



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wainaina v Njuguna (Civil Appeal E236 of 2023)
[2024] KEHC 971 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E236 OF 2023
HM NYAGA, J
JANUARY 31, 2024**

BETWEEN

DAVID MUIRURI WAINAINA APPLICANT

AND

JAMES MWAURA NJUGUNA RESPONDENT

RULING

1. Vide a Notice of Motion dated 11th September, 2023 the Applicant seeks stay of the execution of the judgment and/or decree delivered on 17th August, 2023 pending the hearing and determination of this appeal, an order for provision of a Bank Guarantee of the entire decretal sum of Ksh. 421,750 only as security and for costs of the Application.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by the Appellant herein, David Muiruri Wanaina on the even date. He averred that judgment in Nakuru SCCC No. 262 of 2022 was delivered on 17th August 2023 in favour of the Respondent wherein Liability was entered at 100% against him and General Damages of Ksh. 400,000/=; Special Damages of Ksh. 21,750/= plus costs and interest was awarded to the Respondent.
3. He deponed that the Applicant has lodged an appeal against the judgment and he is apprehensive that the Respondent will commence execution against him thus rendering the Appeal herein nugatory.
4. He deposed that he is ready, willing, and able to furnish a bank guarantee from Family Bank of the entire principal amount in Court as security for the due performance of the judgment/decree or order as shall be directed by this Honourable Court pending the hearing and final determination of the Appeal.
5. He is apprehensive that in the event the amount is paid to the Respondent and the appeal succeeds he may never recover the amount which is very high.



6. He averred that he stands to suffer substantial loss and damage if the orders sought are not granted and the Appeal will be rendered an academic exercise.
7. In response to the application, the Respondent through his replying affidavit sworn on 30th October, 2023, averred that the application is incompetent as it ought to have been filed first in the Trial Court as envisaged under Order 22 Rule 22 of the [Civil Procedure Rules](#) and he believes the same is solely meant to deny him the fruits of his judgment.
8. He deponed that the application does not meet the threshold set under Order 42 Rule 6 of the [Civil Procedure Rules](#) and the appeal does not have any overwhelming chances of success.
9. He deponed that in the event the Court is inclined to allow the application, half of the decretal amount should be paid to him and the other half should be deposited in a fixed joint interest earning account held in the names of both advocates for the parties.
10. He is opposed the facility of Bank Guarantee proposed by the Applicant for grounds that the bank in question is not a party to this proceedings and it would be tedious exercise to follow up payment with it; the bank guarantee is only for a period of one year and in the event it is not extended after its expiry he will be left in a limbo in following up for payment; And Bank Guarantee is a general form with a specific limit amount of money and the insurance company in issue is utilizing the said document in numerous Court cases country and as such there is a likelihood the said limit has exceeded.
11. The Application was canvassed through written submissions. The Applicant filed his submissions on 27th October 2023 whereas the Respondent chose to rely on his replying affidavit.

Applicant's Submissions

12. On the Substantial Loss, the Appellant submitted he will be prejudiced if the application is disallowed as his properties will be attached and sold thus rendering his appeal nugatory.
13. He further submitted that judgment is of substantial amount and if paid to the Respondent, he may not be able to recover the same in the event the appeal succeeds. To bolster his submissions, the Applicant placed reliance on the case of [Jackline Tabitha Kinyua v Jacob Mugo Nyaga & another](#) [2019] eKLR where the Court declined to release half of the decretal sum to the Respondent on ground that the refund could not be guaranteed in the event of a successful appeal.
14. On security, the Applicant submitted that he is ready and willing to furnish the Court with a bank guarantee which is reasonable. He relied on the case of [Bernard Ontita Zebedeo v Julius Nyamwega Ontere](#) [2022] eKLR where the Court allowed the provision of a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal.
15. On whether the application has been filed without inordinate delay, the Applicant submitted that the lower Court's judgement was delivered on 2nd August 2023 and he filed the instant application on 13th September, 2023 and therefore this application was brought within reasonable time.
16. He prayed that the application be allowed in the interests of justice.

Analysis & determination

17. Having considered the application, affidavits and the submissions on record, it is my considered view that the following issues fall for determination: -
 1. Whether the application is incompetently before this Court



2. Whether the Applicant has met the threshold for grant of stay pending appeal.
3. What would be the most appropriate security to grant under the circumstance?

