



**Wanyona v Macharia & another (Suing as the Administrator of the Estate of David Kuria Njoroge - Deceased) (Civil Appeal E041 of 2024) [2024] KEHC 15322 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15322 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E041 OF 2024  
PN GICHOHI, J  
NOVEMBER 27, 2024**

**BETWEEN**

**LEAH WANYONA ..... APPELLANT**

**AND**

**MARY MUGURE MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**BENSON NG'ANG'A ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID KURIA  
NJOROGE - DECEASED**

**RULING**

1. The Appellant/Applicant has moved this Court by way of a Notice of Motion dated 14<sup>th</sup> March, 2024 brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking for Orders: -
  1. Spent.
  2. That pending the hearing and subsequent determination of this application inter-partes this Honourable Court be pleased to make a temporary order for stay of execution of the judgment of Hon. Priscah Nyotah Senior Resident Magistrate delivered on the 28<sup>th</sup> February, 2024 in Nakuru CMCC No. E210 of 2020 Mary Mugure Macharia & Benson Ng'ang'a (suing as the administrators of the estate of David Kuria Njoroge (Deceased)).
  3. That consequential to prayer 3 above, this Honourable Court be pleased to make an order for stay of execution pending the hearing and subsequent determination of the applicant's appeal herein.
  4. That the costs of this application be in the cause.



2. The application is supported by the grounds on the face of the Application and the affidavit sworn on 15<sup>th</sup> March, 2024 by Grace Njuguna in her capacity as the legal officer of the Applicant's insurer.
3. She stated that the Respondent herein filed a suit in Nakuru CMCC No. E210 of 2020 Mary Mugure Macharia & Benson Ng'ang'a (suing as the administrators of the estate of David Kuria Njoroge (Deceased) under the tort of negligence. That judgement was delivered on 28<sup>th</sup> February, 2024 in favour of the Respondent as against the appellant.
4. However, the Applicant is dissatisfied with the judgment both on liability and quantum and has filed this Appeal. That the stay orders issued in the lower court are on the verge of lapsing, necessitating the filling of this application.
5. She states that she is apprehensive, that the Respondent will enforce the judgement of Court unless stay is granted. It is her averment that compelling the Applicant to satisfy the decretal award would be prejudicial to her and will render the appeal nugatory and a mere academic exercise.
6. She states that she stands to suffer irreparable loss as she may not recover the said award from the Respondent should the appeal succeed. She depones that the Applicant's appeal has good chances of success as shown in the Memorandum of Appeal.
7. She states that the Applicant is willing to comply with any conditions for security that this Honourable court may deem fit to impose for the end of justice to be met. Lastly, she states that the application has been made without undue delay.
8. The Respondents have opposed that application by filing a Replying Affidavit which they both swore on the 25<sup>th</sup> June, 2024. It is their position that the application herein is bad in law and wholly incompetent and for dismissal ex-debito justitiae for reasons that the Applicant only seeks stay of execution in Nakuru CMC No. 210 of 2020 pending inter-partes hearing of this application. That there is no proper prayer for stay pending the hearing and determination of this appeal and therefore, if the application was allowed, the consequential orders will be academic and of no effect as the prayers are poorly drafted.
9. It is the Respondents' contention that having not sought stay pending appeal before the lower court, the Applicant cannot move the superior Court directly seeking stay and therefore the application is for striking out.
10. The Respondents maintained that the Applicant has not satisfied any of the requirements for grant of stay pending appeal as provided for Order 42 Rule 6 of the Civil Procedure Rules in that the application was not filed timeously as judgement was delivered on 28<sup>th</sup> February, 2024 hence the delay is inordinate and unexplained.
11. The Respondents further stated that the Applicant has not provided security pending appeal or security for the due performance of the decree that may be ultimately binding on her.
12. The Respondents' contention that Applicant has not demonstrated that the Respondents are people of straw who will be unable to refund the decretal sum if the same is paid out and therefore, she will suffer substantial loss unless stay pending appeal is granted.
13. They contend that on the contrary, they own properties worth over Kshs. 20,000,000 and therefore, they will refund the decretal sum with ease if the Appeal succeeds.



14. In conclusion, the Respondents urged that the application herein be dismissed for not only being defective in form and poorly drafted and of no consequential result as drawn but also fully devoid of merit.
15. The Application was canvassed by way of written submission, with the Applicant filing hers on 16<sup>th</sup> October, 2024 while the Respondents filed theirs on the 5<sup>th</sup> September, 2024.

### **Applicant's Submissions**

16. Emphasising on the conditions she must satisfy this application for stay of execution to be allowed as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicant submitted that the application herein has been made without unreasonable delay as the judgment was delivered on 28<sup>th</sup> February 2024 and the Applicant filed this application and Memorandum of Appeal simultaneously on 21<sup>st</sup> March 2024.
17. On substantial loss, it was submitted that unless stay is granted, the Applicant will be compelled to pay the Respondents the sum of at least Kshs. 2,309,150/- which may not be refunded if the Appeal succeeds.
18. Arguing that substantial loss is just but loss whose worth can be established, the Applicant submitted that having indicated his apprehension of the Respondents refunding the decretal sum, then the evidential burden shifted to the Respondents to show that they indeed have the means to repay the decretal sum should the appeal succeed.
19. While citing the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR, the Applicant argued that the Respondents have not demonstrated their capability to refund the said money.
20. On security, the Applicant proposed to furnish the Court with a bank guarantee as security pending the determination of the appeal. In support of this, cited the case of Esther Kemunto Maera v Madison Insurance Co. Ltd 2021 eKLR where High Court was amenable to the appellant therein furnishing security in form of a bank guarantee for the entire decretal sum.

