



Turbo Highway Eldoret Limited v Karira t/a Karira and Co Advocates (Civil Appeal 21 of 2019) [2025] KEHC 3862 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 21 OF 2019
JRA WANANDA, J
MARCH 28, 2025**

BETWEEN

TURBO HIGHWAY ELDORET LIMITED APPELLANT

AND

NICHOLAS KARIRA T/A KARIRA AND CO ADVOCATES RESPONDENT

RULING

1. This Ruling is in respect to two Applications which both arise from the Judgment delivered herein on 31/07/2024, whereof I dismissed this Appeal.
2. From the record, the Appellant had, as a condition for grant of stay of execution pending the hearing and determination of this now dismissed Appeal, deposited funds, as security, in an interest earning bank account opened in the joint names of the Advocates on record herein. Dissatisfied with the dismissal of the Appeal, the Appellant has filed a Notice of Appeal signifying its intention to file a further Appeal to the Court of Appeal. It is this background that forms the genesis of the two Applications in issue herein.

1st Application

3. The 1st Application is the Appellant's Notice of Motion dated 27/08/2024 and filed through Messrs Nyairo & Co. Advocates. The substantive prayers still pending in the Application are the following:
4. That there be stay of execution and/or further execution of the decree herein pending the hearing and determination of the Appeal to the Court of Appeal against the judgment and/or decree delivered on 31/7/2024.
5. That costs of this application be provided for.



4. The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by one Amit Aggarwal who described himself as a Director of the Appellant.
5. In the Affidavit, the deponent stated that aggrieved by the said Judgment, the Appellant has lodged a Notice of Appeal signifying an intention to move to the Court of Appeal and wishes to be heard on the appeal before any monies are released or paid to the Respondent.
6. He deponed that the Appeal raises very serious and weighty legal issues for determination by the Court of Appeal hence the Application ought to be allowed. He deponed further that there is no stay order in place and the Respondent is therefore likely to execute the Decree anytime from now and hence the need for grant of the orders of stay of execution pending appeal. He urged that should the Respondent proceed with execution of the Decree, the Appellant stands to suffer substantial loss that cannot be monetarily compensated in the likely event that the Appeal succeeds, as there is no guarantee that the Respondent will have the means sufficient to refund the monies which he may have received pursuant to the Decree. He deponed further that the Appellant is ready and willing to comply with the provisions of Order 42 Rule 6 of the Civil Procedure Rules which, however, should not be punitive. In conclusion, he deponed that considering that funds were already deposited in the joint names of the Advocates on record herein, as a pre-condition for stay of execution pending appeal, the same can be retained as such security.

Respondents' Replying Affidavit

7. In response to the Application, the Respondent, through Messrs Mukabane & Kagunza Advocates LLP, filed the Replying Affidavit sworn by the Respondent, Nicholas Karira on 06/11/2024. In the Affidavit, the deponent averred that the Application is incompetent and fatally defective since it is premised on wrong provisions of the law and that the Affidavit in support of the Application is equally incompetent. He urged that the Application is a mischievous one aimed at taking him in circles and prevent him from enjoying fruits of litigation. He urged further that the Appellant has not met the threshold for grant of an order of stay of execution under Order 42 Rule 6 Civil Procedure Rules, that the Applicant has not demonstrated substantial loss that may result, has not demonstrated that the Application has been made without unreasonable delay, and has not established sufficient cause.
8. He further averred that no security has been offered, and also that no proof has been tabled to prove that the Appeal shall be rendered nugatory. He further deponed that the intended appeal does not raise triable issues and is just a mere sham without any chance of success, that he is not a man of straw as he is financially stable and a businessman owning Suncraft Limited situate on a parcel of land on Eldoret Municipality Block owned by his company known as Pamoja Solutions, that he is the proprietor of a hotel known as Vijiji Hotel and Conference situate on his parcel of land known as Eldoret/Municipality Block 5/545 in the name of Pamoja Solutions and that he is also an Advocate of the High Court of Kenya, thus capable of repaying the decretal amount to the Appellant in the event the Appeal is successful.
9. He urged further that the right of Appeal and Application for stay of execution must be balanced against the equally weighty right of the successful party to enjoy the fruits of the Judgement delivered in his favour, and that further delay as a result of the unwarranted stay would occasion insurmountable prejudice to him in times of costs, legal fees and time expended. He added that the Appellant has approached this Court with unclean hands and is guilty of material non-disclosure, and thus undeserving of the orders sought, and that by allowing the Application, the Court will only be aiding the Appellant to temporize payment of a legally accrued debt. He also contended that he will continue



to suffer substantial loss should the Application be allowed noting that this matter has been pending in Court since 2009.

