**Nzyuko v Matheka (Civil Appeal E061 of 2023)**
**[2023] KEHC 23844 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23844 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E061 OF 2023**

**MW MUIGAI, J**

**OCTOBER 12, 2023**

**BETWEEN**

**JONATHAN MUTUA NZYUKO ..... APPELLANT**

**AND**

**ANCENT MBATHA MATHEKA ..... RESPONDENT**

**RULING**

## Background

1. By a Notice of Motion dated and filed in Court on 13th April,2023 brought under Section 3A, 79G & 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 4, 6 and 7, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules, 2010*, the Applicant sought Orders that:

    a. As a condition for stay of execution pending the hearing and determination of this Appeal/ intended appeal, the Applicants/Appellants be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form a Bank Guarantee to be issued by Family Bank Limited.

    b. The costs of this Application abide the outcome of the Appeal.

## Supporting Affidavit

2. By Supporting Affidavit dated and filed in court on 13th April,2023 Sworn by Jonathan Mutua Nzyuko, the deponent herein deposed that he is advised by his Advocate that the appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming, chances of success; deposing that the Respondents have extracted a decree and hence execution is eminent, thus requiring timely intervention of this honorable court for stay (annexed and marked copy of the decree); it is deposed he is apprehensive that the Respondent may levy execution against the Appellant/Applicant and the same will render the Applicant's appeal nugatory hence cause the Applicant to suffer irreparable loss and

damage; deposing that his insurer is willing and ready to furnish the Court with a bank guarantee as security, pending the hearing and determination of the appeal and instant application herein(annexed and marked copy of bank guarantee forms).

**Replying Affidavit**

3. The Respondent vide a Replying Affidavit dated and filed in court on 8th May, 2023 sworn by Ancent Mbatha Matheka. The deponent deposed that: judgment delivered on 23/02/2023 was on deponent favor against the Appellant and advocate on record having drafted and extracted the decree of the judgment and served on the Appellant's advocate on record for approval it was not responded to, instead filed for stay of execution awaiting appeal against the judgment.

4. It is deposed that bank guarantee is not a suitable form of security in this case it does not provide any real assurance that the deponent will receive the decretal sum in the event that the Appellant loses the appeal and in the event the Appellant's appeal is unsuccessful, it may be difficult to enforce the Bank guarantee as the Appellant may not have sufficient assets to satisfy the Decretal sum; it is deposed that half of the amount be deposited with the court while the other half is personally guaranteed.

5. The matter was canvassed by written submissions.

**Submissions**

**Appellant's/Applicant's Written Submissions**

6. The Appellant/ Applicant by his written submission dated and filed in court on 12th June,2023, Mr. Kimondo counsel for the Applicant raised the following issues which he sequentially addressed as follows:

7. On whether the Applicant has ab arguable Appeal, the counsel submits that applications for stay pending Appeal in the subordinate courts is not a requirement to show the Appeal has chances of success, the Applicant only needs to show he has an arguable Appeal. Counsel relied on the Court of Appeal in *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others* (2015) eKLR, to buttress his case.

8. Regarding the issue whether substantial loss will occur from refusal to grant stay, Mr. Kimondo argues that the Respondent's means are unknown and is likely unlikely the Respondent will be capable of funding the decretal amount in the event that the Applicant's Appeal succeeds since the Respondent has not disclosed nor furnished the court with any documentary evidence to prove financial standing. Reliance is made on the case of *Edward Kamau & Anor v Hannah Mukui Gichuki & Anor* (2015) eKLR, to support this point. Counsel contends that in the absence of an affidavit of means the Respondent's financial status remains unknown and has not been proven hence there is likelihood the Respondent has no means to refund the Decretal amount.

9. As to the issue of whether the Application was done without unreasonable delay, counsel submits that the application is filed on 24th March, 2023 soon after the delivery of judgment thus signaling the Applicant's interest in pursuing the appeal and that after the Respondent's counsel wrote to the Applicant's counsel about the intention to execute that the Applicant found it necessary to file the instant application hence no inordinate delay on the part of the Applicant.

10. On the issue of whether the Applicant is ready and willing to furnish security, it is contended by the counsel for the Applicant that the Applicant is ready and willing to provide security in the form of a bank guarantee pending the hearing and determination of the appeal. Counsel quoted the case of

*Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* (2019) eKLR, to support this point.

11. Finally, counsel avers that conditions set out in Order 42 Rule 6, is satisfied and pray that he granted an order of stay of execution pending hearing and determination of the appeal.

**Respondent's Written Submissions**

12. By the Respondent's written submission dated 2nd June,2023 and filed in court on 15th June,2023, Mr.B.M Mung'ata raised the following issues:

    i. Whether the Applicant's request for bank guarantee as security for the decretal sum should be granted.

    ii. Whether a bank guarantee is suitable form of security in this case, taking into account the uncertainties and risks involved.

13. Counsel submits that bank guarantee, although commonly employed as a form of security cannot provide the Respondent with the necessary certainty and guarantee of receiving the Decretal sum. While it represents a promise by the bank to pay out the sum it does not guarantee the availability of funds at the time of payment. Reliance is made in the case of *Nyang'au v Choi & 2 Others* (Civil Appeal E088 of 202) [2022] KEHC 3015 (KLR) to buttress the point.

