



**Njau & another v Kibui & another (Suing as the personal representatives  
of the Estate of Rhoda Wangechi Kariuki - Deceased) (Civil Appeal  
E010 of 2024) [2024] KEHC 13112 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL E010 OF 2024  
AK NDUNG'U, J  
OCTOBER 31, 2024**

**BETWEEN**

**JOHN KAMAU NJAU ..... 1<sup>ST</sup> APPELLANT**

**REBECCA WAMBUI GICHUNJU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RAHAB WACHUKA KIBUI & JOHN KARIUKI WANGECHI (SUING AS THE  
PERSONAL REPRESENTATIVES OF THE ESTATE OF RHODA WANGECHI  
KARIUKI - DECEASED) ..... RESPONDENT**

**RULING**

1. This ruling resolves the notice of motion herein dated 18/06/2024. The application seeks stay of execution of the decree arising from Nanyuki MCCC E080 of 2023 pending the hearing and determination of the appeal.
2. The application is brought under section 1A, 1B, and 3A of the *Civil Procedure Act*, Order 42, Rule 6, Order 22 Rule 22 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.
3. What is sought to be appealed against is the judgment of the trial court of which the Respondents were awarded Kshs.5,784,717.5/- as decretal sum plus interest and costs.
4. The application is based on the grounds on the face thereof and supported by an affidavit of Rebecca Wambui Gichunju, the 2<sup>nd</sup> Applicant herein. She averred that on 04/04/2024, the trial court awarded the Respondent a decretal sum of Kshs.5,784,717.50/- plus costs and interest which necessitated the filing of the appeal herein. She stated that the Respondent has been pursuing execution. She averred that the decretal sum is quite substantial and if paid to the Respondents, they will not be able to refund. She further deponed that if stay is not granted, the Respondents will proceed with execution and they



- stand to suffer irreparable loss and damage. That the appeal is well grounded and has high chances of success and is willing to comply with any condition imposed by the court.
5. She deponed that she approached the trial court for the same order and the court allowed the application on the condition that she deposit the decretal sum in a joint interest earning account but she can only raise Kshs.3,000,000/- being the cover policy limit and the insurer is willing to pay. That since she is unable to raise any other amount due to financial constraints, she urged the court to find that the proposed security of Kshs.3,000,000/- will be adequate. She deponed that the prayers sought will not in any way prejudice the Respondents and the facts and circumstances of this case are in favour of granting of the orders sought.
  6. In opposing the application, the Respondents filed a replying affidavit dated 11/07/2024 sworn by Rahab Wachuka Kibui. She averred that the orders sought are meant to frustrate the Respondents from accessing the fruit of the judgement for reasons that when the judgement was delivered, the Applicants applied for 30 days stay which was granted and after the lapse of 30 days stay, they filed another application before the trial court seeking stay of execution which was allowed vide a ruling dated 07/06/2024 on condition that the Applicants were to deposit the decretal sum in a joint interest earning account within 21 days from the date of the ruling. She averred that the Applicants are willing to only deposit Kshs.3,000,000/- which is about half of the amount decreed by the trial court and have not demonstrated any willingness to provide security for the balance being Kshs.2,784,717.50/- plus interest and costs of Kshs.245,946/- which means that if the appeal fails, the Respondents will be forced to go back to the trial court to commence the process of execution again and this will occasion hardship to them.
  7. She stated that the Applicants should be discouraged from forum shopping since the trial court had granted stay of execution orders and they should be ordered to comply with the conditions set by the trial court. That from the memorandum of appeal filed, it appears that the Applicants are only aggrieved by a segment of the judgment and therefore there is no justifiable reason why the Respondent should be kept away from the fruits of the whole judgment. She further deponed that the application does not meet the requirement for grant of stay because the Applicants have not demonstrated the substantial loss they stand to suffer if execution was to proceed. That the estate of the deceased has the resources that can be used to refund the Applicants if their appeal succeeds as enumerated in the trial court judgment.
  8. She averred that the decree is a monetary decree and the Applicants have not offered adequate security equivalent to what will be binding on them for due performance of the decree. That the application is an afterthought made in bad faith and does not meet the requirements for granting stay and should therefore be dismissed with costs to the Respondents.
  9. The 2<sup>nd</sup> Respondent filed a supplementary affidavit. She reiterated that she can only raise a sum of Kshs.3,000,000/- which the insurer is ready to have the same deposited in a joint account and that the appeal raises triable issues with high chances of success and therefore, the said amount will be adequate. Further that the Respondents have not shown that they have the means to pay back the decretal sum should the appeal succeed. She stated that her bank is willing to provide a bank guarantee for the entire decretal sum. That the orders sought are necessary to ensure that the appeal is not rendered nugatory.
  10. The application was canvassed by way of written submissions. In their submissions, the Applicants argued that in order for the court to allow an application for stay, the applicants must show that the application has been made without unreasonable delay, substantial loss may result and that the Applicant has furnished security for due performance of the decree. As to whether the Applicants will suffer irreparable loss, counsel submitted that substantial loss would occur if the Applicants' appeal



