



REPUBLIC OF KENYA



**Kivondo v Mutisya (Civil Appeal E039 of 2024)
[2024] KEHC 9630 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E039 OF 2024**

**MW MUIGAI, J
JULY 29, 2024**

BETWEEN

SUSAN WAYUA KIVONDO APPLICANT

AND

ANNAH NDUKU MUTISYA RESPONDENT

RULING

Notice Of Motion Application

1. Vide application dated 13/02/2024 brought under Article 47 of *the Constitution* of Kenya, Section 3A, 78 (1), 79G of the *Civil Procedure Act*, Order 50 Rule 4 of the *Civil Procedure Rules*, 2010 the Applicant seeks the following orders, that;
 - a. Spent
 - b. Spent
 - c. There be stay the execution of the judgment decree and all consequential orders made on 14/12/2023 by the Honourable H.M. Nyaberi CM pending hearing and determination of the intended Appeal.
 - d. The Appellant/Applicant be granted an extension of time to file and serve the Memorandum of Appeal against the judgment of Honourable H.M. Nyaberi out of time.
 - e. The costs of this Application be provided for
2. The Application is supported by an affidavit sworn by Susan Wayua Kivondo on 13.02.2024 in which she stated that she is the owner of motor vehicle Registration number KCJ 604S which was involved on a road accident on 22.03.2021 in favour of the Respondent for a decretal sum of Kshs 10,819,074 with costs and interests on 14.12.2023. Being aggrieved by the decision, she instructed her Insurance



Company (APA) to take up the appeal but it blatantly refused saying it would only cater for Kshs 3,000,000 leaving the Applicant with a hefty balance to bear.

3. She contends that the delay to lodge the appeal was not intentional or deliberate as she had financial constraints hindering her from lodging the appeal on time. The Applicant indicated that she was desirous of filing and appeal, she would suffer extensive damages if the orders sought are not granted and that the prospects of the intended appeal are overwhelming.

Replying Affidavit

4. The Respondent opposed the Application through a Replying Affidavit sworn on 15.03.2024 deposed by Annah Nduku Mutisya in which she stated that an accident occurred on or about 22.03.2021 and sustained severe and extensive injuries and was hospitalized for long duration of time and incurred a colossal amount of Kshs 3,319,794 as medical expenses, future medical expenses of Kshs 3,874,180 and loss of future earnings of Kshs 12,960,000 and the judgment was delivered 2 months ago.
5. After delivery of the judgment, the Applicant was granted stay of 45 days and no good reason has been given why the Appeal was not filed on time. She indicated that she is a woman of means and in the unlikely event that the Appeal was successful, she would be willing to refund the decretal sum herein.
6. The Application was canvassed by way of written submissions.

Submissions

7. The Appellant did not file submissions.
8. The Respondent filed submissions dated 12.04.2024 and submitted that the Application is factually defective as firm of J. Mbugua Mburu & Associates as the firm has not sought to come on record as enshrined in order 9 Rule 9 (a) of the Civil Procedure Act and should be struck put with costs to the Respondent. Reliance was placed on the case of HCCA NO 21 of 2013, John Langat vs Kipkemoi Terer & 2 others ELC No 252 of 2014 Julieta Marigy Njagi vs Virginia Njoki Mwangi & John Ngari Ngugi
9. Secondly, it was submitted that after judgment was delivered, the Applicant went into slumber and rushed to court with the current application as an afterthought. It was submitted that the Applicant did not demonstrate what loss would be suffered but the Respondent suffered life threatening injuries resulting in paraplegia and 100% permanent incapacity. Further, grant of this order would hinder her from enjoying the fruits of the judgment since it would help her in paying her the medical bills she is still incurring.
10. It was submitted that no security had been provided as required by Order 42 Rule 6 of the Civil Procedure Rules. Reliance was placed on the case of Misc. Civil Application No 401 of 2018 Nginyanga Kavole vs Mailu Gedion.

Determination

11. I have considered the Application, the Replying affidavit and the submissions on record and I find that the issue for determination are;
 - a. Whether failure of the firm of J.m Mbugua to seek consent from the outgoing and incoming advocate is fatal.
 - b. Whether this Court should issue orders of stay of execution.



12. Order 9 Rule 9 of the [Civil Procedure Rules](#) 2010 provides that;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

13. The mischief of this rule was discussed in the case of [S.K. Tawadi v Veronica Mueblmann](#) (2019) eKLR where the court stated as follows;

“It has been stated time and again that, the purpose of the rule is to protect advocates representing parties before judgment, from being shunted aside without notice, upon the entry of judgment. It is a safeguard for the payment of such advocates’ fees. See [S.K. Tarwadi v Veronica Mueblmann](#) [2019] e KLR. The rule is important and parties are expected to comply therewith.

....

In the circumstances, rather than strike out the entire pleadings already filed, and thereby occasion unnecessary delay and costs to the parties, but so that there may be due compliance with the provisions of order 9 r 9 [Civil Procedure Rule](#), the court will direct as follows:

- a. Leave is hereby granted to the Appellants to amend the motion filed on 9th January 2019 to include the prayer for leave for the firm of M.M. Uvyu and & Co. Advocates to come on record for the Appellants; or in the alternative, to file a consent in the terms anticipated in Order 9 r 9(b) of the [Civil Procedure Rules](#)
- b.

14. In this case, no leave was sought by the Applicant and the advocate for the applicant has not attended court nor filed submissions since filing of the application. The court is inclined to determine such issues based on judicial discretion on the pleadings filed.

15. The second and last issue is that of stay of execution is espoused under Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#),2010 which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

16. The principles drawn from the above section can be summarized into three. The first issue is whether the application has been filed without unreasonable delay. I note that Judgment in Machakos CMCC No E215 of 2022 was delivered on 14.12.2023 while the current application was filed on 15.02.2024, two months later. I find that there was a delay but it was not inordinate.

17. Secondly, the Applicant has stated that she stands to suffer loss if the orders sought are not granted as the amount is a colossal amount of Ksh. 10,819,074/- and the Insurance Company agreed to only settle Ksh 3,000,000/- Substantial loss was discussed in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, as:

“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 nugatory.”

18. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The Applicant has not indicated what security she is willing to provide while the Respondent contends that she is woman of means. No evidence has been provided either way for the Court to consider.

19. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where 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 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.”

20. In the case of *Mwaura Karuga T/A Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was said 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, HCCA E050.21 Page 19 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.”

21. In the case of *Gianfranco Manentbi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, observed thus:-

“... 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.

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 judgement 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.”

22. The decretal amount in this case was Kshs.10,819,074 being general damages, Future medical expenses and special damages exclusive of costs and interests. In the circumstances, based on Article 159 (2) (d) of *the Constitution* the following orders are granted.

Disposition

23. In the circumstances, Orders are as follows;
- a. The Respondent advocate to comply with order 9 Rule 9 *CPR* 2010 and the Court grants leave within 21 days from date of delivery of Ruling to file serve the Respondent with memorandum of appeal failure to which the application stands dismissed.
 - b. Stay of execution pending appeal is granted on condition the Appellant’s Insurance Company APA pays the Ksh. 3,000,000/- to the Respondent through Advocate on record within 60 days from date of Ruling and in default there shall be no appeal.
 - c. FMD on 18/9/2024.
 - d. Costs are awarded to the Respondent.

It is so ordered.



**RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 29/7/2024(VIRTUAL/
PHYSICAL CONFERENCE).**

M.W.MUIGAI

JUDGE

