



REPUBLIC OF KENYA



**Greatrift Express Shuttle Services Ltd & another v Ahmed (Civil Appeal E554 of 2021) [2023] KEHC 3440 (KLR) (Civ) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3440 (KLR)

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

**CIVIL**

**CIVIL APPEAL E554 OF 2021**

**CW MEOLI, J**

**APRIL 20, 2023**

**BETWEEN**

**GREATRIFT EXPRESS SHUTTLE SERVICES LTD ..... 1<sup>ST</sup> APPLICANT**

**MUIGAI KAMAU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SAUMU AHMED ..... RESPONDENT**

**RULING**

1. For determination is the motion dated 04.09.2021 by Greatrift Express Shuttle Services Ltd and Muigai Kamau (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicant/Applicants) seeking inter alia to stay execution of the judgment in Nairobi Milimani CMCC No. 5717 of 2019 pending hearing and determination of the appeal. The motion is expressed to be brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#) (CPA) and Order 42 Rules 4, 6 & 7 of the [Civil Procedure Rules](#) (CPR), among other, 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 her affidavit is that judgment was delivered in Nairobi Milimani CMCC No. 5717 of 2019 on 04.08.2021 in favour of Saumu Ahmed (hereafter the Respondent) in the sum of Kshs. 200,000/- as general damages. That the Applicants have since lodged an appeal and unless stay of execution is granted the appeal will be rendered 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 despite being given ample opportunity failed to file a response to the motion.



4. The motion was canvassed by way of written submissions. As regards the prayer for stay of execution pending appeal, the Applicants anchored their submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, the decision in *Mukuma v Abuoga* and *National Industrial Credit Bank v Aquinas Francis Wasike & Another* [2006] eKLR to contend that in the present application, there are two competing interests that ought to be considered in the court's exercise of its discretion. That in the absence of an order to stay execution there exists a likelihood that the appeal may be rendered nugatory as the Respondent's financial means are unknown. Hence the apprehension that if the decretal sum is paid out, the Respondent will not be able to refund the Applicants in the event of the appeal succeeding resulting in what is described as irreparable loss. Further, calling to aid the provisions of Section 27 of the *Civil Procedure Act*, the case of *Jasbir Singh Rai & Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR inter alia, it was argued that an award of costs while discretionary ought to abide the conclusion of the appeal.
5. Addressing the court on provision of security by way of bank guarantee, counsel for the Applicants relied on *Black's Law Dictionary*, on the definition of a Bank Guarantee and the decision in *Westmont Holdings SDN. BHD v Central Bank of Kenya* [2017] eKLR. She argued that the said form of security would not prejudice the Respondent, as it guarantees availability of the monies upon demand. It was further contended that the said form of security balances the interest of both parties. The court was thus urged to allow the motion as prayed.
6. On behalf of the Respondent, counsel similarly citing the applicable principles under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* submitted that the reliefs sought herein are discretionary and the court's discretion should be exercised judicially, that is, upon defined principles of law and not capriciously or whimsically. On the issue of substantial loss he relied on several decisions including *Machira t/a Machira & Co Advocates v East Africa Standard (No.2)* [2002] KLR 63 and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR to assert that the matter of substantial loss is a factual issue which must be proved in the supporting affidavit. And that the Applicant has not placed before the court evidential material in establishing substantial loss if stay is denied.
7. Concerning provision of security counsel cited the decision in *Edward Kamau & Another v Hannah Mukui Gichuki* Misc. 78 of 2015 in urging the position that the Respondent is entitled to equal treatment before the law. Hence it is in the interest of justice the Applicants be ordered to furnish security in balancing the rights of both parties by ordering provision of security as the Respondent has a lawful judgment.
8. 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 judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.
9. 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 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”.

10. 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.”

11. The decision of Platt Ag JA (as he then was), in the *Shell case*, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> 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)



12. 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).

13. Earlier on, Hancox JA (as he then was) 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 LJ in *Wilson v 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.”

14. The Applicants through counsel have claimed that unless stay of execution is granted the appeal will be rendered nugatory thereby occasioning the Applicants what was described as irreparable loss and damage. The Applicants were duty bound to demonstrate through affidavit depositions how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to her under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants. They have not discharged this duty and only raised the issue in their submissions. The question of substantial loss is a matter of fact that ought to have been deposed in the affidavit sworn in support of the motion. Raising it in submissions appears to be an afterthought effectively denying the Respondent a chance of rebuttal. Submissions cannot be used as a substitute for affidavit evidence as attempted here. 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.

15. 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 and will not be deterred save where a lawful cause is demonstrated. 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 ELECTRONICALLY IN NAIROBI ON THIS 20TH DAY OF APRIL 2023.**

**C.MEOLI**

**JUDGE**

In the presence of:



For the Applicant: N/A

For the Respondent: N/A

C/A: Carol

