



**Cosmos Cars Ltd & another v Cherotich (Civil Appeal
E041 of 2022) [2023] KEHC 3766 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E041 OF 2022
JK SERGON, J
APRIL 24, 2023**

BETWEEN

COSMOS CARS LTD 1ST APPELLANT

AMOS KOECH 2ND APPELLANT

AND

YVONNE CHEROTICH RESPONDENT

RULING

1. The 1st and the 2nd Applicants filed a Notice of Motion dated 15th August, 2022 under certificate supported by the grounds laid out on its face and the facts stated in the affidavit of Amos Koech seeking for the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That this Honourable Court be pleased to order stay of execution of the judgement/decreed dated 26th July, 2022 vide Kericho CMCC No.14 Of 2020: *Yvone Cherotich v Cosmas Cars Ltd & Amos Koech* pending the hearing and determination of Kericho HCCA no 39 of 2022.
 - iv. That this Honourable court be pleased to order that the Appellant furnishes security in the form of a Bank Guarantee for the decretal sum of Kshs. 600,000/= pending hearing and determination of this Appeal.
 - v. That the cost of this application be provided for.
2. On 26th August, 2022 the court while dealing with Civil Appeal case No. 39 of 2022 directed that the respondent file a replying affidavit and serve within 14 days, that thereafter, the applicant to file written submissions and serve within 7 days and the Respondents file written submissions after 7 days



of service. The parties herein by consent agreed that the orders issued in the Civil Appeal case No.39 of 2022 apply to cases No. HCA No. 40 of 2022 and HCA No. 41 of 2022.

3. The instant motion was canvassed by way of Written submissions. It is clear from the Record that the Respondent did not file her Written Submissions.
4. The Applicants vide their Written Submissions dated 22nd September, 2022 submitted that unless stay of execution of the Judgement dated 26th July, 2022 is granted, then they stand to suffer irreparable loss as the Applicants contend that the Respondent failed to prove her case under the limb of quantum and was awarded the sum Kshs. 610,800/= which was manifestly excessive as to amount to an erroneous estimate of damages. That the Applicants have an arguable appeal with high chances of success and therefore if stay of execution is not granted, the said appeal will be rendered nugatory.
5. It was the Applicants further submission that the appeal being on quantum the same is arguable, raises serious points of law and fact that warrants the Honourable Court's intervention on appeal.
6. The applicants contended that in the application for a stay pending appeal, it is not a requirement to show that the Appeal has high chances of success, that the applicants only needs to show that they have an arguable appeal. The Applicants relied on the case of *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others* [2015] eKLR where the Court of Appeal held that:

“This Court has further held that the applicant need only prove or establish one arguable point nothing that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”

7. Consequently, the Applicants submitted that the Respondent having only sustained a fracture of the distal 1/3 ulna, an award of Kshs. 610,800/= was excessive and deserves to be relooked at hence the court should exercise its discretion to find that the Applicants have an arguable appeal.
8. On whether substantial loss will occur, the Applicants submitted that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that Applicants' Appeal succeeds. That the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing and that in their Replying Affidavit, the Respondent did not dispute the allegation nor show that she had means of paying the decretal amount in the event judgement was delivered in favour of the Applicant, the amount awarded being a colossal sum of Kshs. 610,800/=
9. The Applicants relied on the case of *Edward Kamau & another v Hannah Mukui Gichuki & another* [2015] eKLR where the court opined as follows:

“I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed. I am enjoined by the holding of the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinans Francis Wasike* Court of Appeal Civil Application No.238/2005, the Court of Appeal held: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is un reasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back



the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

10. It was the applicants’ submission that in the absence of an Affidavit of means, the Respondent’s financial status was still unknown and had not been proven hence there was a likelihood that the Respondent had no means of refunding the decretal amount and that the evidential burden shifted to the Respondent to show that she had financial resources to satisfy the decretal amount.
11. On whether the application was made without unreasonable delay, the Applicants submitted that the instance judgement was delivered on 26th July, 2022 and the Applicants filed their memorandum of appeal on 3rd August, 2022 which was well within the thirty (30) days initial stay of execution period and that an application for stay of execution pending appeal was filed on 19th August, 2022 which was about 20 days from the date of delivery of judgement hence the applicants had approached the court as soon as possible thus not guilty of laches.
12. Concerning the issue of whether the applicants are ready and willing to furnish security, the applicants submitted that paragraph 10 of their supporting affidavit provided proof that they are willing, ready and able to furnish security by providing a Bank guarantee for the decretal sum of Kshs. 610,800/= pending the hearing and determination of the instant appeal and that they were opposed to having any sum released on the grounds of liability being challenged. They relied on the case of *Susan Njuguini Gachui & another v Sophia Nyokabi Wambui* [2021] eKLR where the court observed as follows:

“The Applicants have indicated their readiness to furnish security for the due performance of the decree by offering a bank guarantee to act as security for the entire decretal amount which is an appropriate security.

