



**Mwananchi Credit Limited v Opiyo (Civil Appeal E184 of 2021)  
[2024] KEHC 10291 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10291 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E184 OF 2021  
F WANGARI, J  
APRIL 26, 2024**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... APPELLANT**

**AND**

**BERNARD OMONDI NJAWE OPIYO ..... RESPONDENT**

**RULING**

1. The Applicant vide an application dated 3/8/2023 sought for the following orders: -
  - a. Spent
  - b. Spent
  - c. That upon hearing and determination of this application, this Honourable Court be pleased to extend the orders of stay of execution of the Judgement of the lower court (Hon. E.K Makori – CM) in in Mombasa CMCC No. 769 of 2020 issued on 10/3/2023 and direct that the same stay in force until the Appellant’s intended appeal to the Court of Appeal is heard and determined.
  - d. That costs of the application be provided for.
2. The application is based on grounds inter alia that a Notice of Appeal was filed on 2/8/2023 as the Appellant was dissatisfied with this court’s judgement delivered on 1/8/2023, and that the intended appeal has very high chances of appeal.
3. The application was opposed through the Respondent’s Grounds of Opposition dated 11/8/2023. It was stated that the application was bad in law and defective as the was no points of law to be determined in the Court of Appeal. By granting the stay orders, it would be an injustice to the Respondent who is yet to enjoy the fruits of the judgment.



4. Directions were taken that the application be disposed of by way of written submissions. Both parties complied by filing the rival submissions.
5. I have considered the application, the Applicant's submissions, authorities cited as well as the law and in my view, the following are the issues for determination;
  - a. Whether the application is meritorious;
  - b. What is the order as to costs?
6. On granting the stay of execution, the principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -

“(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

7. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...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. Indeed, to grant or refuse an application for stay of execution pending appeal is



discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

8. I have considered that Kshs. 1,000,000 had already been deposited in the court account as security pending appeal before this court. The Appellant states that in the event the appeal is successful, the Respondent may not be in a position to repay the decretal sum. The Respondent in his submissions states that it would be an injustice occasioned to him if further stay of execution of judgment is granted.
9. I have balanced the interests of both parties. In the event the intended appeal is dismissed, the Respondent would have part of the decretal sum assured save for costs. The Appellant being a financial institution should be in a position to meet the decretal sum.
10. In the event the appeal is successful, the money deposited as security shall revert back to the Appellant, with no risk of the Respondent being unable to repay the money. For purposes of expeditious dispensation of justice, the application shall be compromised by granting the orders as herein below.
11. On the issue of costs, the same follows the event. This is what section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. The costs shall abide by the outcome of the appeal.
12. Flowing from the foregoing, I proceed to make the following orders: -
  - a. The application dated 3/8/2023 is hereby allowed on the following terms;
    - i. That stay of execution is hereby granted till hearing and determination of the intended appeal.
    - ii. That order (i) above is subject to a further deposit of the decretal sum of Kshs. 3,500,000 in an escrow account i.n.o both counsels on record within the next 30 days.
    - iii. In default of (ii) above, stay of execution orders lapses and the Respondent is at liberty to execute.
  - b. The costs to follow the outcome of the appeal.
  - c. File is hereby closed

Orders accordingly

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 26<sup>TH</sup> DAY OF APRIL, 2024.**

**F. WANGARI**

**JUDGE**

In the presence of:

Bulowa Advocate h/b for Khaemba Advocate for the Appellant

Saisi Advocate for the Respondent

Barile, Court Assistant

