



**Marshalls East Africa Ltd v Mulevi & another; Rugut & another (Interested Parties)  
(Civil Appeal E195 of 2022) [2024] KEHC 5843 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E195 OF 2022  
RN NYAKUNDI, J  
MAY 24, 2024**

**BETWEEN**

**MARSHALLS EAST AFRICA LTD ..... APPLICANT**

**AND**

**SAMASON WECHULI MULEVI ..... 1<sup>ST</sup> RESPONDENT**

**MOSES KIPCHIRCHIR TENAI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**EZEKIEL OUMA ..... INTERESTED PARTY**

**FANUEL RUGUT ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 19/12/2022, the Applicants seeks orders that:
  - a. This Honourable Court be pleased to Order EShikhoni Auctoneersto forthwith stay the Proclamation of Attachment dated 3rd October 2022 as against the Applicant/Appellant pending the hearing inter-partes of this Application or further Orders of this Honourable Court.
  - b. There be an order of stay of execution of the Decree and all consequential Orders of The Chief Magistrates Court - Eldoret Civil CaseNo.898 of 2018 being the subject matter of this Application and Appeal pending the hearing of this Application and further Orders of this Court.
  - c. That this Honourable Court be pleased to grant interim or interlocutory stay of execution of the Judgment, Decree and all consequential Orders delivered by Her Honour, Hon. Nancy N. Barasa, Chief Magistrate in the lower Court



on 16th December 2022 pending the inter-partes Hearing and determination of this Application.

- d. That this Honourable Court be also pleased to Order a stay of execution of Judgment and Decree and all other Orders of the Lower Court made in Chief Magistrates Court at Eldoret in Civil Suit No. 898 OF 2018 pending the Hearing inter-partes and determination of an Application by the Applicant/Appellant herein to the High Court on Appeal thereto for stay of execution pending Appeal.
- e. That there be a stay of execution of all or any Orders pending the Hearing and determination of the Appeal filed herein, as admitted by this Honourable Court.
- f. That upon making the Orders prayed for herein, this Honourable Court be further pleased to grant Orders that the Appeal herein be admitted on such terms and conditions as may be imposed or determined by the Court.
- g. That this Honourable Court be pleased to grant such Directions and further or other Orders as may be just and expedient.
- h. That the costs of and incidental to this Application be provided for and or that the same be in the cause, and be paid by the Respondent.

2. The application is premised on the grounds therein and is further supported by the Affidavit sworn by Sanjay Kishorkumar Mashru on 17/12/2022.

### **The Applicant's Case**

3. He deposed that he is the General Manager of the Applicant herein, that the Applicant filed a Notice of Motion application under Certificate of urgency dated 5th October 2022 seeking for orders of stay of execution as goods in its premises had been proclaimed by the firm of Eshikhoni Auctioneers on 3/10/2022, that the said application further sought for orders that the judgment entered on 19/5/2022 be set aside. He further deposed that the Appellant's Notice of Motion application in the Chief Magistrate court, in Civil Case No.898 of 2018 was dismissed with costs vide a ruling delivered on 16/12/2022 and that the Applicant is aggrieved and dissatisfied with the ruling and the appellant has a Memorandum of Appeal and also orally requested for certified copies of the proceedings and the ruling in court and followed up with a written letter and in the meanwhile uncertified and unsigned copies of the ruling were obtained. He added that the Applicant has opted to pursue an Appeal against the entire ruling and now the applicant makes this application without unreasonable delay, and that the absence of a stay of execution pending the hearing of this application and or the intended Appeal will expose the applicant to execution. He maintained that the Applicant has an arguable Appeal with high chances of success and that if the orders sought herein are not granted the applicants intended Appeal will be rendered nugatory and it is fair just and expedient and in the interest of justice that the Applicant's application be allowed as the Appellant /Applicant will suffer serious and irreparable loss, damage and expenses if this Application is declined, or denied or refused and the Respondent stands to suffer no prejudice if this Application for stay is granted and prayed.