succeed and the Respondent is unable to refund the decretal sum. That the appeal challenges the award under the loss of dependency whereby the trial court adopted a multiplier approach which was not applicable in the circumstances and thereby arrived at an award which was inordinately excessive. That the Respondents are keen in executing and if the orders sought are not granted, the Applicants stand to suffer irreparable loss. Reliance was placed on the case of Stanley Kiplagat Rono & another v William Kiprotich Cherus (2021) eKLR that the court has to balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of the judgment.

11. It is submitted that the Respondents have not proved whether they have means to pay the Applicants back should the appeal succeed. Reliance was placed on the case of Century Oil Trading Company Limited vs Kenya Shell Limited Nairobi (2008) eKLR where the court inter alia observed that a court cannot shut an eye where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event the appeal succeeds. That the appeal raises triable issues with high chances of success and therefore the need to preserve the status quo. As to whether the application was made without unreasonable delay, counsel submitted that the application was indeed timeous and was filed without unreasonable delay. As to security of stay, he submitted that the Applicants have indicated their readiness to furnish security for due performance of the decree in that the insurer has confirmed that they are ready to deposit Kshs.3,000,000/- in court or in a joint interest earning account within 45 days. He urged the court to consider the said amount as sufficient security considering the strength of the appeal.
12. In rejoinder, the Respondents submitted that the Applicants have not demonstrated why a general stay of execution should be made over the whole judgment of the trial court yet only one finding of the trial court is disputed. Reliance was placed on the case of Dominic Wamugi Nderi v Daniel Okeri Matunda (2022) eKLR and New Nairobi United Services Ltd & another v Simon Mburu Kiiru (2021) eKLR where the court in both instances ordered for the pay of close to half of the decretal sum to the respondent and balance to be deposited in a joint account. He submitted that it would be unfair if the court were to concentrate more on the Appellant's right of appeal while turning a blind eye to the victims of the accident as was held in Machira T/A Machira & co Advocates vs East African Standard (2002) KLR 63 that to be obsessed with the intended appellant in disregard of a successful opposite party is to flirt with one party and that the successful party is entitled to the fruits of his judgment.
13. He further argued that the Applicants sought for stay of execution orally in court after the delivery of judgement and they were given 30 days stay. After the lapse of 30 days, they made an application before the trial court for another stay of execution and they were granted another 30 days with condition that they deposit the whole decretal sum in a joint account to be operated by the parties' advocates. He stated that since what is appealed against is a money decree, the Applicants must be willing to provide security equivalent to what will be binding on them at the conclusion of the appeal and should be inclusive of costs and interest. That the Applicants have not made any payment and the awards continues to attract interest. That they have offered Kshs.3,000,000/- as security but have not made any offer for the other half which will put the Respondents at a disadvantage.
14. He submitted that the conditions that were set by the trial court were reasonable and fair and they had put the parties in a neutral and equal position. He urged the court to order the Applicants to comply with the conditions set by the trial court. He further urged the court to note that the Applicants have not applied for typed proceedings nor the decree and a period of 4 months has since lapsed which shows that the Applicants are not keen with the appeal but delaying the conclusion of the matter. He urged the court to order that the Applicants do file record of appeal within 30 days.
15. I have read through the application, the replying affidavit and the rival arguments by the parties herein.



