



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kanyi v Kimani & another (Civil Appeal E321 of 2023)
[2024] KEHC 16420 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E321 OF 2023
DO CHEPKWONY, J
DECEMBER 20, 2024**

BETWEEN

JAMES NJOROGE KANYI APPELLANT

AND

MARGARET WANJIKU KIMANI 1ST RESPONDENT

STEPHEN NJOROGE KIMANI 2ND RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion application dated 31st August 2023 filed pursuant to Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#) by the Appellant. The application seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the honourable court be pleased to issue an order staying execution of the judgment delivered on 3rd August 2023 in Limuru CMCC No. 338 of 2019 Margaret Wanjiku Kimani & Stephen Njoroge Kimani (Legal reps) v James Njoroge Kanyi pending the hearing and determination of this appeal.
 - e. That the costs of the application be provided for.
2. The Application is based on the supporting Affidavit by Allan Odede sworn on even date and further on the grounds as set out on its face. The Applicant states that judgment was delivered against him and being aggrieved by the same, he lodged the present appeal. According to the Applicant, the appeal has high chances of success which may be rendered nugatory if the application is not allowed. The



applicant avers that he is ready and willing to comply with conditions which shall be set out by the court. He urges the court to grant order of stay stating that he stands to suffer substantial loss as the Respondents may not be in a position to refund the decretal sum if execution is allowed to proceed and the appeal eventually succeeds. The Applicant further states that the application has been timeously and that balance of convenience tilts in his favour, thus urges the court to allow the application in the interest of justice.

3. The Respondents opposed the application through the Replying Affidavit by Margaret Wanjiku Kimani sworn on 13th September, 2023 . She argues that the judgment was delivered on 3rd August, 2023 and stay of execution was granted for 30 days. That APA Insurance was not a party to the appeal or primary suit hence they allegedly lack locus standi to swear the Affidavit. She further argues that the Respondent’s evidence before the trial court was not rebutted and thus the appeal is not an arguable one. She states the court that should it be inclined to allow the application then it should direct the applicant to deposit the entire decretal sum into the parties advocates joint bank account. The Respondent also holds that the application is an abuse of the court process which is meant to deny the Respondents from enjoying the fruits of their judgment and seeks the court to strike out with costs.
4. The Respondent further filed a Notice of Preliminary Objection dated 13th September, 2023 on the following grounds:
 - i. That Allan Odede has no locus standi to swear the Supporting Affidavit on behalf of the applicant.
 - ii. That the Applicant’s application is therefore bad in law and abuse of court process.
5. However, on 16th May, 2024, the Respondent through their Counsel Mr. Ngigi withdrew the said Notice of Preliminary Objection. On mutual agreement, by the parties, the application was canvassed by way of written submissions which as at the time of writing this Ruling only the Applicant had filed his submissions dated 16th October 2023 which the court has duly read and considered.

Analysis and determination.

6. The law on stay of execution is enshrined under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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”

7. On the purpose of an application for stay of execution pending appeal the court in RWW v EKW [2019] eKLR, held:

“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.

8. Therefore, taking cue on Order 42 Rule 6(2) and the above cited authority, it is trite law that for the court to grant stay of execution three conditions must be met. These are:-

- a. The application has been made without unreasonable delay.
- b. The Applicant will suffer Substantial loss
- c. The Applicant has offered security for due performance of the decree.

9. On the first condition, the judgment subject of the appeal was delivered on 3rd August, 2023 and the present application seeking stay of execution was filed on 2nd September, 2023 which was timely and without unreasonable delay hence this condition had been fulfilled.

10. On the second condition of whether Applicant is likely to suffer substantial loss, the Applicant stated that the Respondents are unlikely to be in a position to refund the decretal sum if the same is paid to them and the appeal eventually succeeds. The court in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR held,

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

11. In the present case the Applicant has expressed fears of the Respondents inability to repay the decretal sum. This court has time and again expressed that while the legal duty is on the Applicant to prove the allegations that the appeal would be rendered nugatory if the Respondent is unable to repay the decretal sum, the applicant fears on her financial capability by filing an affidavit of means so as to clear the air on their capability to refund the decretal sum should they loose the appeal. In this case, no such affidavit has been annexed.

12. Lastly is the issue of security for the due performance, the Applicant has stated in the Affidavit that he is willing to comply with the conditions to be set out in order to fulfil this condition. The Applicant further offered to deposit the entire decretal sum in a joint interest earning account in the name of Counsel. In the case of Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, the court held:

“... 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...”

13. Thus condition to offer security in due performance of the decree only requires the Applicant to express willingness to provide security. I am satisfied that the Applicant has offered to deposit the decretal sum to fulfil the obligations imposed by the judgment therefor the Applicant has met the third requirement.



14. In this case, the Applicant having fulfilled the three conditions for the stay of execution orders to issue. Consequently, the court finds merit in the Notice of Motion application dated 31st August, 2023 and proceeds to allow the same on the condition that:-

- a. The Applicant deposits the entire decretal sum of Kshs 3,362,152/= in a joint interest-earning account in the names of the Advocates on record within 45 days.
- b. In default, the orders of stay herein granted shall automatically stand discharged and the Respondent shall be at liberty to pursue execution.
- c. Costs of the application shall be in the cause.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER, 2024.

D. O. CHEPKWONY

JUDGE

