



**Osmond & 2 others (Suing as Administrators of the Estate of
Keith Howard Osmond) v Banita Sisal Estates Limited (Civil Suit
77 of 2020) [2024] KEHC 821 (KLR) (Civ) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 77 OF 2020

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

SUZANNE OSMOND 1ST APPLICANT
GERALD OSMOND 2ND APPLICANT
PATRICIA HEATHER HAYES 3RD APPLICANT
**SUING AS ADMINISTRATORS OF THE ESTATE OF KEITH HOWARD
OSMOND**

AND

BANITA SISAL ESTATES LIMITED RESPONDENT

RULING

1. The motion dated 13.04.2023 by Suzanne Osmond, Gerald Osmond and Patricia Heather Hayes (hereafter the Applicants) seeks inter alia an order to stay execution of the ruling and order in the taxation proceedings in this cause, delivered by the Deputy Registrar on 23.03.2023, pending hearing and determination of COA - Nairobi Civil Appeal No. E085 of 2022; and that the court be pleased to give further orders and directions as it may deem fit and just.
2. The motion is expressed to be brought under Section 1A, 1B and 3A of the *Civil Procedure Act* (CPA) and Order 42 Rule 6 of the *Civil Procedure Rules* (CPR). It is anchored on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Suzanne Osmond who states that she is one of the executors of the Estate of Keith Howard Osmond, and duly authorized by the Estate’s executors to swear the affidavit on behalf of the Applicants.



3. To the effect that the instant suit was commenced by way of a plaint dated 03.06.2020 and after the hearing, judgment was delivered on 19.10.2021, dismissing the suit with costs. Aggrieved with the judgment the Applicants proceeded to lodge Civil Appeal No. E085 of 2022, before the Court of Appeal, which came up for directions on 29.06.2022 concerning the filing of submissions on the appeal. That during the pendency of the said appeal, Banita Sisal Estates Limited (hereafter the Respondent) filed a Party and Party Bill of Costs dated 25.01.2022, which was later taxed at Kshs. 3,268,540.61/- by the Deputy Registrar vide her ruling delivered on 23.03.2023.
4. That subsequently, the Respondent commenced execution in recovery of the costs by issuing the Applicants with a Ten (10) day demand notice dated 06.04.2023, to settle the taxed costs. She further asserts that although parties have since filed submissions before the Court of Appeal, she is reasonably apprehensive that the appeal hearing may be delayed, and that meanwhile the Respondent will proceed with execution. Thereby occasioning the Applicants substantial loss, and consequently rendering the appeal nugatory, should it succeed. More so as the Respondent's financial status and or ability to pay back the taxed costs is unknown. In conclusion, she asserts the appeal before the Court of Appeal is meritorious and expresses willingness by the Applicants to comply with any such terms as to security that the court may impose in allowing the motion, which it was implored to grant.
5. The Respondent opposed the motion by way of a Grounds of Opposition dated 18.04.2023. The Grounds state inter alia that the application is a gross abuse of the court process and should be dismissed with costs in limine and ex debito justitiae; that the application has been filed after unreasonable delay contrary to the provisions of Order 42 Rule 6(2)(a) of the *CPR*; that an order for costs pursuant to dismissal of a suit cannot be stayed, firstly because there is no order to stay and secondly unless it is shown that the Respondent cannot refund the costs should the appeal succeed; that the Judge and Deputy Registrar are already functus officio and an order for stay can only be granted by the Court of Appeal under Rule 5(2)(b) of the *Court of Appeal Rules*; that it is a mandatory condition under Order 42 Rule 6(2)(b) of the *CPR* that any party applying for stay of execution must provide security and the Applicants should deposit the entire sum into an escrow account in the name of both advocates; and that there is no evidence that the Respondent or its advocate cannot refund the entire taxed costs should the appeal succeed, and hence no justification exists for denying the Respondent the fruits of successful litigation. Therefore, the motion ought to be struck out and or dismissed with costs to the Respondent.
6. The motion was canvassed by way of written submissions. As regards the applicable principles in respect of stay of execution pending appeal, counsel for the Applicants anchored his submissions on the provisions of Order 42 Rule 6(2) of the *CPR*, the decision in *Halai & Another v Thornton & Turpin* (1963) Ltd [1990] eKLR and *Butt v Rent Restriction Tribunal* [1982] KLR 417 as cited in *Tsusbo Capital Kenya Limited v Anthony Mbutia Kiburi & Another* [2019] eKLR.
7. Addressing the Respondent's preliminary issue regarding the court's jurisdiction to grant stay on an order for taxed costs, counsel contended that the court is not functus officio and can be moved to stay the recovery of costs pending an appeal. Further pointing out that submissions before the Court of Appeal have since been filed, counsel asserted it to be in the interest of justice that stay of execution be granted. The decisions in *Board of Governors Dr. Aloo Gumbi Mixed Secondary School v OCO (Minor suing through next friend Ruth Awour Omondi)* [KEHC] 12230 (KLR) and *Donholm Rabisi Stores (suing as a firm) v East Africa Portland Cement Limited* [2005] eKLR were relied on.
8. Supporting submissions on substantial loss, counsel called to aid the decisions in *Winfred Nyawira Maina v Peterson Onyiengo Gichana* [2015] eKLR as cited in *David Mbuba & Another v Victoria Mwongeli Kimwalu & Another* [2017] eKLR, *Njoro Canning Factory v John Michael Mbugua &*



