



**Twenty Mini Bus Sacco & another v Koech & another (Suing as the legal representatives of the Estate of Gilbert Maiyo) (Civil Appeal E084 of 2022) [2023] KEHC 341 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E084 OF 2022  
RN NYAKUNDI, J  
JANUARY 27, 2023**

**BETWEEN**

**TWENTY MINI BUS SACCO ..... 1<sup>ST</sup> APPELLANT**

**JESSE MUNGAI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ZEPHANIA KIPRUTO KOECH ..... 1<sup>ST</sup> RESPONDENT**

**SELLY MAIYO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GILBERT MAIYO**

**RULING**

Coram: Hon. Justice R. Nyakundi

M/S Mwinamo Lugonzo & Kagunza Adv for respondent

Kimondo Gachoka & CO. Adv for the appellants

- 1 The Applicants approached this court vide an application dated June 28, 2022 seeking the following orders;
  1. Spent
  2. Spent
  3. That there be a stay of execution of the judgment and decree of the subordinate court in the subordinate court Eldoret CMCC No. 60 of 2019 between Selly Maiyo & Zephania Kipruto Koech (Suing as the Legal Representatives of the Estate of Gilbert Maiyo- Deceased) -Vs-



Twenty Mini Bus Sacco & Jesse Mungai) pending the hearing and determination the Appeal herein.

4. That the Applicant be allowed to avail a Bank Guarantee of the whole sum of Kshs. 1, 218, 834/ = from Family Bank, Equity Bank or any other Bank of good repute.
  5. That costs of this application be provided for.
- 2 The application is premised on the grounds set out therein and the contents of the supporting affidavit.
- 3 The brief facts underlying the application are that the Applicant was the defendant in Eldoret CMCC No. 60 of 2019 between Selly Maiyo & Zephania Kipruto Koech (Suing as the Legal Representatives of the Estate of Gilbert Maiyo- Deceased) .-Vs- Twenty Mini Bus Sacco & Jesse. Mungai) where the trial court delivered judgement in favour of the Respondents by awarding the Respondent of Kshs. 1, 218, 834/ = plus costs and interest. The Applicants, being dissatisfied with the decision of the court instituted an appeal vide a memorandum of appeal and approached this court for orders of stay of execution as they are apprehensive that the Respondents will levy execution of the decree.

### **Applicants' Case**

- 4 The Applicants filed submissions on July 26, 2022. It is the Applicant's case that if orders for stay of execution are not granted, the Respondents will proceed to execute the decree in his favour and the Appellants shall be forced to settle the decretal sum despite there being an appeal. in paragraphs 4 & 9 of the Supporting Affidavit, the Applicants have averred that the Respondents' financial position is unknown and the judgment being of a substantial amount, the Respondent is unlikely to refund the decretal sum if paid to them. Further, the Appellants have averred in order to protect the substratum of the appeal, it would be in the interests of justice that an order of stay of execution. The Appellants having expressed concerns that the Respondents will be unable to refund the decretal sum should the appeal succeed, the Respondents are/was under the obligation to prove that should the decretal sum be paid to them, then they would be in a position to refund the decretal sum should the appeal succeed. They relied on *National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Anor* (UR) C.A. 238/2005 in support of this submission.
- 5 The Appellants have proposed to furnish this Court with a Bank Guarantee from Family Bank for the whole decretal sum. By offering to furnish security, it shows good faith on the part of the Appellants as the application for stay is not only meant to deny the Respondent the fruits of the judgment, as the form of security will ensure that the interests of both the Appellants and the Respondents will be secured pending the hearing and determination of the appeal.
- 6 The judgment of the trial court which is the subject of the appeal herein was delivered on May 27, 2022. The Memorandum of Appeal was lodged within the required timelines (within 30 days from the date of judgment). The application seeking orders for stay of execution was filed on June 28, 2022. The appellants contended that the application was filed timeously without unreasonable delay.
- 7 The appellants submitted that the application is merited and prayed that it be allowed as prayed.

### **Respondents Case**

- 8 The Respondents opposed the application vide grounds of opposition and filed submissions on July 12, 2002. The Respondents' case is that should this application be allowed then the same should be in the terms that half the decretal sum plus full costs be paid to the Respondents through their Advocate whilst the remaining half be deposited in a joint interest earning account within a period of thirty (30) days in the names of the Advocates on Record. the Order would be fair and reasonable to both parties



as it will safeguard both the Respondents as well as the Appellants. The amount in the joint interest earning account will be available to the Appellant should the appeal succeed as well as available to the Respondents should the appeal fail to succeed.

- 9 The Respondents opposed the proposal for a bank guarantee on the grounds that this is a money decree and a bank guarantee will not ensure the due performance of the decree and /or ensure performance of the decree as it is not a good security. The bank guarantee relates to several matters which might not satisfy the decree in full and or what will be the fate of the Respondents if the Bank giving the guarantee goes under Liquidation or Receivership.
- 10 The Respondents prayed that the application be allowed with the conditions as stated above.

### **Analysis and Determination**

- 11 Stay of execution is guided by order 42 rule 6 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.
- 12 In order to determine whether an application for stay is merited the application needs to satisfy the following conditions;
1. Substantial loss
  2. Unreasonable delay in filing the application
  3. Security

#### **Substantial loss**

- 13 The decretal sum is Kshs. 1, 218, 834/= which is by all means a colossal sum of money. Further, the Applicant contended that the Respondent is not in a position to refund the decretal sum should the appeal succeed. It is trite that when a judgment debtor disputes the financial ability of the decree holder to refund the decretal sum the burden of proof shifts to the decree holder to prove that they are in a position to refund the same by filing an affidavit of means. I reiterate the finding of the Court of Appeal in *Victor Ogola vs Mary Waithe Kihiu* (2021) eKLR where the judges observed;

“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 the 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 the ' Respondent or lack of them. Once an Applicant expresses 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.”

- 14 In the premises the Applicant has satisfied the limb that substantial loss shall be suffered if the orders sought are not granted.



Unreasonable delay

15 The impugned decision the Applicant intends to appeal against was delivered in May 27, 2022. The present application was filed on June 28, 2022. The application was filed without unreasonable delay.

Security

16 The Applicant has offered security in from of a bank guarantee. The Respondents do not oppose the furnishing of security, they are opposed to the mode of furnishing security.

17 In the premises, I find that the application is merited and hereby grant the following orders;

1. A stay of execution on the execution of the judgment and decree in Eldoret CMCC No. 60 of 2019 between Selly Maiyo & Zephania Kipruto Koech (Suing as the Legal Representatives of the Estate of Gilbert Maiyo- Deceased) -Vs- Twenty Mini Bus Sacco & Jesse Mungai) delivered on 27<sup>th</sup> May 2022 is hereby granted on the condition that the Applicants to furnish the Court with security in the form of a Bank Guarantee from Family Bank, Equity Bank or any other Reputable Bank of good standing or deposit half the decretal sum in a joint interest earning account in the names of the advocates of the parties herein within the next 30 days, failure to which the stay orders shall lapse without further directions from the court.
2. Costs shall abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF JANUARY, 2023.**

.....

**R. NYAKUNDI**

**JUDGE**