### **Respondents Submissions**

21. The Respondents also submitted on the merit of the Application and argued that the appeal as set out in the memorandum of appeal dated 14<sup>th</sup> March 2024 does not raise any serious issues for consideration by this court since the trial court's decision was well reasoned and the award given is within the range applied by most courts hence the appeal is a waste of this Court's time.
22. They urged this Court to balance the rights of appeal by the Applicant vis a vis the right of the Respondent to enjoy the fruits of their judgement
23. On whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal as provided for under Order 42 Rule 6 (2), the Respondents submitted that the Application herein was filed one month after the judgement was delivered by the trial court hence, the application was filed with unreasonable delay.
24. On substantial loss, the Respondent relied on the case of Kenya Shell Limited vs. Benjamin Karuga Kibiru [1986] eKLR and submitted that the Applicant should show the damages she would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would deny a successful litigant of the fruits of her judgment which should not be done if the sufficient cause has not been shown.



25. It is their submissions that the execution has not commenced and that the Applicant has not sufficiently demonstrated the ground for substantial loss to warrant stay of execution yet on the other side, the Respondents have demonstrated that they are monied and capable of refunding the decretal amount should the Appeal succeed.
26. On security, the Respondent argued that the Applicant has not provided security pending appeal or security for the due performance of the decree that may be ultimately binding on her and therefore, the Applicant has failed to satisfy the conditions for stay pending appeal. The Respondents therefore urged that the application be dismissed.
27. The Respondent however went on to submit on the adequacy of security as was emphasised by the Court of Appeal in *Nduhiu Gitahi & another v Warugongo* [1988] eKLR.
28. It was their submissions that the Applicant is not contesting the award of general damages but that the award was excessive. The Respondents therefore submitted that should this Court find it reasonable to allow the application, then it should be on condition that the Applicant pays half of the decretal award plus costs and that the other half be deposited in a joint interest earning account in the name of both parties.

### **Analysis And Determination**

29. After considering the application, the affidavits and the rival submissions and the authorities cited by the parties, this Court finds that the sole issue is whether it is in the interest of justice to order a stay of execution and if it is, on what terms the stay should be granted.
30. On the onset, it is noted that the Respondents contended that the Applicant should have filed the Application for stay in the trial Court as opposed to this Court. However, the Applicant has an option to file the application either before the trial court or the High Court. In this case, the Applicant's choice to file the application in this Court was not in error.
31. On the main issue here, parties have aptly captured the three conditions that the Applicant must meet in an application for stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, that is: -
  - i. The application must be brought without unreasonable delay.
  - ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
  - iii. The applicant must furnish 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.
32. On the first condition, judgment was delivered 28<sup>th</sup> February 2024. The application dated 14<sup>th</sup> March 2024 was filed on 21<sup>st</sup> March 2024 together with a Memorandum of Appeal. In the circumstances, it is evident that the application was filed timeously.
33. On substantive loss, it is settled that substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. Regarding the issue the Court of Appeal in *Kenya Shell Limited* (supra) had this to say: -

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order



for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

34. Similarly, in this case, the Applicant argued that the decretal sum in question is a colossal sum of Kshs 2,309,150, which the trial Court awarded by misdirecting itself in apportioning liability and in awarding loss of dependence.
35. It was further argued that the financial capabilities of the Respondent are not known and therefore paying the decretal sum when there is a pending Appeal has the effect of rendering the Appeal nugatory and that the Respondent will not be in a position to refund the decretal sum in the event the Appeal succeeds.
36. In *National Industrial Credit Bank Ltd (supra)*, the Court of Appeal held on this issue:
- “This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”
37. The Respondents maintained that they are people of means owning properties of over Kshs 20,000,000/- but there was nothing annexed to support averment despite the burden having shifted to them. Even if execution has not yet started as stated by the Respondent, there would be nothing to stop the Respondents from commencing the process at any time.
38. There being a pending Appeal and should the Respondent successfully carry out execution, the Appeal will be rendered nugatory and that will be prejudicial to the Applicant in the circumstances herein.
39. On security, the Court of Appeal in *Nduhiu Gitahi & another (supra)* adopted the remarks by Lord Justice Parker in *Rosengrens Ltd v Safe Deposit Centres Ltd [1984] 3 All ER 198* that: -
- “The process of giving security in one which arises constantly ... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving that security.
- It may take many forms. Bank guarantee and payment into court are but two of them... so long as it is adequate, then the form of it is a matter which is immaterial.”
40. In this case, the Applicant herein only stated in her application that she is willing to comply with any conditions for security that this Court may deem fit to impose for the end of justice to be met. There was no specific offer of any kind of security that application. It is only in her submissions that she has boldly proposed security in form of a bank guarantee for due performance of the decree.
41. The Respondents on the other hand objected to the bank guarantee and proposed that half of the decretal sum be paid to them while the other half be deposited in an interest earning account in the joint names of their advocates.
42. In the circumstances and in order to balance the rights of both parties, this Court allows the application but on conditions and in the following terms: -



1. A stay of execution be and is hereby granted pending the hearing and determination of the Appeal.
2. Within thirty (30) days of this ruling, the Applicant shall deposit the entire decretal sum of Kshs. 2, 309,150/= in an interest earning account in the joint names of both Advocates on record for the parties herein.
3. Costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF NOVEMBER, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

N/A for Ms Kipchoge for Applicant

Ms Kamau for Mr. Murimi for Respondents

Ruto, Court Assistant

