



Kan Travellers Company Limited & another v Ndalú & Savola Suing as legal representative of the Estate of the Late Zacharia Wasike) & another (Civil Appeal 149 of 2022) [2023] KEHC 2846 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 149 OF 2022
RN NYAKUNDI, J
MARCH 31, 2023**

BETWEEN

KAN TRAVELLERS COMPANY LIMITED 1ST APPELLANT

DANIEL MUGO MUIGAI 2ND APPELLANT

AND

**ROSALINE WASIKE NDALU & MARGARET KHATI SAVOLA (SUING AS
LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ZACHARIA
WASIKE) 1ST RESPONDENT**

ASTO TRANSPORTERS COMPANY LIMITED 2ND RESPONDENT

RULING

Coram: Before Hon. Justice R. Nyakundi

Torei & Company Advocates for the appellant

Rioba Omboto for the respondent

Background

1. Before me is an application for determination dated January 26, 2022 brought under orders 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* seeking for orders for stay of execution of the judgment delivered by the Honorable Naomi Wairimu in Chief Magistrate Court CMCC No 1205 of 2017 pending the hearing and determination of the application and the appeal.
2. In opposition to the said application, the respondent filed a replying affidavit dated February 2, 2023.



The Appellants' case

3. It is the appellants' case that judgement was delivered on September 30, 2022 and the trial court granted thirty (30) days temporary stay of execution on January 24, 2023. Being aggrieved by the decision of the trial court, the appellants' sought to appeal against the whole judgment.
4. The appellants/applicants contend that the appeal raises arguable issues with high chances of success and if stay of execution is denied it shall render the intended appeal nugatory and the applicants will suffer irreparable harm as they will have to pay the decretal sum. Furthermore, it is contended that if the decretal sum is paid, the applicant may not recover the sum from the respondents as both of them are persons of straw and therefore incapable of refunding the decretal sum in the likely event the appeal succeeds. Moreover, the applicants state that they are ready to pay security of costs as may be ordered by the court.

The Respondent's Case

5. It is the respondent's case that the application is frivolous, vexatious, devoid of any merit and an abuse of the court process hence the same should be dismissed with costs. She states that the intended appeal has no chances of success as the appellants/applicants have no arguable appeal.
6. The respondent contends that she is a business woman who will be able to refund the decretal sum if the appeal is decided against her. She further states that the appellants should be ordered to deposit half of the decretal sum and the other half be deposited in an interest earning joint account with the respondent.

Issues For Determination

7. The only issue I find for determination is whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
8. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
9. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 rule 6 of the [Civil Procedure Rules](#) stipulates:-

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders set aside.

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 1st 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.



10. Therefore, under order 42 rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
 1. Substantial loss may result to him unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
11. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under order xli rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial Loss

12. On this limb, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v Kibiru and another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in order xli rule 4 (now order 42 rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs....”

The learned judge continued to observe that: -

“It is usually a good rule to see if order xli rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has



to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

13. The applicants state that they stand to suffer substantial loss as the respondent is a person of straw and as such, they are apprehensive that if the decretal sum is paid, she will not be in a position to refund the same if the appeal succeeds. The respondent on the other hand states that she is a business woman and she is financially capable to repay back the decretal sum in the event the appeal succeeds. It is trite law that a mere claim that the respondent cannot refund the decretal sum is not efficient. There must be reasonable grounds provided by the applicants to show that the respondent cannot make refund of the decretal sum after which the respondent will be called upon to discharge her evidential burden. Though the respondent in the instant case did not provide evidence to show his financial capabilities nor did he swear an affidavit of means. In that regard, I do find that the applicants have not demonstrated substantial loss.

The Application Has Been Made Without Unreasonable Delay.

14. Judgment herein was delivered on September 30, 2022 and temporary stay for 30 days was granted on January 24, 2023. The instant application was filed on January 26, 2023 which was within the period of stay given by the trial court. As such, the application has been filed timeously.

Security Of Costs.

15. The applicants ought to satisfy the condition of security. In the persuasive decision of *Gianfranco Manenthi & another v Africa merchant Assurance Co Ltd* [2019] eKLR the court observed: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”



16. Similarly in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR the court stated:-

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

17. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, in their application, the applicants stated that they are willing to offer security if called upon by this honourable court to do so. The respondent on the other hand prays that if stay is granted, the court should order the applicants to pay half of the decretal sum and deposit the remainder in a joint interest earning account in the names of both parties.

18. It is worth noting that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreiz Maternity v James Karanga Kabia* civil appeal No 63 of 1991 and stated that: -

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

19. It is my considered view that on a balance of interests, since the applicants are willing to deposit the decretal sum, I am convinced that the fair balance would be for the applicants to deposit the decretal amount to a joint interest earning account.

20. In the upshot, I find this application merited and allow it in the following terms: -

- a. That stays of execution against the judgement of delivered on September 30, 2022 in CMCC No 1205 of 2017 is hereby granted.
- b. That the applicants do deposit the full decretal amount in an interest earning account in the joint names of the advocates on record for the parties within 30 days.
- c. That in default of compliance with the deposit of the decretal amount, the orders for stay will be automatically vacated.
- d. That the applicant will meet the costs of this application

It is hereby so ordered.

DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MARCH, 2023

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R. NYAKUNDI

JUDGE

