



**Nyagwoka v Nyamweya (Civil Appeal E010 of 2022)
[2023] KEHC 1742 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E010 OF 2022
JN KAMAU, J
FEBRUARY 20, 2023**

BETWEEN

JARED MOSOTI NYAGWOKA APPELLANT

AND

LILIAN BOSIBORI NYAMWEYA RESPONDENT

RULING

INTRODUCTION

1. In his Notice of Motion dated 14th March 2022 and filed on 21st March 2022, the Appellant herein sought an order for stay of execution of the judgment/ decree in Nyamira CMCC NO E026 OF 2021 that was delivered on 10th March 2022 pending the hearing and determination of his appeal.
2. He swore an affidavit in support of the application on 14th March 2022. He averred that the hearing of the aforesaid case in the Trial Court proceeded ex-parte due to his non-attendance and/or that of his advocate whereupon was entered against him in favour of the Respondent.
3. He asserted that the Plaintiff's advocate only served his counsel with a Hearing Notice dated 9th November 2021 on 11th November 2021. It was his contention that the two (2) days' notice did not accord them sufficient time to prepare and attend court for the hearing. He pointed out that his counsel did not join the virtual proceedings on 27th September 2021 due to internet challenges and he had to await communication from the Respondents.
4. He was categorical that he had not admitted the Respondent's claim and that he had a good defence and sought to be given an opportunity to defend the suit. He asserted that he had a good and plausible appeal that raised serious triable issues with overwhelming chances of success as was set out in his Memorandum of Appeal.



5. He further stated that his application had been brought without undue delay in light of the circumstances of the case and that the Respondent would not suffer any prejudice, loss or damage if the orders he had sought for were granted. It was his averment that he stood to suffer irreparable loss and damage if the orders sought for were not granted. He was apprehensive that if the Respondent executed against him, it would render his Appeal nugatory.
6. He therefore urged this court to allow his application as he had a good and sufficient cause for granting of the stay of execution awaiting the hearing and determination of the appeal
7. In opposition to the said application, on May 25, 2022, the Respondent herein swore a Replying Affidavit. The same was filed on even date. She wondered why both the Appellant and his counsel missed to attend court yet virtual proceedings were eminent (sic). She was emphatic that both of them ought to have sworn affidavits to explain their non-attendance in court.
8. She contended that the Appellant did not have an arguable defence as he did not file a counter-claim and that he would not suffer irreparably as he had already paid the principal amount of Kshs 2,800,000/= and made a proposal to pay Kshs 82, 500/= as part of her costs which she rejected.
9. She was categorical that by granting the orders sought, she would be prejudiced greatly as she had spent much time and money to secure justice. She added that she stood to suffer substantially as the damage would be accelerated. She termed the present application as malicious, a waste of court's time and meant to prejudice her and urged this court to dismiss the same.
10. The appellant's Written Submissions were dated June 6, 2022 and filed on June 7, 2022 while those of the respondent were dated August 5, 2022 and filed on August 12, 2022. The ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

11. This court noted that the parties delved into great detail on the merits or otherwise of the Appeal which was strictly under the purview of the appeal. It did not therefore consider the averments and submissions that touched on the merits or otherwise of the appeal herein and restricted itself to determination of issues on whether or not the appellant had met the conditions for the granting of the orders he had sought.
12. The appellant relied on the cases of *Stephen Boro Gitiba vs Family Finance Building Society & 3 Others* Civil Application No 263 of 2009 (eKLR citation not granted) and *Visbram Ravji Halai vs Thornton & Turpin* [1990] KLR 365 where the common thread was that the High Court could only grant an order for stay pending appeal if an applicant had met the conditions that were set out in order 42 rule 6 of the *Civil Procedure Rules*.
13. He also placed reliance on the case of *Butt vs Rent Restriction Tribunal* [1979] where the Court of Appeal held that the power of the court to grant or refuse an application for a stay of execution was discretionary and the discretion had to be exercised in such a way as not to prevent an appeal and so that the appeal was not rendered nugatory. It was also held that the court would consider if there might be a better remedy at the end of the proceedings, special circumstances and unique requirements.
14. He urged this court to consider the special circumstances and the unique circumstances in determining whether or not to make an order for deposit of security as a condition for the grant of an order for stay of execution. It was his contention that asking him to deposit security would amount to penalising him for mistakes that were not of his own making. He therefore prayed that this court grant him an unconditional stay of execution pending appeal.