16. Order 42 rule 6 (1) grant this court power to order for stay by stating that;

“(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.”

17. The principles guiding the grant of stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which states;

“(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.”

18. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal court reverse the judge’s discretion.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”



19. See also the case of *Halal & Another v Thornton & Turpin Ltd*, (1963) Ltd [1990] eKLR where the Court of Appeal held that:

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted...”

20. The court also must be satisfied that there is an arguable appeal before granting stay of execution as was held in the case of *Benedict Ojou Juma & 10 Others v A.J. Pereira & Sons Ltd* [2016] eKLR, thus;

“The applicant must first satisfy the court that appeal or intended Appeal is not frivolous, that is to say, that it has an arguable Appeal.”

21. Has the Applicant satisfied the above conditions? As to arguability of appeal, the Court of Appeal in *Mwalimu & 6 others v Halal & another (Civil Application E091 of 2022)* [2023] KECA 634 (KLR) held that;

“It is therefore important for the applicant to satisfy the Court that the ground or intended ground is bona fide without satisfying the Court that the said ground will necessarily succeed. As long as the point raised is bona fide and ought to be argued fully before the Court, the same meets the arguability or non-frivolity test.”

22. I have perused the memorandum of appeal attached to the Applicant’s further replying affidavit and I do not consider it to be frivolous.

23. As to whether there was inordinate delay in filing the application, the trial court judgment was delivered on 04/04/2024. The Applicants were granted stay on two occasions with the last order of stay being granted on 07/06/2024. The instant application was filed on 19/06/2024. It is instructive to note that the rules do not set out the number of days that would be considered as inordinate, and therefore each case should be determined on its own facts, as held in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR in which it was stated as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

24. As to whether substantial loss will be occasioned, the Applicant was supposed to demonstrate how the same was likely to occur as was held by Musinga J in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001* stated that;

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “Substantial loss” is a relative term and more often than not can be assessed by



the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.”

25. The other condition is furnishing of security. The Applicants has offered to deposit Kshs.3,000,000/- to a joint interest earning account which she stated that the insurer is ready to deposit. In her supplementary affidavit she stated that her bank is willing to provide a bank guarantee for the entire decretal sum. In her submissions, she stated that the insurer is willing to deposit Kshs.3,000,000/- in a joint account and she urged this court to find the said amount to be sufficient security for the performance of the decree. She did not offer security for the balance of the decretal amount. There is an alternative offer to secure the entire decretal sum through a bank guarantee.
26. Having considered the application herein and in line with the principles set out above, am persuaded that the application has been filed timeously and further, that the likelihood of substantial loss is real. I also take note that the Applicant though not offering security for the entire decretal sum has offered reasonable security.
27. The orders sought are in light of the above meritable.
28. I allow the application and make the following orders;
  1. An order for stay of execution be and is hereby granted pending the hearing and determination of the Appeal.
  2. That the stay so granted is conditional to the Appellant depositing Kshs. 3,000,000 in a joint interest earning account in the joint names of the Advocates on record within 30 days hereof in default of which the stay herein lapses.
  3. The record of appeal be filed and served within 30 days.
  4. Costs of this appeal to abide the outcome of the appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF OCTOBER 2024**

**A.K. NDUNG’U**

**JUDGE**

