



Kiilu v Askhulu & another (Suing as Personal Representative of the Estate of Deborah Shisiah Osolo & another; Milele Car Rental Services Ltd (Third party) (Civil Appeal E001 of 2021) [2023] KEHC 3388 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E001 OF 2021
FROO OLEL, J
APRIL 25, 2023**

BETWEEN

STANLEY MUTHAMA KIILU APPELLANT

AND

**JOHN WEBO ASKHULU & DAVID A OSORO (SUING AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF DEBORAH SHISIAH
OSOLO 1ST RESPONDENT**

GRACE WARUIRU 2ND RESPONDENT

AND

MILELE CAR RENTAL SERVICES LTD THIRD PARTY

RULING

1. The application before this court is the Notice of Motion application dated 15th February 2022 brought pursuant to provisions of Section 1A, 3A & 79 of the *Civil Procedure Act*, Order 42 Rule 6(2) of the Civil Procedure Rules and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is that there be a stay of execution of the judgment/decree delivered on 18th November 2022 in Kithimani SPM CC No. 310 of 2016 herein pending the hearing and determination of this appeal and that costs be provided for.
2. The application is supported by a supporting affidavit of Stanley Muthama Kiilu dated 16th February 2022, and the appellants written submissions filed in court on 22nd March 2022.
3. This application is opposed by the Respondents who filed Grounds of opposition dated 25th February 2022 and a Replying Affidavit's dated 24th February 2021 sworn by one David Osolo. They further filed written submissions on the 18th March 2022.



4. The Appellant averred that he is aggrieved by the judgment and decree dated 18th November 2021 delivered in Kithimani PMCC NO 310 OF 2016 and have subsequently filed an appeal against the said judgment. He states that he has an arguable appeal which has high chances of success and further that the said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.
5. Further, if stay is not granted, the respondents are likely to demand payment of the decretal amount which is colossal and punitive. They will also institute execution proceeding to attach his property, and therefor he will suffer substantial loss/damage and render this appeal nugatory.
6. The Applicant stated that he was ready and willing to give security for the decretal sum so ordered, but urge the court to consider the special circumstances of this case given that the appellant was merely a driver and ordinarily liability rests with the owners of the motor vehicle. Secondly, he pointed out that liability was apportioned between two parties and that meant that each party was to contribute 50% of the decretal sum. And finally that in considering the security to be imposed the court should consider a non-monetary security as the court shall have power to determine.
7. The appellant also confirm that this appeal has been filed without undue delay and similarly this application too has been brought without undue delay.
8. The Respondents did oppose this application through their grounds of opposition dated 24th February 2022 and Replying Affidavit dated the same date. They state that the Appellant has not satisfied the conditions set forth under Order 42 rule 6(2) of the civil procedure rules and consequently the orders sought should be denied as there were no special circumstances shown to warrant the granting of the orders sought.
9. The respondents further stated that the deceased family has continued to suffer anguish as a result of her death and thus the decretal sum ought to have been paid. The 1st respondent averred that he had a shamba back home in Kakamega that can fetch enough money from sales proceeds to refund the decretal sum if paid. They finally submitted that the application had not been brought with due urgency and ought to be struck out.

Appellants Submissions:

10. The Appellant in his submissions reiterated what he had stated in the application, while emphasizing the power of the court in exercising its discretion while determining applications for stay. Further he stated that there were guiding principles which the court should consider while determining an application of this nature. These were;
 - a. Proof of substantial loss may result to the applicant unless the order is made.
 - b. The application is made without unreasonable delay.
 - c. An applicant must provide such security as the court orders for the due performance.
11. On the issue of substantial loss the appellant relied on the citation of *Sewankambo Dickson V Ziwa Abby*-(HCT-00-CC-MA 178 OF 2005)(2005), Where it was stated that substantial loss refers to any loss, great or small, that is of real worth or value as distinguished from a loss or value that is merely nominal.
12. The applicant also stated that the application had been filed without undue delay and relied on the citation *Antoine Ndiaye V African virtual university* (2015) eklr



13. On the issue of security the applicant submitted that he was willing to given as ordered by court orders regarding the same, but the same ought to be considered on case to case basis. There was a possibility that the applicant could be completely exonerated form liability in this appeal as he was merely the driver of the suit motor vehicle. Given that liability was apportioned at 50% each and also considering the high decretal sum awarded, he prayed that the court does consider a non-monetary security.

