



**Makena v Okutoyi (Civil Appeal E12 of 2024)  
[2024] KEHC 16010 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16010 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E12 OF 2024**

**DK KEMEL, J  
DECEMBER 20, 2024**

**BETWEEN**

**FAITH MAKENA ..... APPELLANT**

**AND**

**VIVIAN OKUTOYI ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant herein filed an application dated 29<sup>th</sup> April 2024 brought pursuant to Order 22 Rule 42(6) of the Civil Procedure Rules seeking principally and order that there be stay of execution and any further proceedings in Siaya SCCCOMM No, E003 OF 2024 Vivian Okutoyi Vs, Faith Makena pending the determination of this appeal. It also seeks for costs thereof.
2. The application is supported by grounds set out thereunder as well as a supporting affidavit sworn by the Appellant/Applicant Faith Makena on even date.
3. The Appellant/Applicant’s gravamen is inter alia; that she was sued in Siaya SCCCOMM No. E003 of 2024 Vivian Okutoyi Vs Faith Makena wherein the Respondent clearly indicated the applicant’s place of residence and work to be in Kisumu and that the Respondent’s current residence is the United States of America as per the annexed copy of claim marked F.M. -1; that the Applicant through her Counsel responded to the claim and raised the issue of jurisdiction of the magistrate’s court to hear and determine the matter; that vide a Ruling dated 08/03/2024, the trial court held that it had jurisdiction to hear the matter; that the applicant filed this appeal without delay, which raises serious issues of jurisdiction; that the applicant’s Advocates on record has already applied for certified copies of proceedings, Ruling and order in readiness for the appeal; that it is in the interest of justice that the application be granted and that the Respondent will suffer no prejudice; that the Respondent is likely to execute the decree to her detriment; that if the stay is not granted, then the appeal may be rendered nugatory as the Respondent does not even live within the jurisdiction of the court and that it will be difficult to implement the judgement in the event of success of the appeal.



4. In rebuttal, the Respondent filed grounds of opposition dated 25/6/20224 wherein she averred inter alia; that the claimant is a resident of Siaya as captured in her verifying affidavit dated 24<sup>th</sup> January 2024 and that she was only in the USA on a visiting visa and that the claim is lawfully lodged under section 15 (1)(a) of the Small Claims Act; that the Applicant has not provided any security for costs as required under Rule 30 of the Small Claims Rules; that the application dated 29<sup>th</sup> April 2024 is time barred by virtue of the 30 days stay which had been granted by the trial court on 8<sup>th</sup> March 2024 and that 21 days have passed without explanation for the inordinate delay.
5. The application was canvassed by way of written submissions. Both parties duly complied.
6. The Applicant submitted that the Appellant/Applicant has met the threshold provided for under Order 42 Rule 6(2) of the Civil Procedure Rules and thus the order sought should be granted. Reliance was placed on a plethora of authorities in support of her application including Westmount Holdings SDN BHD vs. Central Bank of Kenya & 2 Others (Petition No. E023 OF 2023) KESC 11 KLR (17<sup>th</sup> February 2023 (judgment).
7. Based on the above authority, the Applicant submitted that the grant of an order for stay of execution is discretionary by the court and prayed that the application be allowed with costs.
8. The Respondent submitted that the Applicant has not met the threshold for and order of stay of execution as provided for under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules to wit: “No order of stay of execution shall be made under sub rule (1) unless- (a) the court is satisfied that the 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.”
9. The Respondent relied on the case of Standard Assurance co. ltd vs Alfred Mumema Komu(2008)EKLK where it was held: “the proof of loss must be substantiated by the one who alleges it and that it would be unfair to deny the Respondent the fruits of a regular judgment just because the Applicant has filed an appeal”
10. The Respondent submitted that it is trite practice when an application for stay is initiated, the Applicant has to furnish the court with security since the Respondent herein having obtained a judgment in her favor is entitled to enjoy the fruits of her judgment.
11. Finally, the Respondent submitted that the Applicant has not demonstrated what sort of loss she would suffer if the stay is denied. The Respondent prayed that the application be dismissed with costs.
12. I have given due consideration to the application, rival affidavits and submissions presented. It Is not in dispute that the applicant has since lodged an appeal which is now pending determination and that the lower court has already rendered a judgement in which the applicant is aggrieved. I find the issue for determination is whether the application has merit.
13. It is noted that the application is premised under Order 42 Rule 6(1) and (2) which requires the applicant to satisfy the conditions imposed therein before she can be considered for an order of stay of execution. The same 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.”