Another [2015] eKLR and *James Wangila & Another v Agnes Naliaka Cheseto* [2012] eKLR. And argued that the Respondent having evinced an intention to execute, the appeal will likely to be rendered nugatory, exposing the Applicants to substantial loss to the tune of Kshs. 3,268,540.61 should stay of execution be denied. Counsel here pointing out that the Respondent has not tendered any evidence to demonstrate its ability to refund the taxed costs in the event of a successful appeal.

9. Concerning delay, counsel contended that there was no unreasonable delay because following the taxation ruling delivered on 23.03.23, the Applicants filed the motion on 13.04.2023. Further that the Respondent's computation of time from the date of judgment is misplaced. Lastly, on security, counsel citing *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another* [2018] eKLR reiterated the Applicants' willingness to comply with any conditions as to security that may be imposed. The court was thus urged to allow the motion as prayed.
10. On behalf of the Respondent, counsel in addressing the preliminary issue on whether stay of execution can be granted on costs, cited the decisions in *Francis Kabaa v Nancy Wambui & Another* [1996] eKLR, *Multiline Motors (Kenya) Ltd v Migori County Government* [2021] eKLR and *Suns and Dune Ltd v Raiya Construction Ltd* [2021] eKLR. He asserted that the motion being one seeking stay of execution in respect of costs ought to be dismissed. Moreover, the Applicants ought to have sufficiently demonstrated before the Appellate court that the Respondent is incapable of refunding the taxed costs if paid out. Counsel took the position that it is inconceivable that the payment of the taxed cost would render the proceedings before the Court of Appeal nugatory as the taxation proceedings in themselves have not been challenged in the said appeal. Counsel urged the court to order that the taxed sums be deposited in a joint account in the name of both advocates. In conclusion, it was submitted that the merits of the pending appeal are not for this court's consideration and therefore the motion ought to be dismissed with costs.
11. The court has considered the material canvassed in respect of the motion. The Respondent opted to file grounds of opposition in response to the motion. Order 51 Rule 14 (1) of the *CPR* prescribes for different approaches for opposing a motion presented before the High Court, including grounds of opposition. Recently the Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited* (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) addressed the effect of filing only grounds of opposition in response to a motion by stating that; -

“Be that as may, it is notable that a statement of Grounds of Opposition is provided for in Order 51 Rule 14 of the Civil Procedure Rules as a recognized pleading opposing an application in the High Court, but is not expressly provided for in the Court of Appeal Rules.

What then is the import of filing Grounds of Opposition in response to an application filed in the Court of Appeal? A “ground” is in this regard defined in *Black's Law Dictionary*, Ninth Edition at page 772 as “the reason or point that something, (as a legal claim or argument), relies on for validity”. An affidavit on the other hand is defined at page 66 as “a voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths”. Therefore, any facts sought to be introduced in an application before this Court can only be done by way of an affidavit, and cannot be by way of Grounds of Opposition, and any attempt to do so through the Respondent's Ground of Opposition will be incompetent. In essence, the Respondent is therefore restricted to only raising issues of law and to making legal arguments in this application.” (sic)



12. Thus, the Respondent was well within its right to file grounds of opposition rather than a replying affidavit in response to the Applicants motion. However, by opting to file grounds of opposition the Respondent confined itself to issues of law and legal arguments only. Nevertheless, an application for stay of execution pending appeal involves judicial discretion fettered by certain conditionality as provided for by the [CPR](#) hence the absence of a replying affidavit by the adverse party does not necessarily give free rein to the Applicants.
13. Moving on, the court proposes to simultaneously deal with the Respondent’s preliminary jurisdictional objection and the substance of the motion. At the outset the Respondent contends that the court is functus officio and that an order of stay of execution of taxed costs can only be granted by the Court of Appeal, in respect of the instant matter. Concerning the former, the Supreme Court of Kenya expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 [Raila Odinga & Others vs. IEBC & Others](#) [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “[The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law](#),” (2005) 122 SALJ 832:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
14. The court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”
15. This court delivered judgment in the instant cause on 19.10.2021. The purport of the same being that the Applicants suit was dismissed with costs. A perusal of the Case Tracking System (CTS) of this Court reveals that a Notice of Appeal in respect of the judgment was lodged on 21.10.2021, while a decree was issued by this court on 08.02.2022. The taxation ruling in respect of costs as awarded to the Respondent pursuant to the judgment, was delivered on 23.03.2023.
16. Pursuant to the definition of the term “decree” in Section 2 of the [CPA](#) as read with Order 21 Rule 7 and Order 21 Rule 9, the awarded costs were a derivative of the judgment of the court upon the Applicants suit being dismissed. In as much as the [CPR](#) contemplates that the ascertainment of costs in a suit may proceed separately before a taxing officer if not expressly stated in the judgment, costs are essentially not separable from the judgment itself. Here, the Respondent is in the process of executing for taxed costs awarded under Section 27 of the [CPA](#), consequent to the dismissal order of this court which is currently being challenged on appeal in the Court of Appeal.
17. This court is empowered to issue execution in respect of its judgments pursuant to section 38 of the [CPA](#) and Order 22 of the [CPR](#). Equally, under Order 42 of the [CPR](#) the Court is empowered to stay



