



**Mbatia v Odera (Civil Appeal E163 of 2022) [2023] KEHC 2513 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2513 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E163 OF 2022  
RN NYAKUNDI, J  
MARCH 27, 2023**

**BETWEEN**

**SAMSON MBATIA ..... APPELLANT**

**AND**

**ELIZAMA THOMAS ODERA ..... RESPONDENT**

**RULING**

**Coram:** Before Hon. Justice R. Nyakundi

Kimondo Gachoka & Co. Advocates

M/s Mwinamo Lugonza & Co. Advocates

1. The applicant approached this court vide an application dated November 17, 2022 seeking the following orders;
  1. That there be a temporary stay of execution of the judgment and decree of Kshs 546,000/= plus assessed costs and interests delivered in Eldoret CMCC No 571 of 2020; Elizama Thomas Odera v Samson Mbatia pending the hearing and determination of this application inter-partes.
  2. That there be a stay of execution of the judgment and decree of Kshs 546,000/= plus assessed costs and interest delivered in Eldoret CMCC No 571 of 2020; Elizama Thomas Odera v Samson Mbatia pending the hearing and determination of Eldoret HCCA No E163 of 2022; *Samson Mbatia vs Elizama Thomas Odera*.
  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 is premised on the grounds set out therein and the affidavit sworn in support of the same.
3. The applicant contends that the application meets the requirements set out in Order 42 Rule 6 of the Civil procedure rules as the decision he seeks to appeal was delivered on October 28, 2021 whereas the application was filed on November 18, 2022, 21 days after delivery of the judgement. Therefore, the same was filed timeously. It is his case that he has express concerns that the respondent shall not be able to refund the decretal sum in the event that the appeal does not succeed and as such substantial loss shall be occasioned. He is amenable to offer security in form of a bank guarantee.

## Decision

### The applicable law

4. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows;
  - (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.
5. The principles for considering stay of execution were set out in the case of *Giella v Cassman Brown & Co Ltd and another* [1973] EA. 358 being that, first the applicant must show a prima facie case with a probability of success at the trial. Secondly an interlocutory injunction will not be granted unless the applicant would suffer an injury, which cannot be compensated in damages. Thirdly if the court is in doubt, it should decide the application on a balance of convenience.
6. I have considered that the application was filed on November 18, 2022 which was 21 days after the impugned decision delivered on October 28, 2022 thus the same was filed without delay. I have considered the decretal sum and it is my strong view that the applicant shall suffer substantial loss if the prayers sought are not granted. The applicant has offered a mode of security and the court is satisfied that it meets the requirements for stay to be granted.
7. *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR it was held: “ the appellants need to satisfy the court on the following condition before they can be granted the stay orders
  1. Substantial loss may result to the applicant unless the order is made
  2. The application has been made without unreasonable delay and
  3. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”
8. Further in *Ujagar Singh v Runda Coffee Estates Limited* [1966] EA 263

“It is not normal for a court to grant stay of execution in monetary decree but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no know assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”



9. Beyond these in *Bonface Kariuki Wabome v Peter Nziki Nyamai & Another* [2019] ekLR it was held “In view of the foregoing, the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove.

The law is that as stated by the Court of Appeal in *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* (UR) C.A. 238/2005, the evidential burden is on the respondent to prove that he is able to refund. I am of the view that the Respondent has not discharged the burden to prove that she has resources to pay back the decretal sum. The Respondents merely stated that they are capable of repaying the decretal amount that the Court grants after hearing and determination of the Appeal if it exceeds the sum to be released to the Respondents.”

10. In view of the above principles and the substratum of the Notice of Motion filed by the applicant I am satisfied that there is merit in the remedies sought by the Applicant to warrant this court exercised discretion to order as follows:
1. That there be stay of execution of the judgment and decree of Kshs 546,000/= plus assessed costs and interest delivered in Eldoret CMCC No 571 of 2020; *Elizama Thomas Odera vs Samson Mbatia* pending the hearing and determination of Eldoret HCCA NoE163 of2022; *Samson Mbatia vs Elizama Thomas Odera*.
  2. That in the interim the Applicant to deposit the decretal sum of Kshs 546,000 in a joint earning interest account of both counsels as security deposit for due performance of the decree within 45 days from today’s date.
  3. That the Applicant to prepare, file and serve the record of Appeal upon the respondent within the same period in clause 2 above.
  4. That in default of compliance with order two (2) the stay of execution shall be deemed to have lapsed and any further execution by the respondent is enforceable
  5. That costs be in the cause.

**DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 27TH DAY OF MARCH 2023**

.....

**R. NYAKUNDI**

**JUDGE**