2nd Application

10. The 2nd Application is the Respondent's Notice of Motion dated 28/08/2024 and filed through Messrs Mukabane & Kagunza Advocates LLP. The substantive prayers still pending in the Application are the following:
 2. That the funds deposited and currently being held at Consolidated Bank of Kenya Limited in joint account in the names of Nyairo & Co. Advocates and Mathai & Co. Advocates together with the interests thereto be released to the respondent/applicant herein.
 3. Cost of this application be borne by the Appellant/Respondent.
11. The Application is premised on the grounds set out on the face thereof and the Supporting Affidavit sworn by the Respondent, Nicholas Karira. In the Affidavit, the Respondent deponed that he instituted Eldoret CMCC No. 670 of 2009 against the Appellant seeking compensation in the sum of Kshs 440,000/-, plus costs and interest, and that the suit proceeded in the subordinate Court to full hearing and the same was determined in the Respondent's favour as the Court awarded him the Judgment as prayed. He deponed that the Appellant, dissatisfied with the said decision, challenged the same through this Appeal upon which the decretal sum was deposited in the joint names of the Advocates on record as a condition for stay of execution, and that the Appeal then proceeded for hearing and Judgement was delivered on 31/07/2024 whereof the Appeal was dismissed. He deponed that the Appellant's Counsel, in collusion with Consolidated Bank of Kenya Limited, with the ulterior motive of circumventing the Judgment, have unreasonably refused to release the funds to the Respondent despite several letters to them, that he has been unreasonably and unjustifiably deprived of funds belonging to him, and that it is in the interest of justice that the Application be allowed to allow him enjoy the fruits of his Judgment.

Appellant's Replying Affidavit

12. The Respondent opposed the Application vide the Replying Affidavit sworn on 4/10/2024 by Anne Halwenge Odwa, the Appellant's Counsel herein. She deponed that there are no legal provisions that have been cited empowering the Court to grant the orders sought, the Appellant has lodged an appeal to the Court of Appeal and the Application dated 27/8/2024 seeking stay of execution pending appeal and that therefore, there is no point in releasing the funds before a final determination is rendered by the Court of Appeal. She averred that the amount deposited in the joint interest earning account is earning interest and whichever party finally succeeds on appeal will have access to it hence no loss and/or damage will be occasioned if the Application is declined. She deponed that should the monies held in the joint account be released to the Respondent, the same will be out of reach of the Appellant should the appeal to the Court of Appeal ultimately succeed.

Hearing of the Applications

13. Upon deliberations with the Court, and considering the straightforwardness of the Applications, it was agreed that the parties would not need to file submissions thereon.

Determination

14. The broad issue that arises for determination herein is; "whether, pursuant to the dismissal of this Appeal, an order stay of execution pending further Appeal to the Court of Appeal should be granted



or whether, instead, the funds deposited in the joint interest earning bank account should now be released to the Respondent”.

15. I will first deal with the Application for stay of execution since it is its outcome that will chart the fate of the Application for release of the funds deposited as security.

16. The Court’s power to grant stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

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

17. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is that the Application has been made “without unreasonable delay”, the second is to demonstrate that “substantial loss” may result to the Applicant unless the order is granted, and the third is the Applicant’s willingness or readiness to “deposit security” for due performance of the decree or order.

18. The first condition that I need to consider is therefore whether the Application has been made without “unreasonable delay”. In determining this limb, I note that the Judgment dismissing the Appeal herein was delivered on 31/07/2024. The instant Application seeking stay of execution was then filed on 29/08/2024, about 1 month later. There should therefore be no contention that the Application was filed timeously and without delay.

