



Nyamira Luxury Express Company Limited & another v Manyoni & another (Suing as the Legal representation of the Estate of the Late Alfred Mokaya Ombui) (Civil Appeal E060 of 2024) [2024] KEHC 13308 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E060 OF 2024
HI ONG'UDI, J
OCTOBER 31, 2024**

BETWEEN

NYAMIRA LUXURY EXPRESS COMPANY LIMITED 1ST APPELLANT

GUARDIAN BUSES COMPANY 2ND APPELLANT

AND

SAMUEL OMBUI MANYONI 1ST RESPONDENT

MARGARET MAGOMA MOKAYA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATION OF THE ESTATE OF THE LATE
ALFRED MOKAYA OMBUI**

RULING

1. This is the Notice of Motion dated 11th April 2024 where the appellants/applicants seek the following orders:
 - i. Spent.
 - ii. This honourable court be pleased to grant an order of stay of execution of the judgment on 14th March 2024 and all consequential orders arising therefrom pending the hearing and determination of this application interpartes.
 - iii. This honourable Court be pleased to issue an Order for provision of a Bank Guarantee of Kenya Shillings Three Million (Kshs. 3,000,000) only being the maximum amount payable within the scope of the *Insurance (Motor Vehicles Third Party Risks) Act* award payable by the insurance company pending hearing and determination of HCCA E060 of 2024.



- iv. This honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
 - v. Costs of this application be provided for.
2. The application is premised on the grounds thereof and the affidavit of the appellants/applicants' advocate sworn on even date. She deposed that the judgment before the subordinate was delivered on 14th March 2024 in favour of the respondent. That being dissatisfied with the said judgment, they have preferred this appeal on the two limbs.
 3. She further deposed that they were apprehensive that the respondent may commence execution thereby rendering the Appeal nugatory. That the applicants were ready, willing and able to furnish the court with a bank guarantee from Family Bank for Kenya Shillings Three Million (Kshs. 3,000,000) only, as security for due performance of the judgment/ decree pending the hearing and determination of the appeal, within the scope of the *Insurance (Motor Vehicles Third Party Risks) Act* as this court may order.
 4. She went on to depose that Directline Assurance Company Ltd, who are the appellants' insurers, had entered into an agreement with Family Bank for the provision of a bank guarantee. She added that the applicants would suffer substantial loss and damage if the orders sought are not granted and that the Appeal would in the circumstances be an academic exercise.
 5. The respondent filed a replying affidavit dated 14th December 2023. He averred that indeed judgment was entered in this matter on 14th March 2024 in his favour for a sum total of Kshs. 6,986,552/20 plus costs and interest thereon. Further, that the present application was a smack of bad faith by the appellants/applicants and their intent was to delay and/or deny and frustrate him from enjoying the fruits of his judgment and the same should therefore be dismissed.
 6. He added that in the event that the court was inclined to allow the instant application, then the decretal sum being Kshs. 3,493,276/10 should be released to him and ½ of the same be deposited in a fixed deposit joint interest earning account, as a condition for the grant of stay pending appeal.
 7. The application was canvassed by way of written submissions.

Appellants/applicants' submissions

8. These were filed by Kimondo Gachoka & Company Advocates and are dated 27th April, 2024. Counsel cited Order 22 rule 22 (1), Order 42 rule (6) Order 50 rule 6, Order 51 rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the *Civil Procedure Act* which specify the circumstances under which either the trial court or the appellate court may order for stay of execution of a decree pending appeal.
9. The court's attention was drawn to the case of Halai & Another V Thorton & Tu sin 1963 LTD 1990 KLR 365 cited in Industrial Cause Number 1715 OF 2011 Elena Doudoladova Korir v Kenyatta University [2014] KLR at Nairobi where the Court of Appeal, Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that:

“The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay”



10. On substantial loss, counsel submitted that the respondent had not filed any documents to prove his financial standing and had not shown to the court any property he owned which can satisfy the decretal sum should the appeal succeed. He relied on the case of *Amal Hauliers Limited versus Abdulnasir Abukar Hassan 2017*] eKLR where the court held that

“the Respondent has not disclosed any source of income that she would use to refund the Applicant the decretal amount should the appeal succeed. Indeed the Respondent’s averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum were the Applicant’s appeal to succeed. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed”

11. Counsel further submitted that the applicants had filed their application seeking stay pending appeal before the stay had lapsed, meaning it was done without undue delay. He added that the appellants/ applicants were ready and willing to furnish the court with a bank guarantee which was reasonable security in law. Further, that the appeal had a high chance of success based on the grounds stipulated vide the memorandum of appeal filed herein. He urged the court to allow the application.

