appeal filed to show that there are triable issues. That the applicant has not shown what prejudice will be suffered if the decretal sum is paid.
6. The applicant swore a supplementary affidavit in which it is deponed that is tried to file a memorandum of appeal at the Court of Appeal in Meru but they were directed to the Court of Appeal at Nyeri. That when they tried to file it in Nyeri, they were told that they needed to file the record of appeal, but have been unable to get the proceedings, despite several requests. That however, they were eventually successful in doing so and were duly issued with a certificate of delay . To the Applicant, there is a competent appeal in the Court of Appeal.

Applicant's submissions

7. The Applicant framed the following issues for determination:-
 - a. Whether the applicant has met the principles for stay of execution pending appeal, and
 - b. Whether the applicant has an arguable case to warrant grant of stay of execution.
8. The applicant referred to order 42 Rule 6 of the Civil Procedure Rules and submitted that firstly, that they made the application without any delay, just a month after the Judgement was delivered. Cited to support this submission was *Matata and another v Rove and Another* [2024] KE HC 2799 KLR and *Johnson Thiaka Nyaga v James Kinyua Nyaga and 5 others* [2019] eKLR.
9. On substantial loss, the Applicant submits that it will suffer substantial loss if execution is to proceed. That the Appellant/ Respondent may not be able to refund the money if the appeal is successful, thus render it nugatory. To buttress their case the Applicant cited *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR ,*James Wangalwa and another v Agnes Naliaka Chesete* [2012] eKLR and *Amoke Otieno Pascal v Melvin Onyango Owuor* [2022] eKLR.
10. On the question of security, the Applicant states that it is ready to deposit the decretal sum in a joint interest earning account in the name of both advocates. It is acknowledged that this is a crucial requirement as set out in *Evanfrance Mureithi and another v African Merchant Assurance Co. Ltd* [2019] eKLR and *Arun C. Sharma v Ashana Raundalia and 2 others* [2014] eKLR.
11. The Applicant further submits it has an arguable appeal. On what constitutes an arguable appeal, the Applicant referred to *Ahmed Musa Israel v Kumba Ole Ntamarua and 4 others* [2014] eKLR.

Respondents submissions.

12. The Respondent argues that there is no subsisting appeal as the applicant has failed to file the intended appeal and record of appeal. Counsel referred me to *University of Eldoret and another v Hasaa Sitienei and 3 others* [2020]eKLR.
13. Counsel referred the court to Rule 82 of the Court of Appeal Rules and the consequences of non-compliance under Rule 83.

Analysis and determination.



14. Order 42 Rule 6 of the Civil Procedure Rules provides 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 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 of stay 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 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”

15. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, 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.

16. As correctly submitted by the Applicant, it has to show that substantial loss will be suffered if the stay is not granted.

17. The Applicant argues that the Respondent has not demonstrated that he has the means to refund the decretal sum if the appeal succeeds. There is no doubt that the decretal amount is quite substantial. The Respondent has not demonstrated the means to refund it.

18. On the question of delay, I find that the application was filed without undue delay.

19. On the question of the existence of an appeal, I am satisfied that there is now an appeal filed in the Court of Appeal, go wit Nyeri Court of Appeal case No. E165 of 2024. This court cannot determine whether it is an arguable appeal as was validly filed. That task falls on the shoulders of the court of Appeal.

20. As for security, the Applicant has offered to deposit the entire decretal sum in a joint account.

21. Having considered the matter I find that the Applicant has made a case for grant of the orders sought even if it is conditional.

22. The following were ordered issues:-

- a. There shall be a stay of execution of the decree herein pending hearing and determination of the Appeal filed, subject to the Applicant paying ½ of the decretal sum without costs in the next 45 days.



- b. The balance to await the outcome of the appeal.
- c. In default execution to issue
- d. Costs to abide by the outcome of the Appeal.

SIGNED, DATED AND DELIVERED AT MERU THIS 27TH DAY OF FEBRUARY 2025.

H.M. NYAGA

JUDGE