14. On whether the application has been filed without undue delay, it is noted that the impugned ruling was delivered by the lower court on 7/3/2024 and that the Applicant was granted 30 days stay of execution which lapsed on 7/4/2024 and that the present application was filed on 29/4/2024 while the appeal was lodged on 4/4/2024. It is clear that the appeal was lodged within the stipulated period thirty days right of appeal. The application was thus filed within 22 days after the appeal had been lodged. I am satisfied that there was no inordinate delay in the circumstances since the delay of three weeks is not unreasonable. I find that the Applicant has satisfied this condition.
15. On whether substantial loss may result to the applicant if the stay is not granted, it is noted that the decretal sum is indicated as Kshs 156, 500/ which is a tidy sum during these hard economic times and that the execution is likely to paralyze the applicant somewhat. I am aware that the Respondent is entitled to enjoy the fruits of her judgement since she is the victorious litigant while on the other hand the Appellant is also entitled to access justice and to ventilate her appeal now pending before this court. The applicant has averred that the Respondent is a resident of USA and likely to pose problems to the applicant during enforcement of judgement in the event of success of the appeal. It is noted that the Respondent did not file a rejoinder to the averments by the applicant but only filed grounds of opposition. Grounds of opposition are not in themselves valid responses to averments made under oath via affidavits. Hence, there is a likelihood that the applicant stands to suffer loss in the event of success of her appeal as by then the Respondent will be out of reach. Even though the grounds of opposition indicated that the Respondent is out on a visiting visa to the USA, the same has not been averred via oath. In the premises, I must give it to the applicant that she stands to suffer loss if the order of stay is not granted and that her pending appeal will be rendered nugatory in the end.
16. Finally, it is noted that the Appellant's appeal raises a germane issue namely that the lower court did not have jurisdiction to entertain the suit. This shows that the applicant appeal is arguable and ought to be given the opportunity to ventilate it before this court and hence the need for grant of an order of stay of execution so as not to render it nugatory.
17. As regards the issue of security, it is noted that the applicant in her affidavit has not made an averment to the effect that she is willing to provide security for the due performance of the decree which may become binding on her. Indeed, the issue of security is a prerequisite for an applicant seeking for an order of stay of execution pending an appeal. Even if the same has not been alluded to by the parties, this court is empowered to make such orders as are appropriate in order to meet the end of justice for the parties. It is my considered view that an order that the entire decretal sums plus assessed costs be deposited into a joint interest earning account in the names of both Advocates within a certain timeline pending the determination of the appeal will cater for the competing interest of the parties herein.
18. In the result, the application dated 29/4/2024 has merit. The same is allowed in the following terms:
  - a. An order of stay of execution of the decree in Siaya SCCCOMM No. E003 of 2024 Vivian Okutoyi Vs Faith Makena is hereby granted upon the Applicant depositing the entire decretal sums plus assessed costs into a joint interest earning account in the names of both Advocates herein within thirty (30) days from the date hereof failing which the stay shall lapse.
  - b. The costs of the application shall abide in the appeal.Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**

**D. KEMEI**

**JUDGE.**



In the presence of:

N/A Ongweso for Bichaba....for Appellant/Applicant

M/s Mkungu.....for Respondent

Ogendo.....Court Assistant

