



REPUBLIC OF KENYA



**Kamau v Muema (Civil Appeal E205 of 2023)
[2024] KEHC 3106 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 3106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E205 OF 2023
MW MUIGAI, J
FEBRUARY 29, 2024**

BETWEEN

JAMES MAINA KAMAU APPLICANT

AND

JOSEPH MUTHOKA MUEMA RESPONDENT

RULING

Notice of Motion Application

1. Vide application dated 18.09.2023 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and order 51 Rule 1 and 3 of the [Civil Procedure Rules](#), 2010 the Applicant seeks the following orders, that;
 - a. Spent
 - b. Spent
 - c. The Court to stay the execution of the judgment/ decree delivered on 3rd August 2023 by Honourable Nyoike (SPM) sitting at Machakos in Civil Suit No 288 of 2019 pending the hearing and determination of the Appellant's Appeal filed at the High Court of Kenya at Machakos.
 - d. This Court allows the Applicant to furnish the Court with security in the form of a Bank Guarantee from a reputable bank pending the full hearing and determination of this Appeal.
 - e. Spent
 - f. The costs of this Application abide the outcome of this Appeal.
2. The Application is supported by an affidavit sworn by James Maina Kamau on 18.09.2023 in which he deposes that he is the owner of KCG 760H and is aggrieved by the judgment in Machakos Civil



suit number 228 of 2019. He deposes that he intends to appeal against the said judgment and is apprehensive that the Respondent may proceed and levy execution against them. He contends that if the orders sought are not granted, the appeal will be rendered nugatory. He indicated that his bank is ready to furnish the court with a bank guarantee from Family bank as his financial standing has been compromised by the corona virus. He also pointed out that the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing.

Replying Affidavit

3. The Respondent opposed the Application through a replying affidavit dated 23.10.2023 deposed by Joshua Kyalo Muasya in which he contends that the Applicant has come to court with unclean hands and does not deserve the exercise of the courts discretion in its favour as since the judgment was delivered, the Appellant has failed and or ignored to settle the decretal sum of Kshs 832,272 despite attempts by his advocates to have the amount settled. According to him, the appeal is geared to waste the courts time and delay or bar him from enjoying the fruits of his judgement. As regards the bank guarantee, it was contended that it is ambiguous and there is fear that Directline Assurance Company Limited will not renew it after expiration from 14th June 2023
4. The Application was canvassed by way of written submissions.

Applicant's Submissions

5. *Vide* submissions filed on 27.11.2023 the Applicant reiterated the contents of the Supporting affidavit and while relying on the case of *Bake 'N' Bite (Nrb) Limited vs Daniel Mutisya Mwalonzi* [2015] eKLR, *Esther Wamaittha Njibia & 2 others vs Safaricom Limited* [2014]eKLR, *Tabro Transporters Ltd vs Absalom Dova Lumbasi* [2012] eKLR further opined that it had satisfied the conditions for stay provided for in order 42 Rule 6of the *Civil Procedure Rules*.
6. On the occurrence of substantial loss, It was submitted that the Applicant had stated that his insurer was willing to issue security in the form of a bank guarantee while the Respondent's financial status is unknown and is highly likely unable to refund the decretal sum if the appeal succeeds. This because he has not furnished the court with any documentary evidence to prove his financial standing. Reliance was placed on the case of *Edward Kamau & Another vs Hannah Mukui Gichuki & Another* [2015] e KLR and *Tabro Transporters Ltd vs Absalom Dova Lumbasi* (supra).
7. It was submitted that there has been no inordinate delay in filing the application.

Respondent Submissions

8. *Vide* submissions filed on 07.02.2023, the Respondent contends that the Application has not met the threshold for grant of stay of execution pending appeal. While citing the case of *Nicholas Stephen Okaka and another vs Alfred Waga Wesonga* [2022] e KLR and *Visbaram Ravji Halai vs Thornton & Turpin* [1990][KLR 365, the Respondent submits that the application lacks clear reason as to why the decision should be appealed and it lacks a clear demonstration as to the nature or extent of the loss claimed by the Applicant.
9. On the bank guarantee, it was submitted that the general rule is that the bank guarantee should match the order but in this case, it is a generic bank guarantee which seems impersonal and is not a reliable assurance of performance. In addition, the Respondent opines that it is a promise of payment and not a guarantee of the availability of funds. Further, it fails to take into account the costs of lengthy appeal process and potential accrual of interest. Reliance was placed on the cases of *Nyang'au vs Choi & 2*



Determination

10. I have considered the Application, the grounds of opposition and the submissions of parties on record and I find that the issue for determination is whether this court should issue orders of stay of execution.
11. Stay of execution is espoused under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

12. The principles drawn from the above section can be summarized into three. The first issue is whether the application has been filed without unreasonable delay. I note that Judgement in Machakos in Civil Suit No 288 of 2019 was delivered on 03.8.2023 while the current application was filed on 20.09.2023, about six weeks later. I find that there has been a delay of about two weeks but using the courts discretion, I will allow the application with a caveat that costs will be awarded to the Respondent to compensate for this delay, though not inordinate.

13. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted but I agree with the Respondent to the extent that the Applicant has not demonstrated how exactly it will suffer. Substantial loss was discussed in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, as:

“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 ... 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.”

14. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.

15. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Asbana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

16. The Applicant has indicated that he is insurer is willing to deposit security on his behalf in the form of a bank guarantee. The Court has a duty to balance the rights of both parties. The bank guarantee between Family bank and the Applicant’s insurance company, Directline Assurance Company Limited is for a period of 12 months from 14th June 2023, there is no guarantee for renewal and realistically speaking, the appeal and execution process will not be complete. There is thus no guarantee that the interests of the Respondents will be catered for.

17. In *Gianfranco Manentibi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, observed thus:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants



to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

18. The decretal amount in this case was Kshs.832,272 being general, special damages, costs and interest as at the time of filing this application.

Disposition

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent half the decretal sum within 90 days and;
2. Deposit the other half in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses.

It is so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS THIS 29TH DAY OF FEBRUARY, 2024 (PHYSICAL/VIRTUAL CONFERENCE).

M. W. MUIGAI

JUDGE

In The Presence/absence Of:

Ms Wanjiku -for The Appellant

Mr. Mungata - For The Respondent

Geoffrey/patrick - Court Assistant(s)

(JUDGE BEREAVED)

File Released To The Registry On 26/03/2024.

M.W. MUIGAI

JUDGE