Respondent’s submissions

12. These were filed by E.M Juma & Ombui Advocates and are dated 21st May, 2024. Counsel identified one issue for determination which is whether the applicants had demonstrated that the orders of stay of execution pending appeal are merited.
13. He submitted that in determining the application for stay pending appeal the Court is guided by the provisions of Order 42 rule 6 of the Civil Procedure Rules. He cited the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012]* eKLR, where the court 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 nugatory.”

14. Counsel further submitted that the applicants had not demonstrated the nature of substantial loss that they would have suffered if the said stay pending appeal is not granted. Additionally, that the applicant had proposed providing a bank guarantee of Kshs. 3,000,000/= only, as security for the stay pending appeal. That the said amount was relatively low, and did not meet the threshold for security in this matter, being that the decretal sum awarded by the trial court was Kshs, 6,986,552/=.
15. In support of this position he relied on several cases among them being the case of *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.”

16. He urged the court to dismiss the application in its entirety with costs to the respondent, or in the alternative, the same be allowed on condition that the applicant shall pay half of the decretal amount to the respondent, and deposit the other half in a joint interest-earning account within 45 days from the date of the said Ruling of court.

Analysis and determination

17. I have considered the application, affidavits and submissions by the parties. I find the issue arising for determination to be whether an order for stay of execution against the judgment delivered on the 14th March, 2024, should issue.

18. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

No order for stay of execution shall be made under sub rule (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.

19. In *RWW vs. EKW* [2019] eKLR, also relied on by the respondent the court addressed the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

20. From the provisions of the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh both situations.



21. Further, in the case of Regional Institute of Business Management v Lucas Ondong' Otieno [2020] eKLR the court observed as follows;

“ 20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of *the Constitution* of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.

22. The application herein is dated 11th April 2024 and was filed on 12th April, 2024. The impugned judgment was delivered on 14th March 2024. Hence, there was no delay in filing of the application.

23. On substantial loss, the appellant argued that if the stay orders are not granted the appeal would be rendered nugatory. The respondent on his part argued that the application was a smack of bad faith bent on denying him the right to enjoy the fruits of his judgment.

24. In the case of Silverstein vs. Chesoni [2002]1 KLR 867, the court observed that substantial loss was the cornerstone of both jurisdictions and the same had to be prevented by preserving the status quo because such loss would render the appeal nugatory.

25. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of each case. This is what this court is called upon to do for justice to be served. The appellants/applicants have not demonstrated that the respondent may not refund the decretal sum if the appeal succeeds. Equally the respondents have not demonstrated their ability to refund the decretal sum in the event of a successful appeal.

26. After considering the circumstances of this case, and reading the Judgment being challenged, it is my view that the interests of both parties ought to be balanced. I therefore allow the prayer for stay of execution on the following conditions:

- i. The appellants to pay the respondents Ksh 500,000/= (Five hundred thousand) through her advocate within 30 days from today.
- ii. A further sum of Ksh 2,500,000/= (Two million five, hundred thousand) to be provided for by the appellants in form of a Bank Guarantee within 21 days.
- iii. Non-compliance of any of the two conditions will lead to automatic vacation of the stay of execution granted herein.
- iv. Appeal to be mentioned before the DR on 22/01/2025 to confirm filing of the Record of Appeal and availability of the Lower court file.

27. Costs in cause.

Orders accordingly.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 31ST DAY OF OCTOBER, 2024 IN OPEN COURT.

H. I. ONG'UDI

JUDGE

