



**Nzaku v Nzaku; Kioko (Respondent) (Civil Appeal 134 of 2022)
[2023] KEHC 2577 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 134 OF 2022
MW MUIGAI, J
MARCH 28, 2023**

BETWEEN

PHILIP MUSEMBI NZAKU APPELLANT

AND

PHILIP MUSEMBI NZAKU APPELLANT

AND

BENDETAH KALEKYE KIOKO RESPONDENT

*(Being An Appeal from the Judgment delivered by Hon. Martha Opanga
(SRM) in Kangundo CMCR. Case No. 890 of 2018 on 16th August, 2022)*

RULING

Notice of Motion Dated 14th September, 2022

1. The Applicant vide a Notice of Motion dated 14th September, 2022 brought pursuant to Section 3A,79G of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 51 Rule 1 and 3 of the Civil Procedure Rules sought Orders: -
 - 1) (Spent)
 - 2) That the Hon. Court be pleased to stay execution of the judgment of trial court dated 16/8/2022 pending hearing and determination of this application.
 - 3) That the Hon. Court be pleased to stay execution of the judgment delivered by the trial court in Kangundo on 16/8/2022 pending hearing and determination of the intended appeal.
 - 4) That the Application heard inter parties on such date and time as this honorable court may direct.



- 5) That the cost of this application be provided for and the same do await the outcome of the appeal.
2. The Application is supported by the annexed Affidavit Philip Musembi Nzaku and on the following other grounds.
 - a. That judgment herein was delivered on 16th August, 2022 and the respondent was awarded liability 100% General Damages of Kshs 540,000, Special Damages of Kshs 23,000, costs and interest.
 - b. That the appellant/applicant being aggrieved and dissatisfied with the said judgment on both quantum and liability has preferred to appeal against the same.
 - c. That the lower court Magistrate did not consider the defendant's evidence on quantum and liability and sited authorities with similar injuries.
 - d. That the appellant's/applicant's appeal has high chances of success.
 - e. That the application has been presented without delay.
 - f. That the respondent herein is a person of unknown means hence the applicant/appellant is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
 - g. That the applicant/appellant has strong arguable appeal which has high chances of success.
 - h. That the application is made in good faith and the respondent will not suffer any prejudice / damage that cannot be compensated by way of costs if this application is allowed.
 - i. That the lower court granted stay of days from 16/8/2022 which stay expires on 16/9/2022 and so unless a stay of execution is granted as prayed, the applicant's application for stay pending the hearing and determination of the intended appeal will be rendered Nugatory and the applicant/appellant will suffer irreparable loss and damage as respondent may commence execution proceedings against him.
 - j. That the applicant is ready and willing and able to furnish such reasonable security for the entire decretal amount pending the hearing and determination of this application and the intended appeal.
 3. The Appellant/Applicant swore an affidavit and deposed that;– judgment was delivered on 16/8/2022 in the terms liability 100%, General Damages, Kshs 540,000, Special Damages Kshs 23,000 costs and interest; that the application has been presented without inordinate delay and he is willing to give security for the entire judgment award pending hearing and determination of this application and the intended appeal.
 4. That the Respondent is one of unknown means hence he is apprehensive that if the decretal sum is paid out the appeal will be rendered an academic exercise since the respondent will not be in a position to refund the amount; that the appeal raises pertinent issues with high chances of success; that the lower Court granted stay from 16/8/2022 which stay expires on 16/9/2022 and so unless he is granted stay of execution as prayed he stands to suffer irreparable loss and damage as the respondent may commence execution proceedings against him; that unless this application is heard and stay granted as prayed the respondent will proceed to execute against him thus rendering this application and the appeal nugatory and greatly prejudicial to him; that he prays the orders sought in the application be granted as prayed.



Replying Affidavit Dated 4th October, 2022

5. The Respondent herein filed a Replying Affidavit stating as follows:- that the said application is opposed, unmeritorious, an abuse of Court process and should be dismissed by court suo moto; that the Respondent filed the suit against the Appellant/Applicant on 2/12/2021 for damages arising out of assault by the Appellant/ Applicant; that the issue of liability was held at 100% as against the Appellant/ Applicant by the trial Court as the appellant was not only convicted in a criminal matter being Kangundo Criminal Case No. 890/18 for assaulting her and fined but the Appellant/ Applicant never called any witness to rebut his evidence on the same and her evidence at the Trial Court remains uncontroverted; that appeal by the appellant does not touch the issue of liability as his evidence before the trial Court was uncontroverted.
6. That Order 42 Rule 6 (2) of the Civil Procedure Rule, 2010 provides that no order for stay of execution shall be made unless such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the Appellant/ Applicant; That she stands prejudiced if the application is allowed because as correctly observed by the Trial Court and confirmed by both her doctor on record who examined her that she still needs further medical treatment due to the horrific injuries sustained in the assault by the applicant herein.
7. That as it stands the Respondent is and entitled to the fruits of the judgment as pronounced by the Trial Court; that Appellant/ Applicant have only filed this application in order to deny the Respondent the fruits of judgment as entered against the Appellant/ Applicant by the Trial Court; that litigation must come to an end as is this present case and the application has not raised any ground that could lead to the same being heard and determined; that this Court is to order in security, at least $\frac{3}{4}$ of the decree to be paid to the Respondent as she still goes to the hospital for checkup due to the injuries sustained in the assault.
8. If the Court allows the application, then the applicant be compelled to release the sums as quoted above and the rest to be deposited in an interest earning account in the names of her advocate and the appellant/applicant's advocate on record; that the averments that she is a person of no means that she will not be able to refund the said sum if the appeal is successful is meant to mislead the Court as the Appellant/Applicant is her cousin and knows she is in a position to refund the said sum.