15. On her part, the respondent relied on several cases among them the case of *Kenya Shell Limited vs Kiburu* [1986] KLR 410 where it was held that substantial loss in its various forms, was the cornerstone of both jurisdiction for granting stay (sic) as that was what had to be prevented and therefore without such evidence it would be difficult to see why respondents should be kept out of their money.
16. She reiterated that since the appellant had tendered the sum of Kshs 2,800,000/= the principal amount and expressly agreed to pay further costs of Kshs 82,500/= excluding disbursement, he did not stand to suffer any substantial loss.
17. Right at the outset, this court noted that the Appellant had sought an order for stay of execution of the decree arising out of the Judgment of the court that was delivered on March 10, 2022(sic) pending the hearing and determination of the Appeal. It was evident that the aforesaid Judgment was delivered on November 18, 2021. What was delivered on March 10, 2022 was the ruling of the appellant's application dated 16th December 2021 in which the appellant had that sought to set aside the aforesaid Judgment.
18. Strictly speaking, the present application was defective and incompetent because the date of the Judgment did not tally with the date that was indicated in the present application and the prayer for stay of execution pending appeal was not capable of being granted as drawn. Indeed, the ruling of March 10, 2022 was a negative order and could not be stayed.
19. However, in the spirit of the provisions of article 159(2)(d) of *the Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court found it prudent to deem the date of 10th March 2022 on the face of the present application as a typographical error which was a procedural technicality.
20. In addition, this court had due regard to the provisions of Section 3A of the *Civil Procedure Act* Cap 21 (Laws of Kenya) that provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
21. It also considered Section 1A of the *Civil Procedure Act* that stipulates that:-

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”
22. This court also had at the back of its mind the need for efficient and timely disposal of the court business expeditiously within the limited judicial resources with a view to furthering the objectives of section 1A of the *Civil Procedure Act* as is stipulated in section 1B (b), (c) and (d) of the *Civil Procedure Act* that states that:-

“...the court shall handle all matters presented before it for the purpose of attaining the following aims—

 - b. the efficient disposal of the business of the court
 - c. the efficient use of the available judicial and administrative resources;



- d. the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
23. It was on that basis that this court found it prudent to determine the present application on merit. Notably, before an order for stay pending appeal under order 42, rule 6(2) of the *Civil Procedure Rules, 2010* could be granted, an applicant had to demonstrate the following:-
1. That substantial loss may result unless the order is made.
 2. That the application had been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
24. The three (3) conditions for the grant of an order for stay of execution had to be met simultaneously as they are conjunctive and not disjunctive.
25. Notably, none of the parties annexed a copy of the Judgment to determine what the decretal sum was. This court thus perused the file from the lower court and noted from the Judgment that was delivered by the Trial Court on November 18, 2021 that the Respondent herein was awarded general damages in the sum of Kshs 150,000/= plus interest and costs. It was evident from the said Judgment that the Appellant had refunded the Respondent herein a sum of Kshs 2,800,000/=.
26. In addition, none of the parties submitted on whether or not the Respondent was a person of means. Be that as it may, although the decretal sum of Kshs 150,000/= was not colossal, this very court held in *Dr G. N. Muema t/a Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another (2018) eKLR* that the rigours of recovering sums of money can amount to substantial loss because of the resources that would be put in recovering the same.
27. It was for that reason that this court found and held that the Appellant had satisfied the first condition of being granted an order for stay of execution pending appeal.
28. The ruling the Appellant wished to appeal against was delivered on November 18, 2021. The trial court had also delivered a Ruling on 10/3/2022. The present application was filed on March 21, 2022. This court found and held that a period of four (4) months from November 18, 2021 was not inordinate. There was therefore no delay in filing the said application. The court hence found and held that the appellant had satisfied the second condition for being granted an order of stay of execution pending appeal.
29. In his affidavit, the Appellant had averred that he was ready and willing to abide by any condition of this court. However, in his submissions, he sought an unconditional stay of execution pending appeal.
30. This court was not persuaded that it should grant an unconditional stay as the Appellant had not demonstrate exceptional circumstances for the grant of an unconditional stay of execution pending appeal. It was necessary to secure the Respondent's interests in the event he was unsuccessful on his Appeal. This court and held that the Appellant ought to provide security for the due performance of the decree or such order as may be ultimately binding on him.

Disposition

31. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated March 14, 2022 and filed on March 21, 2022 was merited and the same be and is hereby allowed in the following terms:-



1. That an order for stay of execution of the Judgment and Decree of Hon W.C Waswa (RM) that was delivered at Nyamira in Resident's Magistrate's Court Civil Case No E026 of 2021 on November 18, 2021 be and is hereby granted pending the hearing and determination of the appeal on condition that the Appellant shall deposit the decretal sum of Kshs 150,000/= into an interest earning account in the joint names of his advocate and the Respondent's advocates herein within thirty (30) days from the date of this Ruling.
 2. For the avoidance of doubt, in the event the Appellant shall default on Paragraph 31(1) hereinabove, the conditional stay of execution shall automatically lapse.
 3. The appellant be and is hereby directed to file and serve his Record of Appeal within thirty (30) days from the date of this Ruling.
 4. This matter will be mentioned on March 29, 2023 to confirm compliance and/or for further orders and/or directions.
 5. Costs of the application herein will be in the cause.
 6. Either party is at liberty to apply.
32. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF FEBRUARY 2023

J. KAMAU

JUDGE

