



**Mutunga & another v Oyugi (Civil Appeal E708 of 2022)  
[2023] KEHC 1214 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E708 OF 2022**

**JK SERGON, J  
FEBRUARY 23, 2023**

**BETWEEN**

**GEOFFREY MAINGI MUTUNGA ..... 1<sup>ST</sup> APPELLANT**

**JOSPHAT KIOKO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SILVANUS OTIENO OYUGI ..... RESPONDENT**

**RULING**

1. The subject matter of this ruling is the notice of motion dated September 23, 2022 taken out by the appellants/applicants herein, in which it sought for an order for stay of execution of the judgment delivered on August 26, 2022 in CMCC No 9666 of 2019 pending the hearing and determination of the appeal. The applicants also sought for an order to the effect that they be allowed to provide a bank guarantee from Diamond Trust Bank as security for the decretal sum.
2. The respondent put in a replying affidavit sworn on November 1, 2022 to oppose the motion.
3. The instant motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the relevant documents filed.
4. I have considered the grounds laid out on the body of the motion; the facts deponed in the affidavits supporting and opposing the motion.
5. A brief background of the matter is that the respondent instituted a suit against the applicants *vide* the plaint dated December 23, 2019 and sought for damages arising out of a road traffic accident.



6. Upon hearing of the suit, judgment was delivered in favour of respondent for the sum of Kshs 600,000/= as general damages and Kshs 6,640/= as special damages. Being aggrieved by the aforementioned decision the applicants appealed to this court against the lower court's decision.
7. I have considered the grounds laid out on the body of the motion; the facts deponed in the affidavits supporting and opposing it; and the brief oral arguments.
8. The guiding provision in considering an application seeking an order for a stay of execution is order 42, rule 6(2) of the [Civil Procedure Rules](#) which sets out the following conditions in determining an application for stay:
  - i. The application should have been brought without unreasonable delay;
  - ii. The applicant must demonstrate the substantial loss to be suffered; and
  - iii. There must be provision of security for the due performance of the decree or order being appealed against.
9. The above conditions were similarly laid out in the case of [G N Muema P/A \(Sic\) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another \[2018\] eKLR](#).
10. On the first condition, from my study of the record and the impugned judgment, I note that it was delivered on August 26, 2022 which is barely a month prior to the filing of the instant motion. I therefore find that there has been no unreasonable delay in bringing the motion.
11. Under the second condition on substantial loss, it is apparent from the motion that the applicant avers that this court should exercise its discretion in their favour because they stand to suffer irreparable loss and that the respondent, whose financial means are unknown, will not be able to refund the decretal sum if the same is paid to him and the appeal succeeds. The applicant is apprehensive that the appeal will consequently be rendered nugatory.
12. On his part, the respondent is of the view that the current application does not meet the threshold of granting stay of execution and that the applicant's aim is to curtail him from enjoying the fruits of justice that he rightly deserves.
13. In the case of [Masisi Mwita v Damaris Wanjiku Njeri \[2016\] eKLR](#) in which the court reasoned that:

“The corner stone of the jurisdiction of the court under order 42 of the [Civil Procedure Rules](#) is that substantial loss would result to the applicant unless a stay of execution is granted... 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.”
14. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal's analysis in the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another \[2006\] eKLR](#) where it held thus:

“Once an applicant expresses a reasonable fear 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...”



15. In the absence of anything to indicate or ascertain the respondent's financial capacity therefore, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss.
16. In respect to the final condition on the provision of security for the due performance of such decree or order, the applicants on the one hand indicate their readiness and willingness to furnish the court with a bank guarantee as security to the court. On the other hand, the respondent is of the view that should an order for a stay of execution be granted, then the applicants should be ordered to pay him half the decretal sum and the balance to be deposited in a joint interest earning account of the firms of advocates representing both parties pending the hearing and determination of the appeal.
17. In the end, the motion dated September 23, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:
  - i. An order for stay of execution of the judgment and decree delivered on August 26, 2022 is granted on condition that the applicants deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates and or firms of advocates within 45 days from today, failing which the order for stay shall automatically lapse.
  - ii. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

.....

**J K SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> appellant

..... for the 2<sup>nd</sup> appellant

..... for the respondent

