



REPUBLIC OF KENYA



**Kiprop & another v Wafula & another (Civil Appeal E175 of 2022)  
[2023] KEHC 1177 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1177 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E175 OF 2022  
RN NYAKUNDI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**ABEL KIPLIMO KIPROP ..... 1<sup>ST</sup> APPELLANT**

**ABEL KIPLIMO KIPROP ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EMMANUEL WAFULA ..... 1<sup>ST</sup> RESPONDENT**

**EMMANUEL WAFULA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Coram: Before Hon Justice R. Nyakundi

Kimondo Gachoka & Co. Advocates

M/s Kimaru Kiplagat & Co.

1. This is an application by Notice of motion Under section 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law) seeking the following orders:
  1. That there be a temporary stay of execution of the judgement and decree of Kshs 206,000/= plus assessed costs and interest delivered in Eldoret SCCC No. E148 OF 2022, Emmanuel Wafula vs Abel Kiplimo Kiprop pending the hearing and determination of this application inter-partes.
  2. That there be a stay of execution of judgement and decree of Kshs 206,000/= plus assessed costs and interest delivered in Eldoret SCCC No. E148 OF 2022, Emmanuel Wafula vs Abel Kiplimo Kiprop pending the hearing and determination of Eldoret HCCA No E175 of 2022, Abel Kiplimo Kiprop vs Emmanuel Wafula



3. That as a condition for stay of execution pending the hearing and determination of this Appeal, the Appellant/Applicant be and is hereby ordered to provide /issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited
  4. That the costs of this application be provided for.
2. The application supported by an affidavit of Abel Kiplimo Kiprop dated 24<sup>th</sup> day of November, 2022. The Applicant in this application and the grounds briefly are that:
1. That judgement in Eldoret SCCC No.E148 OF 2022 was delivered on October 28, 2022 in favour of the Respondent in the following terms
    - a. Liability.....80%: 20% in favour of the Respondent as against the Appellant
    - b. General Damages.....Ksh 250,000/=
    - c. Special Damages .....Kshs 6,000/=
    - d. Total .....Kshs 256,000/=
    - e. Less 10% Liability.....Kshs 50,000/=
    - f. Total Net Award .....Ksh 206,000/=
    - g. Plus Costs and Interests.
  2. That the appellant/Applicant has appealed against the said judgement and the orders of stay of execution have are due to lapse on November 27, 2022
  3. That the respondents financial ability is unknown and is therefore unlikely to refund the judgment sum if paid out to him to the detriment of the appellant/applicant
  4. That the respondent is likely to execute the judgement and decree entered in his favour and the appellant/applicant stands to suffer substantial loss and the appeal stands to be rendered nugatory.
- In opposition of the application the respondent relied on his replying affidavit dated December 6, 2022 whose content briefly state:
1. That the application dated 24/11/2022 is misconceived, bereft of merits and incompetent and should be dismissed with costs
  2. That application is made in bad faith and with intention of denying and/or depriving the Respondent from enjoying the fruits of the judgement herein.
  3. That the grounds in support of the application are spurious and untenable.
3. I have appraised the notice of motion by the applicant, affidavit in support and the counter affidavit in objection to the grant of stay of execution pending an Appeal.

### **Decision**

4. The rules in order 42 rule 6(1) expressly provide the guidelines and basis of exercise of that discretion by the court on stay of execution. The same are reiterated in the case of *Stephen Wanjobi v Central Glass Industries Ltd*, Nairobi High Court Civil Case No. 6726 of 1991 (Hayang J on 3 March 1995
  - a. For the court to order a stay of execution there must be



- i. Sufficient cause
  - ii. Substantial loss
  - iii. No unreasonable delay and
  - iv. Security
- b. The grant of stay is discretionary and the High Court is also a Court of equity.
  - c. It is not just to deny a successful party the benefit of judgement because he is poor
  - d. The court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending appeal
  - e. 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
4. Further the court in *Andrew Kisawuzi Vrs Dan Oundo Malingu* HCMA 467/2013 deliberated on the same subject matter and found that
- “substantial loss cannot mean ordinary loss or the decretal sum or cost which must be settled by the losing party but something more than that...the applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted”
5. I have carefully considered the motion together with arguments of both parties I think it is expedient for me to comment on the objection raised by the respondent on the competence of the appeal and the combined reasons in that affidavit. In the instant case there is no dispute whatsoever on the facts with regard with the judgement of the Lower Court. What is being disputed by the Applicant is how the trial court applied the law on the issues which were disclosed from the pleadings. The major concern by the applicant is that if the application on stay is not granted to preserve the res the Appeal would be rendered nugatory. Further to that in absence of stay orders there is a likelihood that the decretal sum would be paid out to the respondent hence occasioning substantial lose.
5. Applying the above principles in the cited cases to the present application it appears that the instant controversy is a matter of the Appeals court. The applicant would have another opportunity to shed some light on this vexed subject matter on exercise of discretion to award damages of Kshs 206,000. It is in the light of peculiarities of this motion that I find that the applicant may suffer substantial lose if execution is not stayed pending the outcome of the Appeal.
6. Consequently, the Application is granted as follows:-
- i. That any execution against the judgment of the Lower Court in CMCC E148 of 2022 be stayed pending the hearing and determination of the intended Appeal
  - ii. The entirely decretal sum be deposited in a joint interest earning account of both counsels or parties seized of the intended appeal within 30 days from today’s ruling.
  - iii. In the alternative, the entire decretal sum be secured in the form of bank guarantee from a reputable financial institution duly recognized by the Central Bank of Kenya
  - iv. The record of appeal be prepared, filed and served upon the respondent within 30 days of today’s order.



- v. In default in any one conditions more so on deposit of security the stay order pending the hearing and determination of the intended appeal shall lapse Automatically without any reference to this court for enlargement or extension of time
- vi. The costs of this motion shall abide the outcome of the intended appeal

**DATED AND DELIVERED AT ELDORET THIS 23<sup>rd</sup> DAY OF FEBRURY 2023**

.....

**R. NYAKUNDI**

**JUDGE**