Respondents Submissions:

14. The Respondents on the submissions filed averred that this application was based on insufficient grounds, was fatally defective and incompetent. They stated that the purpose of stay of execution was to preserve the subject matter in dispute so that the rights of the parties exercising their rights of appeal are safeguarded and the appeal if successful is not rendered nugatory. That the courts must weigh the rights of both parties so as not to deprive the successful litigant fruits of his/her judgment. See Rww VS Eks (2019) eklr , Machira T/A Machira & co advocates Vs East African Standard (No 2)(2002) Klr 63 & Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Millimani) Hccc 795 of 1997
15. The respondents further stated that the applicant has failed to prove substantial loss and there did not exist exceptional circumstance's which could deny the respondents the fruits of their judgment. That the applicant had not provided evidence to substantiate if indeed he will suffer substantial loss and therefor without evidence it is difficult to see why the respondents should be kept away from their money. The respondents relied on Kenya Shell Limited Vs Kibiru (1986) KLR 410
16. The 1st respondent also averred that he is a man of substance and owned a parcel of land in Kakamega which if sold could fetch sufficient sale proceeds to enable him refund the decretal sum and therefore his financial position was not precarious as alleged.
17. The final issue raised by the respondent is that a greater sense of justice would be served in striking a balance between the interest of both parties in other words a condition order of stay would be appropriate. The court should order the appellant to release one half of the decretal amount while the other half be placed in a joint interest earning account pending hearing and determination of this appeal.

Analysis & Determination:

18. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and parties' respective submissions and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
19. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant (see Butt Vs Rent Restriction Tribunal (1982) KLR 417 and James Wangalwa & Another Vs Agnes Nalika Chereto (2012) eKLR)
20. The judgment/decree appealed against was delivered on 18th November 2021. The Appeal herein was filed on 16th December 2021. Further this application filed on 17th February, 2021. The appeal was filed within a period of 30 days from the date of judgment as required by Sec 79G of the *civil procedure Act* and thus was file timeously. The application for stay of execution too was filed within two months after the said judgment was delivered and that is within a reasonable period of time.



21. On the likelihood of suffering substantial loss, it is evident that the decretal sum together with costs is a tidy sum of money. The Appellant raises reasonable grounds that the Respondent's will not be able to refund the said sum without hardship if paid out to them. I note that the Respondents have averred that they have a shamba in Kakamega which they can sell and refund the decretal sum if need be. The details of this shamba though were not provided.
22. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another (2010) eKLR* the court stated as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
23. In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR* the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
24. Guided by the above authorities if find that the respondent has not placed before court sufficient proof to show that they are in a position to refund the decretal sum if paid out. The parcel of land in Kakamega is not identified nor is it valued to enable the court make a consideration of the same. I find that the Appellant have satisfied this court that he will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
25. On the security, the Appellants have indicated that they are ready and willing to deposit the decretal amount in court but urged the court to consider the special circumstances of this case, given that the appellant was the driver of the suit motor vehicle, and ordinarily liability rests with the owner. Secondly he pleaded with court to consider a kind of security that is appropriate.
26. The Respondents on the other hand stated that the decretal sum should be paid to them as they were in a position to refund the same. Alternatively if the court was inclined to allow the appellant to offer security then he should pay half of the decretal sum due from him to the respondents and deposit the rest in a joint interest earning account
27. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his/her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008*; *Kenya Shell Ltd Vs Kibiru&another (Supreme)*; *Mukuma Vs Abuoga (1988) KLR 645*.
28. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.



29. This issue of adequacy of security was dealt with in the Court of Appeal in *Nduhiu Gitahi Vs Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

Disposition:

30. Taking all relevant factors into consideration. It would be just and proper to allow the appellant ventilated all issues raised in their appeal and have it determined on merit. Unfortunately for him he did not plead which alternative non-monetary security he wanted to deposit it court or use to enable court make a determination on the same.
31. I do grant stay of execution of the decree herein on condition that;
- a. The Appellant/Applicant do deposit the half the decretal sum of Ksh3,353,388/- into a joint interest earning account held at a reputable bank in the joint names of the appellants advocate and the respondents advocates.
 - b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - c. The costs of this Application are awarded to the Respondents.

It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 25TH DAY OF APRIL, 2023.

RAYOLA FRANCIS

JUDGE

In the presence of:-

Musya for Applicant



N/A for Respondent

C/Assistant Susan