### **The 1<sup>st</sup> Respondent's Case**

4. The application is opposed by the 1<sup>st</sup> Respondent vide his Replying Affidavit filed on 16/1/2023.



5. He deposed that the Application dated 19/12/2022 is misconceived, bereft of merits and incompetent and should be dismissed with costs, that the application is made in bad faith and with the intention of denying and/or depriving me from enjoying the fruits of my judgement herein and that the grounds in support of the Application are spurious and untenable. According to the 1<sup>st</sup> Respondent the mere filing of a Draft Memorandum of Appeal does not warrant the grant of the orders for stay of execution sought as no sufficient reasons have been demonstrated by the Appellant/Applicant since there is no appeal filed on record so far. In response to Paragraph 8 of the supporting affidavit the 1<sup>st</sup> Respondent stated that; the Appellant/Applicant has not demonstrated what substantial loss he is likely to suffer should the orders herein be denied, the mere annexure of Memorandum of Appeal does not warrant the grant of the orders for stay of execution sought as no sufficient reasons have been demonstrated by the Appellant/Applicant and that throughout the Appellant's/Applicant's pleadings, it is not stated anywhere that it would be impossible to retrieve the decretal amount from me in the event the appeal succeeds and in any case there is no formal appeal filed so far.
6. The 1<sup>st</sup> Respondent further deposed that the ruling of the Chief Magistrates' court was well reasoned and at no particular point in the Applicant's pleadings have they disputed ever having been served with the court processes, that this matter was filed long in the year 2018 and to date I am yet to enjoy the fruits of a successful litigant only because the Applicant wants to use the court process to circumvent the wheels of justice and that even a cursory look at the Draft Memorandum of Appeal, it does not show any chances of success and granting orders sought will be an exercise in futility.
7. The 1<sup>st</sup> Respondent maintained that in a monetary decree, the jurisdiction of the court to grant stay of execution though unfettered normally not capriciously exercised but on reason and with a lot of caution, that without prejudice of the following if stay of execution is to be granted then the same should be on the condition that the Appellant/Applicant does deposit the entire decretal amount, interest and the costs of the suit deposited in a joint interest earning account of my advocate and the Appellants/Applicants advocate and that in view of foregoing, it is only prudent and just that the Appellant's/Applicant's instant application be dismissed with costs to the Appellant's/Applicant's.

### **The 2<sup>nd</sup> Respondent's Case**

8. The application is opposed by the 2<sup>nd</sup> Respondent vide his Replying Affidavit filed on 13/1/2023.
9. The 2<sup>nd</sup> Respondent deposed that the application now before Court is a mere afterthought and an abuse of the Court process and that he application does not meet the requirements for grant of orders of stay of execution pending appeal to warrant consideration. He maintained that the Appellant/Applicant has neither offered any form of security for due performance of the decree nor have they demonstrated what prejudice they will suffer if the orders sought are not granted as required under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, there is no appeal against the judgment of the trial Court to warrant the grant of stay of execution of the judgment and that the appeal now before this Honourable Court pursuant to which the instant application is filed is in respect of a ruling delivered on 16th December, 2022 on an application that sought to set aside the trial Court's judgment which application was dismissed with costs. According to the 2<sup>nd</sup> Respondent there is no arguable appeal before this court against the trial Court's ruling to warrant the grant of the orders sought and that the appeal by the Appellant/Applicant seeks to challenge the court's discretion which appeal is baseless in law in light of the fact that no compliant has been made against the court with regard to any breach of any law.
10. The 2<sup>nd</sup> Respondent further deposed that the 1<sup>st</sup> Respondent herein instituted the suit before the trial Court against him on 17/8/2018, that he thereafter filed an application seeking to enjoin third parties



the Appellant/Applicant herein included into the suit and the said application was heard and the trial court on 21/3/2019 allowed the application, that upon obtaining the said orders the Third Parties the Appellant/Applicant included was served with the court process and on expiry of the time set within which to enter appearance and file defence, I applied for interlocutory judgment on 11/9/2019 which the court entered, that the matter proceeded to full hearing where the trial Court upon analysing the evidence presented before it entered judgment against the Appellant/Applicant and the other Third Parties and dismissed the claim against me for want of proof. The 2<sup>nd</sup> Respondent maintained that the judgment/decreed which is the subject of execution by the 1<sup>st</sup> Respondent is pursuant to a final judgment which was entered upon a full hearing and upon the trial Court analysing the evidence before it. The Appellant/Applicant was duly served and notified of the proceedings before the trial Court but ignored and/or failed to defend the claim for reasons only known to themselves.