Issue No.1- Whether the Application is incompetently before this Court

18. The Respondent averred that the Application is incompetent as it ought to have been filed first in the trial Court as envisaged under Order 22 Rule 22 of the [Civil Procedure Rules](#).
19. I do not agree with the above position. Order 42 Rule 6 of the [Civil Procedure Rules](#) stipulates as follows:

“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 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.”
20. The above order therefore is very clear. An Applicant can also opt to directly file an application for stay before this Court and there is no law that bars him/her from doing so. This application therefore is rightly before this Court.

Issue No.2- Whether the Applicant has met the threshold for grant of stay pending appeal

21. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides:

“(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.”
22. In the case of [Butt vs Rent Restriction Tribunal](#) [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an application of stay of execution and held that:

“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.

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.



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.

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.

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.”

23. In *Visbram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
24. With the above in mind, the Court must then determine what substantial loss the Applicant will suffer if stay of enforcement of the judgment of the Subordinate Court is not made in his favour.
25. On whether the Applicant will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in *Century Oil Trading Company Ltd vs Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement.”

26. In the instant case the Applicant claims that in the event the Appeal is successful the Respondent will not be in a position to compensate him for the losses that may be incurred as he is not a person of means.
27. The law is that once an Applicant expresses apprehension about the Respondent’s ability to refund the decretal amount, the evidential burden of proof shifts to the Respondent to rebut that apprehension. This proposition was re-iterated by the Court of Appeal in *ABN Amro Bank NK V Le Monde Foods Limited*, Civil Application No. 15 of 2002 [NRB] where it stated as follows:

“...in those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed.



The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on...”

28. In this case, the Applicants’ claim that the Respondent is not a man of means and he may be unable to refund the decretal amount if the appeal is successful has not been rebutted by any evidence.
29. It is worth noting that the Respondent’s replying affidavit did not contain any averment regarding his financial standing. In the premises, I am satisfied that the Respondent has failed to establish that he is capable of refunding the decretal amount should the appeal succeed. As a corollary, I am persuaded to find that the Applicant has demonstrated that he is likely to suffer substantial loss as defined by Gikonyo J in *James Wangalwa & Another V Agnes Naliaka Chesoto*, [2012]eKLR if the stay orders sought are not granted.
30. In regards to whether this Application has been filed without unreasonable delay, I note the lower Court judgement was indisputably delivered on 17th August,2023 and this application was subsequently filed on 13th September,2023. The application herein therefore has been filed timeously.
31. With regards to security, the Applicant has shown willingness to offer security by way of a bank guarantee for due performance of the decree.

Whether the Applicant, has an arguable appeal?

32. Clearly this is a question to be answered by the appellate Court. However, having perused the Memorandum of Appeal it raises issues on the assessment of damages by the Lower Court. It is said that the same was manifestly excessive.
33. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before Court; one which is not frivolous.
34. The three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. In the case of *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 the Court stated that;

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 it without merit.”

35. In the instant case the Applicant has satisfied the three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the Civil Procedure Rules, 2010. Consequently, I hereby grant stay of execution pending hearing and determination of the Appeal.

Issue No.3 - What would be the most appropriate security to grant under the circumstance?

36. The Applicant proposes a provision of a bank guarantee of the decretal sum while the Respondent in his affidavit proposes that three-quarters of the decretal amount plus costs of the suit to be released to him and the balance to be deposited in Court.
37. The Respondent avers that the bank guarantee offered as security is unsafe. I have considered his averments and submissions in that regard. The Applicant has neither advanced any grounds in support of his proposal nor controverted the Respondent’s averments thereof.



38. In determining the security, the Court has to strike a balance on the interests of the Appellant and those of the Respondent. In striking such a balance the Court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.
39. In the case of *Henry Sakwa Maloba vs Bonface Papando Tsabuko* (2020) eKLR the High Court reiterated the finding in the case of *Century Oil Trading Company Limited vs Kenya Shell Limited* Nairobi (2008) eKLR, where the Court stated:
- “Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment”.
40. In conclusion, I find that the application dated 11th September 2023 meets the threshold for the grant of stay of execution.
41. I therefore order as follows;
- a. That execution of the judgment and the ensuing Decree in Nakuru CMCC No. 75 of 2020 be and is hereby stayed pending the hearing and determination of the appeal on condition that the half the decretal sum being Ksh 210,875/= be paid to the Respondent within 30 days of the date hereof.
 - b. The balance to await the determination of the appeal herein.
 - c. In default of payment of (a) above, the stay orders shall lapse automatically without further reference to the Court.
 - d. Costs of the application shall abide the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JANUARY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms. Chelangat for Respondent

Ms. Kemunto for Applicant