19. The second condition is whether the Appellant would suffer “substantial loss” should the order of stay of execution not be granted. As regards what constitutes “substantial loss”, F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

- “ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution,



under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“... 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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

20. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR, pronounced himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

21. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

22. In applying the above principles to the facts of this case, regarding chances of success of the intended further Appeal, no draft Memorandum of Appeal seems to have been exhibited. In the circumstances, this Court has no material before it to interrogate the arguability of the Appeal. Nonetheless, I have my reservations on the strength of the intended Appeal noting that the liability upheld herein against the Appellant arose from the undisputed action of the Appellant of issuing cheques to the Respondent in settlement of a claim, but which cheques were then dishonoured. While it may not be conclusively said that the Appeal will be frivolous, in light of the clear legal position applicable, I have my doubts on its arguability.

23. Regarding “substantial loss” I note that the Judgment awarded to the Respondent by the lower Court on 8/02/2019 was a monetary award of Kshs 440,000/, plus costs, and interest that has accrued thereon. According to the Appellant, an order of stay of execution should be granted because there is doubt over the Respondent’s ability to refund the money should it be paid to him and subsequently, the Judgment is overturned on Appeal.



24. On the issue a decree-holder's ability or inability to refund the decretal sum, the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR guided as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.

The 1st respondent swore the replying affidavit in this matter and in Paragraph 1 thereof, he swore that he is the Chief Executive Officer of and the principal shareholder in the second respondent. He did not disclose the value of his share-holding in the 2nd respondent; nor did he say if he earns a salary and if so how much. In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. On the material before us, the means or resources of the 1st respondent remain wholly unknown and in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory.”

25. In this case, it has not been denied that the Respondent is an Advocate and, in his Affidavit, he has also deponed that, apart from running his own law firm, he is also a businessman operating various enterprises, including a hotel. He also gave reference numbers of some parcels of land that he or his companies own(s).
26. Under the above circumstances, I cannot say that the amount of the decretal sum herein would, vis a vis the Respondent's status, amount to what would be described as colossal or enormous by his standards such that he would be incapable of refunding the same. I am therefore satisfied that the Respondent has satisfactorily demonstrated his ability to refund the decretal sum should the Appeal succeed.
27. On its part, in my view, the Appellant has failed to demonstrate how payment of the Judgment sum of Kshs 440,000/- and even plus costs and interest, would disrupt or paralyse its operations, or in any other manner adversely affect its survival. In the circumstances, I am not satisfied that execution of the decree before the Appeal is determined will cause a great deal of irreparable pain or hardship to the Appellant. By extension therefore, the Appellant has failed to demonstrate the “substantial loss”, as contemplated under Order 42(6)(2)(a) of the Civil Procedure Rules, that would ensue if execution were to proceed.
28. I also consider that the lower Court suit the subject of this Appeal was filed about 16 years ago on 26/08/2009. Delaying payment of the Judgment on the sole ground that the Appellant wishes to file a second Appeal to the Court of Appeal is not, and cannot, by itself, justify any further barring of the Respondent from enjoying the fruits of his Judgment.
29. On the third condition - deposit of security for the decree - I note, as aforesaid, that there are already funds deposited by the Appellant as security, and which may be retained as such. However, in light



of my finding that no “substantial loss” has been demonstrated by the Appellant, this limb of the conditions would be of no meaningful consequence.

30. In view of the foregoing, I find that the Appellant has failed to satisfy the requirements, or meet, the threshold required in Applications of the nature herein. Balancing the interests of the two rival parties, I am persuaded that the scales of justice tilt in favour of the Respondent. Consequently, I decline to grant stay of execution pending Appeal as prayed. Consequently, there would be no reason to continue barring the Respondent from accessing the funds deposited as security in the joint bank account.

Final Orders

31. The upshot of my findings above is as follows:
- i. The Appellant’s Notice of Motion dated 27/08/2024 is hereby dismissed with costs to the Respondent.
 - ii. The Respondent’s Notice of Motion dated 28/08/2024 is allowed in terms of prayer 2 thereof, with costs.
 - iii. Consequently, it is ordered that the funds deposited, and currently being held, at the Consolidated Bank of Kenya Limited in the bank account maintained in the joint names of Nyairo & Co. Advocates and Mathai & Co. Advocates, and deposited as security for settlement of the decree issued in Eldoret CMCC No. 670 of 2009, together with the interest accrued thereon, be now forthwith released to the Respondent herein.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Odwa for the Appellant

Mr. Kagunza for the Respondent

Court Assistant: Brian Kimathi