14. Counsel argues that the potential non-compliance of the bank with the guarantee and the difficulty in enforcing orders against the bank underscore the need for more secure and effective form of security. Counsel avers that court should order the Appellant to provide security in the form of money to ensure the enforceability and certainty of the decretal sum. Counsel further placed reliance on the case of *New Nairobi United Services Ltd & Anor v Simom Mburu Kiiru* [2021] eKLR, in support of the argument.

15. Finally, counsel submits that court should reject the request for a bank guarantee and instead order the half decretal be deposited with the court and the other half be personally guaranteed.

**Determination**

16. I have considered the Application herein, supporting affidavit, Replying Affidavit, annexures and the submissions of both parties in conjunction with the legal authorities they have cited and/ or relied on.

17. Issues that commends themselves to this Court are;

    a. Whether the Application has merit and meets the threshold of a stay of execution.

    b. Whether a bank guarantee is a suitable form security.

**Whether the Application has Merit and Meets the Threshold of a Stay of Execution.**

18. The law as to Stay of Execution pending appeal is underpinned in order 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.

19. In *Vishram Ravji Halai v Thornton & Turpin* Civil Application no Nai 15 of 1990 [1990] KLR 365, the Court of Appeal held that:

> " whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. According to section 1A (2) of the *Civil Procedure Act*:
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> > "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."

20. According to Section 1B objectives specified under Section 1A are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

21. The Court of Appeal in *Vishram Ravji Halai v Thornton & Turpin* Civil Application no Nai 15 of 1990(Supra), gave principles to be established before a stay of execution pending appeal can be granted by holding that:

> " whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

22. The first requirement is that the intended appeal must raise triable and or arguable issues. A look at the Memorandum Appeal I am convinced that the first requirement is met.

23. The second to be considered is whether the appeal has been filed without undue delay. I noted that the decree for execution was given on 23rd February,2023 and the present application is dated 13th April 2023, taking into account the thirty (30) days stay of execution granted by the Trial Court. The Memorandum of Appeal is also dated 18th March, 2023. Thus, there is no undue delay.

24. The third principle that the court must establish is whether failure to grant stay of execution the Applicant is likely to suffer substantial loss. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where it was held that: -

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal."

25. In this present case the Counsel for the Applicant submitted that the Respondents means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Appeal succeeds since the Respondent has not furnished the Court with any documentary evidence to prove financial standing. The question is who has the onus to prove the financial ability or inability of the other in this case. As to this contention I am guided by the decision of my brother Odunga J (as he then was) in *Michael Tooth Mitheu v Abraham Kivondo Musau* [2021] eKLR, stated that:

> " Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree."

26. Further I associate myself with the Court of Appeal holding in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416,where Hancox, JA (as he then was) stated as follows:

> " I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

27. In my view an averment by the counsel that the Respondent means are unknown and that should the decretal sum paid the Applicant will not have a refund is on the face value rather than evidentiary. I therefore find the argument unconvincing the Applicant ought to prove by way of evidence that the Respondent has no means to pay in the event that a decretal sum is paid and that he will be unable to recoup should the Appeal succeed.

28. Having looked at the above authorities and taking into account the circumstances of this present case I find that the applicant's application has partly met the threshold as enumerated by order 42 rule 6.

**Whether a Bank Guarantee is a Suitable Form Security.**

29. Under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I am in agreement with the position in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:

> "... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

30. Similarly, I associate myself with the holding in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.
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> 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 favor. 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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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."

31. In this present case, the counsel for the Applicant submitted that the Applicant is ready and willing to provide security in the form of a bank guarantee. The Applicant annexed to his supporting affidavit Bank Guarantee given by Family Bank in favor of his insurer. On the other hand, the Respondent's counsel contested the said bank guarantee and submitted that the said guarantee is unsuitable as it does not guarantee the availability of funds at the time of payment.

32. The Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

33. This Court notes that there is an agreement exhibited between Family Bank and the directors of Direct Line Assurance Company Limited who is the insurer of the Applicant. The same is for a sum of ksh 50,000,000 million. It is for a period of 12 months with an option to renew the guarantee was received by the said bank on 23rd February, 2022 which as the time of this ruling had not been renewed.

34. This Court further takes note of the fact that Applicant is not a party to the said agreement as the said agreement is between the Applicant's insurer and Family Bank. There is no evidence that the bank guarantee herein is for the intent and purpose of this matter.

35. This Court finds and agree with the Counsel for the Respondent that the said bank guarantee is not suitable in this present case. It is in a nutshell general bank guarantee it has not stated how each party will benefit from it hence it will pose hindrance at the time of enforcement.

**Disposition**

1. Taking all relevant factors into account and in order not to render the intended appeal nugatory and in the interest of fairness and justice and at the same time securing the interests of the successful Plaintiff.

2. This Court grants a stay of execution of the decree herein on condition that the Applicant deposit to the half of the decretal sum in cash being half of the ksh 502,015/- within 90 days to the joint earning interest of both advocates the same to be in the said account for the whole duration of the appeal.

3. The said conditions to be met within 90 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

4. The Record of Appeal be filed and served within the 90 days.

5. The costs of the application to abide the outcome of appeal.

It is so ordered.

**DATED, SIGNED & DELIVERED AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).**

**M.W MUIGAI**

**.....**

**JUDGE**

In the presence/absence of:

Mr. Kimondo - For the Appellant

Mr. Mung'ata - For the Respondent

Geoffrey/Patrick - Court Assistant(s)