



REPUBLIC OF KENYA



**Ngugi v Nzivo & another (Legal representative of the Estate of Patrick Nzivo)
(Civil Appeal E296 of 2023) [2024] KEHC 5331 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E296 OF 2023**

**MW MUIGAI, J
APRIL 30, 2024**

BETWEEN

ALICE NGUGI APPELLANT

AND

MUUSI NZIVO 1ST RESPONDENT

DAVID MAINGI 2ND RESPONDENT

LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK NZIVO

*(Being an Appeal from the judgment and decree of the Hon. Khapoya S. Benson (SPM)
at Kithimani Law Courts in CC No. E184 of 2021 dated and delivered on 18.10.2023)*

RULING

Notice of Motion Application

1. Vide application dated 17/11/2023 brought under Order 42 Rule 6 & 7, Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 Section 3 and 3A of [Civil Procedure Act](#) and all enabling provisions of the law the Applicant sought the following orders, that;
 - a. Spent
 - b. Spent
 - c. The Court to grant a stay of execution of the judgment/Decree in Kithimani Civil Case No. 184 of 2021 delivered on 18/10/2023 by Hon. Khapoya S. Benson (S.P.M) pending the hearing and determination of the Appellant's Appeal.
 - d. The Insurer of the Appellant/applicant be allowed to deposit an insurance bond against the full judgment sum as security for due performance of the judgment/decree herein pending the hearing and determination of the appeal.



- e. The costs of this Application be in the cause.
2. The Application is supported by an affidavit sworn by Kenneth Mwiti a Legal Officer with Britam Insurance Company Limited which had insured the Appellant/Applicant against this claim sworn on 13th October, 2023 stating as follows; that the judgment in the Trial Court was delivered on 18/10/2023 in favour of the Respondent herein against the Appellant/Applicant who were ordered to pay Kshs.1,328,665/-; that being dissatisfied with the judgment of the Trial Court has in this regard lodged a Memorandum of Appeal to that effect; that the intended Appeal has high chances of success; that the Respondent may proceed to execute hence rendering the Applicant's Appeal nugatory; the Insurer of the Appellant Britam Insurance Company Limited is ready, willing and able to deposit an insurance bond as security for the entire decretal sum to be deposited pending appeal; the Respondent may not be able to refund the decretal amount to the Appellant in the event that the instant appeal is successful and finally that the application has been lodged expeditiously without any delay.

Replying Affidavit

3. The Respondent opposed the Application through a Replying Affidavit sworn on 06/12/2023 deposed by David Maingi Nzivoin which he stated as follows; that the instant application is bad in law and incompetent, an abuse of the court process, unmeritorious, brought inordinate delay, an attempt to deny the Respondent reap the fruits of his successful litigation and it is an afterthought and a knee jack action after execution was levied; the Appellant has not met the set criteria in law for grant of stay pending appeal; the judgment on liability was entered by consent of the parties in the ration of 70%:30% in favour of the Respondent; the Appellant has not demonstrated what loss she will suffer in the event an order for stay is not granted whether irreparable or otherwise and Insurance bond is not acceptable in the instant case since the Appellant/Applicant admitted liability to the extent of 70%.
4. The Application was canvassed by way of written submissions.

Submissions

5. The Applicant did not file submission.

Respondent's Submissions dated 01.03.2024

6. On behalf of the Respondent, it is submitted that the Appellant herein has not met the set criteria in law for grant of stay pending appeal.
7. Reliance is made in the case of United Builders & Contractors (Africa) Ltd v Standard Chartered Bank ltd where the Court held that;
- “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 suits”
8. See also the cases of Patani v Patani[2003] KLR 518 and in Diamond Trust (K) ltd v Peter Mailany HCCC 177/2002.
9. That the Appellant be ordered to pay half the decretal amount and the balance can be deposited in a joint interest earning account in the names of both Advocates.

Determination

10. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.



11. 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.”

12. 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 Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

13. 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.”

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

Substantial Loss

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

“... Substantial loss does not represent any particular mathematical 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”



16. 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 a 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.”

17. 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...

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. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. 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.”

18. The Applicant's contention is that the respondent's financial position and economic status is unknown and thus the applicant was apprehensive that if the sum is paid to the respondent, they shall not be able to recover the said amount in the event that the appeal is successful

19. 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.

20. 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.”



21. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
22. 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.
23. 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 has not been met satisfactorily.

Unreasonable Delay

24. 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 18.10.23 and the application was filed on 23.11.23. A month and some few days later is not unreasonable delay.
25. The Court finds that there is no undue delay in filing the application herein.

Furnish Security

26. The Applicant stated she be allowed to deposit an insurance bond against the full judgement sum as security for due performance pending the hearing and determination of the appeal. The Respondent in their replying affidavit that they was to issuance of an insurance bond as security as it was insufficient security in the circumstances of the case.
27. 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.”

28. It follows therefore that it is the discretion of the court to determine the security. It is not disputable that the Applicant has shown some step of good faith by willing to offer an insurance bond as security however the Respondent’s concerns on the insurance bond as sufficient security are valid and cannot be ignored.

Disposition

In the premises: -

1. There will be a stay of execution pending the said appeal on condition that the Applicant deposits ½ decretal amount in a joint interest earning account of both Advocates on record within 90 days and in default, the application for stay shall stand dismissed.



2. The costs of this application abide the outcome of the appeal.

It so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF APRIL, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

In the presence of:

Mr. Muli - for the Appellant

Mr. Kamolo - for the Respondent

Geoffrey/Patrick - Court Assistant(s)

