



REPUBLIC OF KENYA



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

**Mwanzia v Ngina (Civil Appeal E146 of 2023)  
[2024] KEHC 871 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E146 OF 2023  
MW MUIGAI, J  
JANUARY 25, 2024**

**BETWEEN**

**SYLVIA MUNEE MWANZIA ..... APPELLANT**

**AND**

**EUNICE NGINA ..... RESPONDENT**

**RULING**

**Pleadings**

1. Vide a Notice of Motion filed on 30<sup>th</sup> June, 2023 brought under Sections 3A, 79G and 95 of the [Civil Procedure Act](#) and Order 22 rule 22,42 Rule 4, 6 & 7, Order 50 Rule 6 & Order 51 Rules 1 &3 of [CPR](#)2010 and other enabling laws, the Applicants sought the following orders that:
  1. Spent
  2. This Honourable Court be pleased to grant stay of execution of the judgement delivered by the Trial Court on 24/5/2023 pending hearing & determination of this Application.
  3. This Honourable Court be pleased to grant stay of execution of the judgement delivered by the Trial Court on 24/5/2023 pending the hearing and determination of the appeal.
3. That the appellant be allowed to furnish the Court with bank guarantee as security pending the hearing and determination of the intended appeal.
4. That the cost of this application abides the outcome of the intended appeal and the instant application.

**Supporting Affidavit**

5. The application was supported by Supporting Affidavit of Sylvia Munee Mwanzia filed on 30/6/2023. She deposed that the Respondent was awarded on 24/5/2023 Ksh 400,000/- with Costs and interest. There is imminent threat of execution by the Respondent as evidenced by correspondence dated



5/6/2023 marked SF-1. The Applicant lodged Memorandum of Appeal duly filed on 23/6/2023 marked SF -2. The Application was filed without inordinate delay and the underwriter is willing ready and able to give a bank guarantee as security. A copy of Bank Guarantee as security from Family bank is attached marked SF3.

6. On the other hand, the Respondent is of unknown means and the Applicant is apprehensive that if the decretal sum is paid out the appeal will be rendered an academic exercise.
7. It was finally deponed that it was in the interests of justice that the entire decretal sum be fully secured through a bank guarantee without any partial payments/ settlements made as the appellants appeal is primarily on trial court's determination on the issue of quantum which determination is vehemently disputed by the appellant as demonstrated on the memorandum of appeal.

### **Replying Affidavit**

9. By a Replying Affidavit of 13/7/2023, sworn by Munyoki Muthangya who proposed the terms of stay of execution pending appeal should be as follows;  
  
½ of the judgment sum with costs of the suit Ksh 265,147.50/- be paid to Respondent within 30 days the balance of Ksh 265,147.50 be deposited in an interest earning account I the names of both advocates within 30 days and in default of compliance stay of execution lapses forthwith and execution to issue.
10. On 5/6/2023, the Appellant was furnished with a tabulation of judgment and costs total Ksh 530,295/- as per letter marked MM1 and there was no response.
11. The Applicant was served with Draft Decree as copy attached marked MM-2 and there was no response.
12. The Respondent is opposed to issuance of a Bank Guarantee as security since the guarantee does not provide security of interest which is part of the decree of the Court and is insufficient security to the decretal sum and will prejudice the Respondent's award.
13. That the guarantee should be for the specific amount claimed so that the respondent is able to enforce it, the bank guarantee should be addressed to the court and not to the directors of Direct Line Assurance Ltd.
14. He deposed that the respondent was opposed to the issuance of a bank guarantee as security since the guarantee does not provide security of interests which was part of the decree and thus the guarantee is insufficient security to the decretal sum meant to prejudice the respondent's award.
15. The matter was canvassed by way of written submissions.

### **Submissions**

#### **The Appellant/Applicant's Submissions**

16. The Appellant/Applicant filed his written submissions dated 16th October,2023 and submitted that the respondent in his replying affidavit stated that he was not opposed to the application for stay save for the conditions. That they had proposed to supply the court with a bank guarantee as a security for the entire amount pending hearing and determination of the intended appeal.
17. It was submitted that the respondent did propose part payment of kshs 265,147 and a similar sum to be deposited in a joint interest earning account.



18. It was submitted that the respondent was awarded general damages Kshs 400,000 and special damages Kshs 6050 a total of Kshs 406,050, that the cost should await the outcome of the appeal and the applicant prayed that the court grants a fair determination for stay conditions.

### **Determination**

1. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
2. The application is premised on Order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 provides that:-

“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.

(2) No order for stay of execution 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 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.

It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Visbham Ravji Halai v Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

4. The court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.”

5. The only issue necessary for determination would be whether the application seeking stay of execution is merited.



## Substantial Loss

6. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EALR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular arithmetical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

7. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated as follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

8. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“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...”

9. The Applicant’s contention is that the Respondent had already initiated the process of execution and will proceed to execute unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.

10. Odunga J. in *George Kimotho Ilewe Anastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto and James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.

11. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at 417 held:

“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.”



12. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
13. The Court notes that despite the Respondent not stating in his affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss she will suffer. The Applicant has simply stated that the respondent is a person of unknown means and was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
14. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground thus fails.

### **Unreasonable Delay**

15. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 24.05.23 and the application was filed On 30. 06.23. A month and some few days later is not unreasonable delay.
16. The court finds that there is no undue delay in filing the application herein.

### **Furnish Security**

17. The Applicant stated that her underwriter was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal, the Respondent in his replying affidavit that she was opposed to issuance of a bank guarantee as security as it was insufficient security to the decretal sum meant to prejudice the respondent's award
18. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

19. It follows therefore that it is the discretion of the court to determine the security.

### **Disposition**

20. In the premises: -
  - a. There will be a stay of execution pending the appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum be secured by a valid bank guarantee issued within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
  - b. The costs of this application abide the outcome of the appeal.

It so ordered.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25 /1/2024.**



**M.W.MUIGAI**  
**JUDGE**