In the circumstances, I do find the application dated 6th October, 2020 is merited and the same is granted as prayed subject to the Applicants furnishing a Bank Guarantee of Kshs. 200,000 within 45 days hereof. The applicants should file and serve their Memorandum of Appeal within 14 days from the date of this ruling. The costs of the application shall abide the outcome of the appeal.”
13. The applicants submitted that having satisfied all the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules*, they be granted an order of stay of execution pending hearing and determination of the Appeal.
14. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting the motion and the Appellants submissions.
15. Order 42, rule 6 (1) and (2) of the *Civil Procedure Rules* sets out the conditions to be satisfied for the grant of stay of execution pending appeal as follows:

- (1) 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) 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.

16. In the case of *Consolidated Marine v Nampijja & another*, Civil App. No.93 of 1989 (Nairobi), the Court held that:

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

17. Substantial loss is a factual issue, which must be raised and further supported by evidence. In dealing with the issue of substantial loss, I am alive to the fact that the applicants herein ought to establish that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as successful parties in the appeal.

2. In the case of *Shell Ltd v Kibiru & Another*, Civil Appeal No. 97 of 1986, Nairobi it was stated that-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the 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 pay the money.”

18. The Applicants in this matter contend that if the stay orders are not granted, they stand to suffer irreparable loss as the Applicants contend that the Respondent failed to prove her case under the limb of quantum and was awarded the sum Kshs. 610,800/= which was manifestly excessive as to amount to an erroneous estimate of damages. That the appeal being on quantum the same is arguable, raises serious points of law and fact that warrants the Honourable Court’s intervention on appeal.

19. The Applicants further contended that the Respondent’s means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that Applicants’ Appeal succeeds and the said Respondent had not disclosed nor furnished the Court with any documentary evidence to prove her financial standing.

20. I am also alive to the reality that unless the applicants are granted an opportunity to ventilate their appeal, they stand to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicants’ constitutional right to be heard on its appeal if the dispute before the same is conclusively determined.

21. In the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR the court reasoned that:

“The corner stone of the jurisdiction of the court under Order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted... 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.”

22. It is trite law that the Respondent has the burden of proof on the issue of refund of the decretal sum. In National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR, the Court of Appeal held that:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

23. In the absence of anything to indicate or ascertain the respondent’s financial capacity, I am satisfied that the applicants have reasonably demonstrated the manner in which they stand to suffer substantial loss.

24. Order 42 Rule 6(2)(b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted an order for stay pending appeal is that the party must furnish security. The applicants stated in their supporting affidavit that they are ready and willing to provide security by way of a bank guarantee for the entire decretal amount. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] stated that a Court can order security upon application by either party or on its own motion and that failure to put security for costs as ordered will cause the order for stay of execution to lapse.

25. On the purpose of security, the court in the case of Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates [2014] eKLR, held that:

“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.”

26. Bearing in mind that the nature of the security that may be deposited is left at the discretion of the Court, upon my study of the record and my consideration of the circumstances of the matter, I am of the view that the provision of a bank guarantee may not constitute the most suitable form of security in the circumstances.

27. The upshot therefore is that the Notice of Motion dated 15th August, 2022 is allowed thus giving rise to issuance of the following orders:

- i. There be an order for stay of execution of the judgment/decreed delivered on 26th July 2022, vide Kericho CMCC No.14 of 2020 and all consequential orders on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this Appeal within 45 days from today’s date. In default, the order for stay shall automatically lapse.
- ii. Costs of the Motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 24TH DAY OF APRIL, 2023.

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J.K. SERGON

JUDGE

In the presence of:

No Appearance for the Appellants

No Appearance for the Respondent