Submissions

Appellant/applicant's Written Submissions

9. The Appellant/ Applicant on their submission dated 14/11/2022, raised the following issues.
 - A. Whether the appellant may suffer substantial loss unless a stay order is made?
 - b. Whether the appellant should be given more time to give or provide sufficient security for the due performance of the decree.
10. On the issue of whether the Appellant may suffer substantial loss unless a stay order is made, reliance was made in the case of Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai. 15 of 1990(1990) KLR 365, the Court of Appeal held that;

“Whereas the Court of Appeal’s power to grant a stay pending Appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 of the Civil Procedure Rules is fettered by three conditions namely establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of the security. Further the application must be made



without unreasonable delay. That the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act* the Court is no longer to the forgoing provisions. The Courts are now enjoined to give effect to the overriding Objectives in the exercise of its powers under *Civil Procedure Act* or in the interpretation of its provisions. According to Section 1A (2) of the *Civil Procedure Act*:

“The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

11. The Appellant submitted that Order 42 Rule 6 Civil Procedure Rules, 2010 sets the legal threshold to be met by the Applicant and further submitted that the substantial loss to the applicant is a subjective test that is to be determined on the basis of the facts of a particular case.
12. It is submitted that the appellant in his supporting affidavit averred that the respondent is a person of unknown means hence the appellant/applicant is apprehensive that if the decretal sum is paid out the appeal will be rendered academic exercise and the respondent may not be able to pay back the said sum upon the success of the appeal.
13. That the judgment delivered on 16/8/2022 by the lower Court was in respect of a money decree of Kshs 563,000/- which is a substantial sum in sense, it would be futile to seek its recovery after success of the appeal. Reliance was made in the case of James Wangwala & Another vs Agnes Naliaka Cheseto (2012) eKLR in which it was held that:

“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. This is what substantial loss would entail...”
14. Further, it is submitted that the Court of Appeal reinforced the centrality of substantial loss in the case of Mukuma VS Abuoga where it was stated that:-

“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
15. That the refusal to grant stay would occasion substantial loss to the appellant and also render the appeal nugatory in the event the respondent fail to pay the decretal sum awarded. That the refusal of this application would act to impugn the right to Appeal and therefore the Constitutional right to access justice under Article 48 of *the Constitution* of Kenya. Reliance was in the case of James Wangwala & Another vs Naliaka Cheseto (2012) eKLR, which stated that

“the right of appeal actualizes the right to access justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.”
16. On the issue whether the appellant should be given more time to give or provide sufficient security for the due performance of the decree, it is submitted that the law enshrine overriding objective of this Honorable Court in Section 1A of the *Civil Procedure Act*, Cap 21 ... this court is enjoined to effectuate the just, expeditious, proportionate and affordable resolution of the civil disputes that comes before it for determination.



17. The Appellant is willing to abide by the security terms of this Court and is pleading to be granted a maximum time period of 60 days to avail or bring forth the security. This is a sign of good faith the applicant is ready and willing to commit to giving security urging the court not to close its eye on it.
18. Reliance made in the case of Agro Chemical Sacco society Ltd vs Vincent Wasonga Wandey (2010) eKLR quoted Sir Johnson Donaldson in the case of Rosengrens vs Safe Deposit Centres Ltd (1984) ALLER 198 and stated.

“We are faced with a situation where a judgment has been given.it is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiff... it is our duty to hold the ring eve-handedly without prejudicing the issue pending the appeal...”
19. Also see the case of Nduhiu Gitahi & Another vs Annah Wambui Warugongo Civil Appl. No. 3 of 1998, made the following remarks:

‘ The aim is to make sure, in an even-handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The respondent is not entitled, to make life difficult for the appellant so as to attempt him into settling the appeal’. They further relied in the case of Lydia Mutune v Miriam Wambui & Another (2021).”
20. It is finally submitted that the appellant/applicant’s application for stay be granted for satisfying the requirements under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and be allowed 60 days to avail and or give security required.

Respondents Written Submissions

21. On behalf of the Respondents submissions dated 11/11/2022, reliance is made in the case of Butt vs Rent Restriction Tribunal (1982) KLR 417, the court of appeal considered the provisions of Order 41 Rule (4) (2) (now Order 42 Rule 6 (2) and held-
 - a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power.
 - b. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - c. The Court in exercising its powers under Order 41 rule 4(2) (b) (now Order 42 (6) of the Civil Procedure Rules, can only order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
22. It is submitted that the applicant must show that it will suffer irreparable damage if the application is not granted. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012 the Court of Appeal stated as follows on irreparable injury or damage:

On the second factor that the applicant must establish that he ‘might otherwise’ suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction is a threshold requirement and the burden is on the applicant to demonstrate



prima facie the nature and extent of the injury. Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual and substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount will never be adequate remedy.”

