



**General Motors East Africa & 2 others v Mwanja (Civil Appeal
E442 of 2021) [2022] KEHC 14474 (KLR) (Civ) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E442 OF 2021

CW MEOLI, J

OCTOBER 27, 2022

BETWEEN

GENERAL MOTORS EAST AFRICA 1ST APPLICANT

JIMNA KALOKI MUTHUSI 2ND APPLICANT

PETER MUTISO KISILU 3RD APPLICANT

AND

FRED MUNA MWANIA RESPONDENT

RULING

1. The motion dated August 4, 2021 by General Motors East Africa Ltd, Jimna Kaloki Muthusi and Peter Mutiso Kisilu (hereafter the 1st, 2nd and 3rd Applicant/Applicants) seeks to stay execution of the judgment in Nairobi Milimani CMCC No. 4908 of 2018 pending hearing and determination of the appeal. The motion is expressed to be brought under Section 1A, 1B, 3A & 3B of the Civil Procedure Act (CPA) and Order 42 Rules 4, 6 & 7 of the Civil Procedure Rules (CPR), *inter alia*, and on grounds on the face of the motion as amplified in the supporting affidavit sworn by Janerose Nanjira, counsel for the Applicants.
2. The gist of the affidavit is that judgment was entered in Nairobi Milimani CMCC No. 4908 of 2018 on July 9, 2021 in favour of Fred Muna Mwanja (hereafter the Respondent) in the sum of Kshs. 350,000/- as general damages; that the Applicants have since lodged an appeal and the Respondent will proceed to execute the for the entire decretal sum unless stay of execution is granted an event that would render the appeal nugatory thereby occasioning the Applicants irreparable loss and damage. She goes on to express the Applicants' willingness to provide security for the decretal sum by way of a bank guarantee. In conclusion she deposes that it is in the interest of justice that the prayers sought for in the motion be granted as prayed.



3. The Respondent opposes the motion through grounds of opposition dated September 15, 2021 and a replying affidavit dated September 17, 2021 deposed by Stellar Njoki Kariuki, counsel for the Respondent. The Respondent took issue with the motion on grounds that the application is premature as there is yet no threat of execution; that motion is vexatious, an abuse of the court process and a fishing expedition; that the Applicants are guilty of bad faith and delay; that Applicants will neither suffer any loss nor will the Appeal be rendered nugatory if the orders sought are denied; and that the orders sought will cause the Respondent grave prejudice.
4. In the replying affidavit sworn by counsel, the deponent primarily attacks the motion by asserting that the matter has been pending before court for a long time and that the motion is a fishing expedition and ought to be dismissed with costs.
5. The motion was canvassed by way of written submissions and subsequently highlighted by counsels. As regards the applicable principles for granting of an order of stay of execution pending appeal, the Applicants anchored their submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and the decision in *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] KLR 365 as cited in *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR. Counsel cited *Kenya Orient Insurance Co. Ltd v Paul Mathenge Gichuki & Another* [2014] eKLR to submit that the Applicants have a meritorious and arguable appeal with a high chance of success whereas there is a reasonable apprehension that the Respondent may levy execution rendering the appeal nugatory. On substantial loss, it was pointed out that the decretal sum is a substantial amount and if paid over, the Applicants on successful appeal may not recover the same from the Respondent who has failed to demonstrate his ability in that regard. Counsel stated that the application was timeously filed and reiterated the Applicants willingness to furnish security by way of a bank guarantee. He urged the court to balance the respective parties' competing rights and allow the motion as prayed.
6. On behalf of the Respondent counsel equally anchored his submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and the decisions in *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] KLR 365 and *RWW v EKW* [2019] eKLR on the applicable principles for granting of an order of stay of execution pending appeal. First, it was contended that the appeal was not arguable. In response to the Applicants' submissions on substantial loss, counsel contended that the Applicants have failed to demonstrate the Respondent's inability to refund the decretal sum and that the Respondent is a man of means capable of refunding the decretal sum if necessary. The court was urged to order provision of security by the Applicants pending hearing and determination of the appeal and cross appeal. In conclusion counsel contended that the court ought to find that the present motion lacks merit and dismiss it with costs.
7. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judiciously. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.
8. The Applicants prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the *Civil Procedure Rules* which provides that:
 - “(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”.

9. The cornerstone consideration in the exercise of the discretion is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell case* are especially pertinent. These are that:

- “ 1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

10. The decision of Platt Ag JA, in the *Shell case*, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated *inter alia* that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”



11. The learned Judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. 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 event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added).

12. Earlier on, Hancox JA in his ruling observed that

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -Vs- Church* (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

13. The Applicants through counsel have claimed that unless the court grants an order to stay execution pending appeal the Respondent is likely to execute thereby rendering the appeal nugatory and occasioning the Applicants irreparable loss. The Respondent in his submissions has argued quite correctly that the Applicants have failed to demonstrate substantial loss. The Applicants were duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants. They have not discharged this duty and have only raised the issue in their submissions. The question of substantial being a matter of fact ought to have been deposed in the affidavit sworn in support of the motion. Raising it in submissions appears to be an afterthought and denied the Respondent a chance of rebuttal. As stated in the *Shell case*, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money.

14. It is not enough for the Applicants to causally aver that execution will render the appeal nugatory without evidence of how that will arise. The Respondent is entitled to commence the lawful process of execution, save for a lawful cause. Substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay. That is what must be prevented. Therefore, without this evidence, it is difficult to see why the execution process should be stayed. In the court’s view, the Applicants have failed to demonstrate substantial loss and, on that account, the motion must fail and is accordingly dismissed with costs.

DELIVERED AND SIGNED ELCTRONICALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 2022

C.MEOLI

JUDGE



In the presence of:

For the Applicants: N/A

For the Respondent: Mr. Mwaure Waihiga

C/A: Carol

