



**James Wanyoike t/a Promise (Mwanake Luxury) Coach & 2 others v Lomor
(Civil Appeal E003 of 2024) [2024] KEHC 5911 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL APPEAL E003 OF 2024
RN NYAKUNDI, J
MAY 27, 2024**

BETWEEN

**JAMES WANYOIKE T/A PROMISE (MWANAKE LUXURY)
COACH 1ST APPELLANT
NEW PROMISE CONTRACTORS CO. LTD 2ND APPELLANT
GIDRAF MUIRURI 3RD APPELLANT**

AND

BENTAR LOMOR RESPONDENT

RULING

Representation:

M/s Gacathi & Company Advocates

M/s Kimondo Gachoka & Company Advocates

1. This ruling determines the applicants' notice of motion application dated 12th February, 2024 brought under the provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(2) and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. The applicant seeks orders as follows:
 - a. Spent.
 - b. That there be stay of execution of the judgment and decree of Kshs. 306,550/= plus costs and interests pending the hearing and determination of this application inter-parties.
 - c. That there be stay of execution of the judgment and decree of Kshs. 306,550/= plus costs and interest pending the hearing and determination of Lodwar HCCA No. E003 of 2024; James Wanyoike T/A Promise (Mwanke Luxury) coach, New promise contractors Co. Ltd & Gidraf Muiruri v Bentar Lomor.



- d. That this honorable court allow the appellants/Applicants to furnish the court with security in the form of a Bank guarantee from the Family Bank.
 - e. That the costs of this application be provided for
2. The application is anchored on 6 grounds enumerated as follows:
- That the appellants/applicants appealed against the impugned judgment and the orders of stay are about to lapse
- That the Respondent's financial ability is unknown and is therefore unlikely to refund the judgment sum if paid out to him to the detriment of the Appellants/Applicants
- That the Respondent is likely to execute the judgment and decree and the Defendant/Applicant stand to suffer loss.
- That the Appellants/Applicants insurer is ready and willing to furnish the honorable court with a Bank guarantee as security in due performance of the decree, within a stipulated period as directed by this honorable court.
3. In response to the application, the respondent filed a replying affidavit sworn by one Bentar Lomor on 12th March, 2024.
 4. According to the Respondent the instant application is a deliberate attempt to delay the cause of justice and to frustrate her from enjoyment of fruits of the judgment. That there is no possibility and or chances of the intended appeal to warrant the court's discretion.
 5. She deponed that this court is not entitled to grant a stay of execution under the provisions of Order 42 Rule 6 and further that the orders sought under this order are at the discretion of the court and thus not automatic. She maintained that the applicants have not demonstrated that the appeal will be rendered nugatory if stay orders are not granted. That the applicants have not demonstrated any hardship or substantial loss they will suffer if stay orders are not granted.
 6. The respondent urged this court to consider the overriding objective as defined in Section 1A and 1B of the *Civil Procedure Act* and ensure that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. She was opposed to a bank guarantee being issued as it would be unfair to her and would deprive and delay his enjoyment of the fruits of judgment. Instead, he proposed that the applicants should pay half of the decretal sum together with costs and the balance be deposited in an interest earning joint account in the names of both counsel within a reasonable period pending the outcome of the intended appeal.

Analysis and determination

7. I have carefully considered the application, the affidavit in support and the response thereto. The only issue I find for determination is whether the applicant has met the conditions necessary to grant stay pending appeal.
8. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates: -

“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 orders set aside.

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 1st 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.

9. Therefore, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an Applicant should satisfy the court that:

- a. Substantial loss may result to him unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

10. On substantial loss, the applicant is required to clearly state what loss, if any, they stand to suffer. It is evident that the decretal sum of Kshs. 306,550/= is no mean amount of money. The Appellants have raised reasonable grounds that the Respondent will not be able to refund the said sum, or at least has not demonstrated that she would be able to refund the sum in the event that the appeal succeeds. It is the appellants' position that if stay is not granted, the appeal will be rendered nugatory.

11. The applicants state that they stand to suffer substantial loss as the respondent's financial ability is unknown and is therefore unlikely to refund the judgment sum if paid out to him. The respondent on the other hand deponed that the applicants have not demonstrated any hardship or substantial loss they will suffer if stay orders are not granted. It is trite law that a mere claim that the respondent cannot refund the decretal sum is not efficient. There must be reasonable grounds provided by the applicants to show that the respondent cannot make refund of the decretal sum after which the respondent will be called upon to discharge his evidential burden. Though the respondent in the instant case did not provide evidence to show his financial capabilities nor did he swear an affidavit of means. It is for that reason I find that the applicants have demonstrated substantial loss.

12. In the case of [G. N. Muema P/A \(sic\) Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & Another](#) [2018] eKLR, the Court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”



13. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the 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...”

14. As to whether the application was made without reasonable delay, Judgment herein was delivered on 17.01.2024 and temporary stay for 30 days was granted. The instant application was filed on 12.02.2024 which was within the period of stay given by the trial court. As such, the application has been filed timeously.

15. The other element to be satisfied by the applicants is security is security of costs. The applicants ought to satisfy the condition of security. In the persuasive decision of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR the court observed: -

“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 a 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 falls.

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 judgment 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.”

16. Similarly in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR 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 the 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.”



17. The aforementioned decisions are clear on the court's discretion to issue security. Notably, in their application, the applicants stated that they are willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so. The respondent on the other hand prays that if the court is inclined to grant the applicants stay orders and since the issue on appeal is on quantum of damages which the applicants feel is on the higher side, they should be granted conditional stay with terms that the applicants do pay half the decretal sum together with costs and the balance be deposited in an interest earning joint account in the names of both counsel with a reasonable period pending the outcome of the intended appeal.
18. It is important to note that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR where the court upheld the decision of *Portreitz Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that: -

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”
19. From the above analysis, it is my considered view that on a balance of interests, since the applicants are willing to issue a bank guarantee, I am convinced that the fair balance would be for the applicants to provide a bank guarantee from a reputable bank and in which case they have proposed family bank.
20. In the upshot, the motion dated 12th February, 2024 is found to be meritorious. Consequently, an order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.
21. Costs of the motion to abide by the outcome of the appeal.
22. It is hereby so ordered.

DATED SIGNED DELIVERED VIA EMAIL AT LODWAR THIS 27TH DAY OF MAY, 2024

.....

R. NYAKUNDI
JUDGE