23. That the cardinal principle of law that he who alleges must prove is well captured in Sections 107 to 109 of the Evidence Act which reads as follows:

‘107

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 of the Evidence Act further provides that

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

24. The Respondent submitted that the applicant has not demonstrated any prove that the applicant will suffer any irreparable damage if ordered to pay the decretal sum to the respondent.
25. Reliance is made in the case of Kenya Shell Limited vs Kibiru (1986) KLR 410 Platt Ag. JA (as he then was) at Page 416 said as follows

“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 corner stone of both jurisdictions for granting a 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.”

26. On the part of Gachuhi, Ag JA (as he then was) at page 417:

It is not sufficient by merely stating that the sum of KShs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain



as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

27. On whether the applicant has made provisions for security; it is submitted that applicant has submitted the decretal amount with the Court to show that he will pay the same if the application is unsuccessful. That failure to put security for cost means that the applicant is only seeking for a stay with no intention of fulfilling the decretal amount should the application be dismissed.

Order 22 rule 22(3) of the Civil Procedure Rule, 2010 provides:-

“Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

28. See the case of Equity Bank Ltd vs Taiga Adams Company Ltd, Gianfranco Manenthi & Another – vs- African Merchant Assurance Company ltd [2019].
29. On whether the Respondent will suffer prejudice if this application is allowed reliance is made in the case of Machira t/a Machira & Co. Advocates East Africa Standard (No. 2) (2002) KLR 63 where the Court stated that;

“...To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

30. It is finally submitted that the Respondent should be left to enjoy the fruits of the judgment and to be compensated from the acts of the applicant which led to the horrific injuries sustained by the respondent.

Determination

31. The Court considered the application, affidavits in support and in opposition to and the written submissions and find that the issue for determination is whether the Applicant is entitled to the orders sought in the said application.
32. The application is premised on Order 42 Rules 6 of the Civil Procedure Rules, 2010 and stipulates as follows:

“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 order set aside.

- (2) 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.
33. The Applicant deposed that he is apprehensive 1st Respondent as a Decree Holder may proceed and levy execution against him that the same may render the Appeal nugatory and cause him to suffer irreparable loss and damage since the respondent has not furnished the court with any evidence as to her financial standing.
34. In Michael Kamau Kurumah and 2 Others vs Agness Mwikali Malonza HCC 181 OF 2021 that:

“However, the mere fact that the Respondent’s means are unknown to the Applicant does not necessarily mean that if the appeal succeeds, he will not be able to refund the decretal sum. It is upon the Applicant to positively and satisfactorily prove that the consequences of releasing the decretal sum to the Respondent, would be that the same would be out of reach of the Applicant and would be irrecoverable or at least very difficult to recover in the event of the successful appeal”
35. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,

“the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is paid over to him.”
36. In the foregoing, I find that both parties have shown what substantial loss they will suffer; the Appellant as it will render the appeal nugatory as the intended appeal includes challenge to both liability and quantum and the Respondent after suffering injuries arising out of a road traffic accident and obtained judgment she cannot enjoy fruits of the judgment. The stay of execution order is justified in the circumstances.
37. On the ground of time, filing of the appeal without undue delay Judgment in Kangundo CMCC No 81 of 2022 was delivered on 16/8/2022 and the current application for stay of execution pending appeal was filed on 15th September 2022. I therefore find that the application/appeal was filed within reasonable time.



38. As to the issue of whether there is an arguable appeal, the Court of Appeal in *Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 Others* (2010) eKLR stated that:

“For my part, I would hold that the applicant has satisfied me that it has an arguable and not a frivolous appeal and I would repeat the caution that an arguable appeal does not mean an appeal that will or must succeed.”

39. This Court perused Memorandum of Appeal and without going into the merits thereof, I find that the Appeal raises arguable issues that will be determined by the Appellate court.

40. With regard to the issue of deposit of security, it is a statutory mandate for obtaining stay of execution pending appeal. The Applicant made an offer to provide adequate security pending appeal being heard and determined.

This Court in *Focin Motorcycle co. vs Ann Wambui Wangui & another* Civil Appeal No 22 of 2017, observed that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

41. The Court, in *In Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co.* Advocates the Court held;

“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 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.”

Disposition

42. In the end, the Court issues the following orders;

- a. There be a stay of execution pending hearing and determination of this Appeal.
- b. The Appellants will provide security by deposit of ½ decretal sum in a joint earning interest account in the name of the advocates for the respective parties on record within Ninety (90) days from the date of this Ruling.
- c. In default of (b) the appeal shall stand dismissed
- d. By virtue of Memorandum of Appeal the appeal is deemed as filed.
- e. The Lower Court file be obtained through Deputy Registrar Machakos High Court.
- f. Record of Appeal availed filed and served by Appellant.



g. Costs shall abide in the appeal.

It so ordered.

RULING DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF MARCH, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W MUIGAI

JUDGE

