



REPUBLIC OF KENYA



KENYA LAW
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**Kandieh & another v Nangiuro & another (Civil Appeal 130 of 2023)
[2024] KEHC 16252 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 130 OF 2023
MW MUIGAI, J
DECEMBER 19, 2024**

BETWEEN

MONICAH CHEBET KANDIEH 1ST APPELLANT

BERNARD MULWA 2ND APPELLANT

AND

SIMON PETER NANGIRO 1ST RESPONDENT

NICHOMENDUS MUTINDA MAILU 2ND RESPONDENT

RULING

1. In the Notice of Motion Application dated 13th September 2021, the Applicant sought the following orders from the Court, that;
 - a. Spent
 - b. This Honourable Court be pleased to extend time and grant leave to the Applicant/intended Appellant to lodge his Memorandum of Appeal out of time against the judgment and/or decree against him by the Honourable M.A. Otindo, Principal Magistrate in Civil Suit no 736 of 2019 Machakos Law Courts delivered on 9th May 2023.
 - c. Spent
 - d. That this Honourable Court be pleased to grant stay of execution of the judgement and/or Decree issued by the Honourable M.A. Otindo, Principal Magistrate on 9th May 2023 in Civil Suit no 736 of 2019 Machakos Law Courts delivered pending the full hearing and determination of the intended Appeal.



- e. That this Hon. court allow the Applicant to furnish the court with security in the form of a Bank Guarantee from a reputable Bank pending the full hearing and determination of the intended Appeal.
 - f. Spent .
 - g. the costs of this Application abide the outcome of the Appeal.
 - h. That this Hon. Court be pleased to issue any order and or direction it deems fit to grant in the circumstances.
2. The Application is supported by the Affidavit of Bernard Mulwa, The 2nd Appellant deposed on 14th of July 2023 in which he deposed that he was informed by his advocates on record that judgment dated 9th May 2023 where he was found 100% liable and the plaintiff was awarded General Damages of Kshs 180,000, special damages of Kshs 3,280, costs and interest. That the 3rd Party was awarded costs too. The Applicant contended that he delayed filing the Appeal as his advocates were in the process of obtaining the judgment and he delayed in giving instructions.
 3. The Appellant/Applicant contends that the Respondent may levy execution against them and that will render the appeal nugatory and cause irreparable loss and damage upon them.
 4. He stated that the insurer, Direct Line Assurance Company Limited is willing and able to furnish the court with a bank Guarantee from a Family bank.
 5. The Applicant deposed that if the decretal sum is paid to the Respondent, he would not be in a position to refund the same if the Appeal is successful.

1st Respondent Replying Affidavit

6. The 1st Respondent filed a Replying Affidavit on 1st of August 2023 in which he deposed that the application is an afterthought and meant to deny him from enjoying the fruits of the judgment. No explanation has been given as to where the applicant was and why no appeal was preferred within time. He stated that he is a man of means and can repay the decretal sum in the event the appeal succeeds. The money decree is never rendered nugatory for one can sue for recovery.

2nd Respondent Replying Affidavit

7. The 2nd Respondent filed a Replying Affidavit on 1st of August 2023 in which he deposed that he was enjoined as a third party in Machakos CMSS 736 OF 2019 and the suit against him was dismissed with costs. That the Application does not satisfy the conditions laid down under order 42 Rule 6 (2). The 2nd Respondent stated that on 16/5/2023 the Appellant's advocates were served with a letter dated 6/5/2023 forwarding the decree for his approval which he acknowledged and stamped but never responded to it.
8. He contends that no cogent reasons have been advanced to warrant granting the orders sought. There is no letter annexed letter requesting for typed or certified proceedings and judgment thus confirms that no efforts were made in obtaining the same.
9. The bank guarantee was opposed on the grounds that the same was only valid for a year and the appeal may take more than one year to conclude hence the same shall become obsolete, it should be for the specific amount claimed so that in case of default the respondent can enforce it, it should be addressed to the court and not to the directors of Directline Assurance Company Limited. Lastly that it will be used in all applications for stay of execution pending appeal all over the country and this untenable.



10. The 2nd Respondent also stated that the Applicant should be ordered to deposit the sum of Kenya Shillings Eighty Five Thousand in court or joint account in the names of both advocates.
11. The application was disposed of by way of written submissions.

Applicant Submissions

12. The Applicant filed submissions dated 13th October 2023 in which he opined while relying on Order 42 Rule 6 of the Civil Procedure Rules that he had satisfied all the conditions therein. Firstly, he submitted that the insurer is ready and willing to issue security and on the other hand, the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal sum in the event the Appeal succeeds since the Respondents had not disclosed nor furnished the court with any documentary evidence to prove his financial standing.
13. Secondly, he submits that the Application had been brought without unreasonable delay.
14. Thirdly, he submits that he is ready and willing to furnish security in the form of a bank guarantee. Reliance was placed on the cases of Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] eKLR, Recoda Freight & Logistic Limited vs Elishana Angote Okeyo [2015] EKLR and Tabro Transporters Limited vs Absalom Dova Lumbasi [2012] eKLR.

1st Respondent Submissions

15. The Respondent filed submissions on 2nd of November 2023 wherein he relied on his replying affidavit and further submitted that if the court deems it just to grant the orders sought then as per order 42 Rule 6 (2) (b) of the Civil Procedure Rules, it should order deposit half of the decretal sum as a condition for stay and balance be deposited in court.
16. He submits that it is not enough to depose that loss will be suffered, material particulars of loss must be placed before the court by way of an affidavit. The court was asked to balance the interest of the parties. He invites the court to dismiss the Application.

Determination

17. I have considered the Application, the Replying affidavit and the submissions thereto and find the issue for determination is whether the Applicant is entitled to orders of stay pending Appeal.
18. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 provides as follows:
 - (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.
 - (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.”

19. The first issue is whether the application has been filed without unreasonable delay. I note that the Judgement sought to the appealed was delivered on 9th May 2023 whereas the Application for stay was filed on 18th of July 2023, about one and a half months later. I find this not to be ordinate delayed.

20. Secondly, the Applicant has stated that she stands to suffer loss if the orders sought are not grated but has not demonstrated how exactly it will suffer. Substantial loss was discussed in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, as:

“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.”

21. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.

22. On the issue of security, the Applicant indicates that he is ready to comply with the orders of the court. Furnishing of security is key in getting orders of stay pending appeal. The Applicant has indicated that his insurer is willing to deposit security on his behalf in the from of Family Bank. The Respondent on the other hand indicates that he is being denied from enjoying the fruits of the judgement the Court has a duty to balance the rights of both parties. The bank guarantee between Family Bank and the Applicant’s insurance company, Directline Assurance Company Limited is for a period of 12 months from 18th February 2022, the same has since expired and there is no guarantee that the interests of the Respondents will be catered for.

23. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the



court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

24. The decretal amount in this case is Kshs. 183,280 being general and special damages.

Disposition

1. Leave to appeal granted the same be filed within 90 days in default the leave vacates.
2. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent half the decretal sum within 90 days and;
3. Deposit the other half in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses.

It is so ordered.

RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 19/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).

MARGARE W. MUIGAI

JUDGE