11. According to the 2<sup>nd</sup> Respondent, this Court's discretion is not designed to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice such as the Appellant/Applicant herein.
12. The 2<sup>nd</sup> Respondent contends that he stands to be greatly prejudiced if the orders sought issue considering the fact that the Plaintiff dragged me to court to defend a claim that was not meant for me and/or that was not of my own making and have expended so much in terms of resources and time in defending the claim before the trial court and successfully managed to get it dismissed.

#### **The submissions**

13. The application was canvassed vide written submissions and all the parties filed their respective submissions.

#### **The Applicant's submissions**

14. Counsel for the applicant cited Order 42 Rule 6 of the [Civil Procedure Rules](#) with regard to stay of execution. With regard to Substantial loss, Counsel argued that the Applicant herein has satisfied this Honourable Court that it stands to suffer substantial irreparable loss in the form of monetary loss for reasons that if the decretal amount is paid to the 1<sup>st</sup> Respondent, the Applicant will not be able to recover as the 1<sup>st</sup> Respondent has not demonstrated that he can refund the said amount if the appeal succeeds. Counsel maintained that the Applicant is a Limited Company that has operated in this Country since 1947 and is financially stable and able to settle the decretal sum without difficulties and that in the event the appeal does not succeed the 1<sup>st</sup> Respondent will still be entitled to the decretal sum. Counsel further maintained that the appeal raises triable issues as it did not have the opportunity to defend the claim in the trial Court. Counsel cited the case of [Rana Auto Selection Ltd V Lilian Osebe Moses](#) in that regard.
15. With regard to delay, Counsel submitted that the application herein was brought without unreasonable delay. He argued that the Applicant herein learnt of this suit when the firm of Eshikhoni Auctioneers proclaimed on 3/10/2022 and on 5/10/2022 the Applicant filed a Notice of Motion and that the ruling therein was delivered on 16/12/2022 and that on 19/12/2022 the Applicant filed this instant application.
16. With regard to security, Counsel submitted that the issue of security is discretionary and that the same will depend on the merits of each case and that the Applicant is ready to comply with the conditions on security for due performance of the decree if the Court deems fit to order the same. Counsel relied on the holding in the case of *Jamii Bora Bank Limited & Another v Samuel Wambugu Ndirangu*.



## The 1<sup>st</sup> Respondent's Submissions

17. Counsel for the 1<sup>st</sup> Respondent cited Order 42 Rule 6(2) of the [Civil Procedure Rules](#) on stay of execution and cited the case of [H.E v S.M](#) [2020] eKLR in that regard.
18. With regard to substantial loss, Counsel submitted that the allegations by the Applicant that the appeal will be rendered nugatory if the execution proceeds is not an automatic ground for an order for stay execution. Counsel argued that the Applicant has to prove that, if the order is not granted and the intended appeal finally succeeds then the same will be rendered nugatory. According Counsel, the appeal as filed by the Applicant is frivolous and vexatious whose sole intention is to delay execution of the Decree and or delay the Respondent's opportunity to enjoy the fruits of his judgment. Counsel cited the case of [Kenya Hotel Properties Limited V Willesden Investment Limited](#) [2007] eKLR in that regard. Counsel maintained that the mere fact that the Applicant has a Draft Memorandum of Appeal and the process of execution is likely to be commenced by the Plaintiff in realizing his fruits of the judgment should not be construed as an automatic ground that the Applicant will suffer substantial loss and or its intended Appeal would be rendered nugatory if the execution proceeds. Counsel cited the case of [James Wangalwa & Another V Agnes Naliaka Cheseto](#) [2012] eKLR with regard to the issue of commencement of execution does not warrant the issuance of stay orders.
19. With regard to the issue of the refund of the decretal sum, Counsel argued that the Appellant herein has not stated anywhere in its Supporting Affidavit that it will be impossible to retrieve the decretal amount in the event the intended Appeal is successful. Counsel urged the Court to be guided by the holding in the case of *Triton Petroleum Co. Ltd v Kirinyaga Construction (K) Ltd*, HCCC No. 803 of 2003.
20. With regard to delay, Counsel submitted that the application herein has been filed timely and as such the same is thus undisputed.
21. With regard to security for due performance, Counsel submitted that the Applicant has not given security for due performance. Counsel urged that the entire decretal amount plus costs be deposited in both the Applicant's and the Plaintiff's Account pending the hearing and determination of the Appeal.

