



**Kiprop v Mudavadi (Civil Appeal E141 of 2024)  
[2024] KEHC 10142 (KLR) (14 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E141 OF 2024  
RN NYAKUNDI, J  
AUGUST 14, 2024**

**BETWEEN**

**ROBERT KIPROP ..... APPELLANT**

**AND**

**ALEX MUDAVADI ..... RESPONDENT**

**RULING**

1. What is pending before me for determination a notice of motion application dated 30<sup>th</sup> May, 2024 expressed to be brought under the provisions of Section 1A, 3A, 79G, 95 of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Order 50 Rule 5, Order 22 Rule 22(1) and Article 159(2) of the Constitution. The applicant has sought orders as follows:
  - a. Spent
  - b. That the Honourable Court be pleased to extent time for lodging of a Memorandum of Appeal against the judgment of the Hon. N. Wairimu SPM made on 14<sup>th</sup> April, 2024 in Eldoret CMCC E051 of 2021 Alex Mudavadi –vs- Robert Kiprop.
  - c. That the Memorandum of Appeal dated 30<sup>th</sup> May, 2024 be deemed as properly filed.
  - d. That pending the hearing and determination of the application herein, there be a stay of execution of judgment made on 14<sup>th</sup> April, 2023 in Eldoret CMCC E051 of 2021 and of all subsequent orders entered against the appellant/applicant emanating therefrom.
  - e. That pending the hearing and determination of the appeal herein, there be a stay of execution of the judgment made on 14<sup>th</sup> April, 2023 in Eldoret CMCC E051 of 2021 and of all subsequent orders entered against the appellant/applicant emanating therefrom.



- f. That pending the hearing and determination of the intended appeal and under the applicant herein do avail security by way of Bank Guarantee from Family Bank for the whole judgment sum of Kshs. 406,550/=.
2. The application is premised on various grounds and an affidavit in support sworn by Robert Kipsang. The applicant averred that judgment was delivered in Eldoret CMCC No. E051 of 2021 on 14<sup>th</sup> April, 2023 whereby the Plaintiff was awarded a Net Award Kshs. 406,550/= exclusive of costs and interests.
3. That the judgment was delivered on 14.04.2023 by Hon. N. Wairumu when she had already been transferred to Migori Court station and the same was done in the absence of both parties. Upon delivery of the said judgment, the file was not brought back to Eldoret and parties to this case have been following up on the same for several months. The applicant stated that they have since done several letters to the executive officer requesting that the court file be traced to allow them establish if indeed the judgment had been delivered and inform their client.
4. Fortunately, in May, 2024, the applicant deposed that they were able to trace the court file and learnt that the judgment was delivered. The Plaintiff had also recently taxed his costs 1 year after the delivery of judgment, a clear indication that the file had been missing.
5. That the time period in which the judgment dated 14<sup>th</sup> April, 2024 can be appealed according to statute lapsed on 13<sup>th</sup> May, 2023 hence the need to seek an extension of time within which to lodge this instant appeal and have it deemed as properly filed.
6. That the delay in filing this appeal was not deliberate and has been explained.
7. That the 30 days of execution granted by the trial court has since lapsed and unless stay of execution is granted the appellant/applicant's application and consequently the intended appeal will be rendered nugatory and the appellant/applicant will suffer irreparable loss and damage.

### **Decision**

8. Having read through the application and the affidavit in support, the issues I find for determination are whether stay orders can be grant and whether time can be extended for the applicant to lodge an appeal.
9. First and foremost, on the question of stay, the law governing the granting of orders for stay of execution pending appeal is as enumerated under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules which stipulates as follows: -

“6. (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 referred 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. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
- a. Substantial loss may result to him unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
11. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

**Substantial loss**

12. This limb requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“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 this 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....”

13. The Applicant expressed concern on the fact that the 30 days stay of execution granted by the trial court has since lapsed and unless stay of execution is granted, the appellant/applicant’s application and consequently the intended appeal will be rendered nugatory and the appellant will suffer irreparable loss and damage. As the court remarked in *Tropical Commodities Suppliers Ltd & others vs International Bank Credit (in liquidation)* (2004) 2 EA 331;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”( See also *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR)”

14. As observed by Justice Kimaru in *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

15. The application is not opposed and as such it is fair to grant the applicant an opportunity to ventilate its case. I need not say much on this.

16. The next condition to be met by the applicant is on deposit of security for due performance of the decree. With respect to this question, the court in *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR pronounced itself as follows: -.

“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 a 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 decree in order to enjoy the fruits of his judgment in case the appeal falls. 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 judgment 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.”

17. In this respect, the applicant has offered to avail security by way of Bank Guarantee from family bank for the whole judgment sum of Kshs. 406,550/=. The Respondent presently has a right to have the decree executed in order to satisfy his judgment thus if the Respondent is to be denied the fruits of judgment, the court ought to consider the justice of the case including the possibility of ordering for an interim payment or deposit of security for due performance of the decree.
18. On the second issue of extension of time to file an appeal, the discretion to extend time in favor of a litigant or a party by the court is unfettered but it has to be exercised judiciously not on whim, sympathy or caprice. The principles in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* 2013 eKLR observed that:

“It has been stated time and again that an application under Rule 4 of the Rules, the learned judge is called upon to exercise his discretion, which discretion is unfettered. Over the years has of course set out guidelines on what a single judge should consider when dealing with an application for extension of time. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Appeal No. 255 of 1997. The court expressed itself as follows:

“it is now well settled that the decision whether or not to extend the time for appealing, for appealing is essentially discretionary. It is also well settled that in general the matters which this court in deciding whether to grant an extension of time are: First, the length of the delay, secondly, the reasons for the delay, thirdly, chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice if the application is granted. See *Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) KLR – SCK.”

19. It is clear from section 79 (g) of the *Civil Procedure Act* and the principles in the above cases that a judge has complete and unfettered discretion not only as to whether to grant extension of time but also to decide upon what terms should be imposed on granting the extension of time. I have taken the liberty to examine the application on both prayers of stay of execution and extension of time for the applicant to file an appeal out of time. I have come to the conclusion that the stay of execution applied for should be granted particularly because there might have been an oversight on the part of the court in timeously availing the record for the litigants.
20. On extension of time, some of the stated grounds in the affidavit include majorly because the record was not availed in time and as such the applicant was unable to appreciate the contents of the judgment and make a decision on whether to appeal or not.
21. Although the length of delay is a factor to be considered in applications of this nature, there is no principle which has been developed in the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay and reasons thereof are but some of the factors to be considered by the court in its objective of dealing fairly with the issues raised in the Notice of Motion to avoid prejudice, injustice and saving expenses to ensure cases are dealt with expeditiously as envisaged in Section 1A of the *Civil Procedure Act*. While the likelihood of the success of the appeal is a factor for the court’s consideration, there is no requirement in law for an applicant to file detailed evidence to demonstrate the merits of the appeal.



22. In my judgment, having regard to all the circumstances, the notice of motion dated 30<sup>th</sup> May, 2024 be and is hereby allowed. The time for filing and serving the record of appeal is enlarged until the 15<sup>th</sup> of September, 2024. In the same vein, stay of execution of the decree arising out of the judgment in CMCC E051 of 2021 is granted so as not to render the intended appeal nugatory. The applicant also is under duty to avail a security by way of a Bank Guarantee from family bank for the decretal sum of 406,550/=.

23. The costs of this application to abide the outcome of the appeal.

**DATED AND SIGNED AT ELDORET THIS 14<sup>TH</sup> DAY OF AUGUST, 2024**

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**R. NYAKUNDI**

**JUDGE**