execution, including the recovery of costs arising from such judgment that is the subject of an appeal. The motion before the court does not invite this court to reconsider any aspects of its judgment beyond the staying of recovery of resultant costs granted therein. In the circumstances, the Respondent's plea of *functus officio*, holds no water.

18. Regarding the substance of the motion, the court in determining the motion before it is not concerned with the merits of the appeal. That would be a consideration before the Court of Appeal in an application brought under Rule 5(2)(b) of the *Court of Appeal Rules*. That said, the power of this court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Applicants' prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules which provides that: -

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 to 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 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”.

19. The cornerstone consideration in a motion to stay execution is whether the applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell Case are especially pertinent. These are that: -

1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”



20. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”.

21. The learned Judge continued to observe that: -

“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 cornerstone of both jurisdictions for granting 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.” (Emphasis added).

22. Earlier on, Hancox JA in his ruling observed that: -

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, ...render the appeal nugatory. This is shown by the following passage of Cotton LJ in *Wilson v Church (No 2)* (1879) 12ChD 454 at page 458 where he said: -

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

23. The Applicants by their affidavit in support of the motion have expressed apprehension that the Respondent is likely to commence execution of the taxed costs thereby occasioning the Applicants substantial loss with the consequence of rendering the appeal nugatory, should it succeed. Because the Respondent’s means to refund any sums paid to it is unknown. The Respondent did not offer a sworn rebuttal to this assertion and appeared content to assert in its submissions that no proof of its lack of means had been tendered by the Applicants.

24. In the oft-cited case of National Industrial Credit Bank Ltd the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicants 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 Applicants 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.”

25. Thus, the Applicants having demonstrated a reasonable apprehension concerning the Respondent’s financial ability to reimburse any sums paid out should the appeal succeed, the burden shifted on the Respondent to controvert the assertion by proving its own means. Instead of tendering evidence of its means, the Respondent merely threw back the gauntlet at the Applicants’ feet, contrary to the settled position reflected in National Industrial Credit Bank Ltd (supra). The taxed costs amount to Kshs. 3,268,540.61/- which is in no way a small sum. From a perusal of the Applicants’ annexure SO-2, the Respondent has demanded for payment of the taxed costs and equally threatened execution for the entire sum.
26. In the absence of evidence of the Respondent’s means, it seems likely that the Applicants may suffer substantial loss and their appeal if it were successful would be rendered nugatory, if stay is not granted. As stated in the Shell case, substantial loss in its various forms, is the cornerstone of the court’s jurisdiction for granting stay, and what has to be prevented. The court, while not oblivious to the lengthy litigation in this matter, notes that submissions have already been filed before the Court of Appeal (See annexure SO-1), and all that awaits is directions from the said court, an indication that the appeal could well be disposed of expeditiously.
27. It is further not lost on the court that it has the obligation to balance the rights of both the parties to an application of this nature. The words of the court in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

“ We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”
28. While the Applicant’s delay in lodging this motion appears inordinate if time is reckoned from the date of judgment, there was a delay of less than a month since the taxation ruling before the motion was filed. Given the particular outcome of the judgment, it is doubtful that an application for stay of execution before taxation of costs would have been tenable.
29. In the result, the court is persuaded that the Applicants’ motion dated 13.04.2023 is merited. The motion is hereby granted on condition that the Applicants shall within 45 days of this ruling deposit the sum of Kshs. 3,268,540.61/- into an interest earning account in the joint names of the parties’ advocates. The costs of the motion shall abide the outcome of the appeal now pending before the Court of Appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI



JUDGE

In the presence of:

For the Applicants: Ms. Wangila h/b for Mr. Deya

For the Respondent: Mr. Ongocho h/b for Mr. Kopere

C/A: Carol