## The 2<sup>nd</sup> Respondents submissions

22. Counsel for the 2<sup>nd</sup> Respondent cited Order 41 Rule 6 (2) of the [Civil Procedure Rules](#) with regard to stay of execution.
23. With regard to substantial loss, Counsel submitted that other than a bare statement made in paragraph 10 of the Affidavit in support of the Application that the Applicant will suffer substantial loss, no effort has been made by the Applicant to demonstrate with some level of specificity any loss that would be suffered if the orders sought are not granted. Counsel argued that it is now well settled that it is not enough for an Appellant to allege substantial loss, an Applicant must go a step further and prove it. Counsel cited the case of [Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga](#) (1982-1988) KAR 1018
24. Counsel further argued that the Applicant has not demonstrated any likelihood of the appeal being rendered nugatory should stay orders sought be rejected. Counsel argued that the appeal is challenging the ruling dismissing the application to set aside the judgment and not the decree itself as such the issue of the appeal being rendered nugatory cannot stand as there is no appeal challenging the judgment/decree of 11/9/2019.



25. Counsel also submitted that the Applicant has not offered any security for due performance of the decree to warrant the orders sought.

### **Determination**

26. The principles guiding the grant of stay of execution pending appeal 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 1<sup>st</sup> 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.
27. An applicant needs to satisfy the Court on the following conditions before they can be granted the stay orders:
- a. Substantial loss may result to the Applicant unless the order is made,
  - b. The application has been made without unreasonable delay, and
  - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the Applicant.

28. As to whether the applicant shall suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 (*Supra*) the Court of Appeal pronounced itself to the effect that:

“It is usually a good rule to see if Order 41 Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

29. The Applicant has a burden to show the substantial loss it is likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Applicant herein contends that he shall suffer irreparable loss if stay is not granted in the event the appeal succeeds as it would be able to recover the decretal sum advanced to the Respondent. The Respondent on the other hand has not provide any evidence to prove that it



the event the Appeal succeeds he will be able to repay the Applicant herein. In the circumstances am of the view that stay ought to be granted.

30. The Applicant ought to satisfy the condition of security. The Applicant has expressed that it is ready to offer security of costs.

31. On whether this application has been filed timeously. The ruling herein was delivered on 16/12/2022. The Applicant filed the application herein on 19/12/2022 which in my view has been brought without unreasonable delay.

32. In the end, therefore, the Motion dated 19/12/ 2022 is hereby allowed, giving rise to the following orders: -

- i. There shall be a stay of execution of the decree and all consequential orders in Eldoret CMCC No. 898 of 2018 on the condition that the Appellant/ Applicant herein deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within (30) days from today, failing which the order for stay shall automatically lapse.
- ii. Costs of the application to abide by the result of the appeal.

33. It is hereby so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF MAY 2024**

**R. NYAKUNDI**

**JUDGE**

Coram: Before Justice R. Nyakundi

M/s Kimaru Kiplagat & Co. Advocates

Odhiambo M T. Adala Advocate

Nyairo & Company Advocates

**R. NYAKUNDI**

**JUDGE**

