



**Milgo v Chepkemoi (Miscellaneous Civil Application
E024 of 2022) [2023] KEHC 17737 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CIVIL APPLICATION E024 OF 2022**

RL KORIR, J

MAY 25, 2023

BETWEEN

HENRY KIPRONO MILGO APPLICANT

AND

FAITH CHEPKEMOI RESPONDENT

RULING

1. The applicant filed a notice of motion application dated July 6, 2022 which sought the following Orders:
 - I. Spent.
 - II. Spent.
 - III. That pending the hearing and determination of this application, this Honourable Court be pleased to stay execution of the Judgment delivered in Sotik SPMCC No. 63 of 2020 on 14th January 2022, the decree arising therefrom and all consequential orders against the Applicant/Appellant.
 - IV. THAT this Honourable Court be pleased to allow the Applicant leave to file his appeal out of time.
 - V. That pending the hearing and determination of the appeal filed by the Applicant herein against the determination of Sotik SPMCC No. 63 of 2020, this Honourable Court be pleased to stay execution of the Judgment delivered on 14th January 2022, the decree arising therefor mans all consequential orders against the Applicant.
 - VI. That costs of this application be provided for.



2. The Application was brought under section 3A, 79G of the *Civil Procedure Act*, order 42 rule 6, order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*, 2010. The Application was premised on the grounds on the face of the Application and further by the supporting affidavit sworn by Henry Milgo on July 6, 2022.

The Applicant's Case.

3. The Applicant stated that he was under the threat of execution from the Respondent who had a Judgment entered in her favour. That he was aggrieved by the Judgment of the trial court and he intended to file an appeal.
4. It was the Applicant's case that at the time of the accident, his vehicle was insured by Monarch Insurance Company who provided him with an advocate to oversee his case. That the advocate did not keep him informed of the progress of the case despite his repeated inquiries. It was the Applicant's further case that he was surprised when auctioneers accosted him at his home.
5. The Applicant opined that the delay in filing the appeal was due to the inadvertence or mistake of the advocate.
6. The Applicant stated that he stood to suffer a huge loss if the Respondent was allowed to proceed with the execution. That unless he was heard urgently, his appeal would be rendered nugatory and an academic exercise. The Applicant further stated that he would abide by any reasonable condition this court may impose.
7. It was the Applicant's case that the declaratory suit was highly merited and that it was only fair if he was given a chance to prosecute it without the threat of execution hanging over his head.

The Respondent's Case.

8. The respondent opposed the application through a replying affidavit dated November 24, 2022 where she stated that the trial court delivered a Judgment in her favour and awarded her Kshs 955,000/= . That it had been one year since the Judgment was delivered and owing to the nature of injuries she suffered, she continued to suffer irreparable harm as she was unable to seek further treatment due to lack of finances.
9. The respondent stated that when the judgment was delivered, the applicant was granted 30 days stay of execution which have lapsed without an appeal being filed.
10. It was the respondent's case that the intended appeal was incompetent as it did not raise any triable issues. That the applicant did not contest the issue of liability but only contested the award of general damages which was reasonable owing to the injuries she sustained. It was the Respondent's further case that the Applicant had not demonstrated any substantial loss that they would suffer if the stay of execution was not granted.
11. The Respondent opined that if the court was constrained to allow the Application, then the Applicant be ordered to release half the decretal amount to assist her get further medication and deposit the balance into a joint interest earning account in the names of the advocates. That the court imposes such further conditions it deemed fit.
12. It was the Respondent's case that this court had the jurisdiction and the discretion to order for security for the due performance of the Decree.
13. On November 28, 2022, I directed that this Application be heard by way of written submissions.



The Applicant's Written Submissions.

14. The Applicant submitted that he despite the insurance company's advocate's failure to inform him of the progress of the case, he moved swiftly to file the present Application once he was accosted by auctioneers. The Applicant further submitted that issue of filing such an application without delay depended on the circumstances of each case. He relied on *Jaber Mohsen Ali & another vs Priscilla Boit & another* (2014) eKLR.
15. It was the applicant's submission that he would suffer substantial loss. That the Kshs 750,000/= the trial court awarded to the Respondent was not a measly amount and payment of the amount would have a financial effect on the Applicant considering that he was insured and that his insurance company has gone quiet. It was the Applicant's further submission that there was no guarantee that the Respondent would be able to refund the amount if his Appeal is successful.
16. The Applicant submitted that substantial loss lay in the inability of the Respondent to refund the decretal sum in the event of a successful appeal. That he is convinced that the Respondent would be unable to refund the amount. He relied on *Antoine Ndiaye vs African Virtual University* (2015) eKLR.
17. It was the Applicant's submission that substantial loss was the loss that had to be prevented by preserving the status quo. He relied on *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR and *APAR Industries Limited vs Joe's Freighters Limited* (2015) eKLR.
18. The Applicant submitted that he was willing to provide security should the court order so. He relied on *John Odongo vs Joyce Irungu Mubatia* (2015) eKLR

The Respondent's Written Submissions.

19. The Respondent submitted that the Applicant sought stay of execution one year after Judgment had been delivered. The Respondent further submitted that she continued to suffer because her medical expenses had not been settled by the Applicant.
20. It was the Respondent's submission that the Applicant had not demonstrated sufficient grounds to show that he met the conditions for the stay of execution. She relied on *Elena Doudoladova Korir vs Kenyatta University* (2014) eKLR. It was her further submission that this Application was an afterthought and was meant to further delay the settlement of the matter and denying her the fruits of the Judgment.
21. The Respondent submitted that the Applicant had not demonstrated the prejudice he would suffer if the stay was not granted. That the Applicant should be ordered to pay half the decretal sum to the Respondent and the other half to be deposited into a joint interest earning account.
22. I have read through and considered the notice of motion application dated July 6, 2022, the replying affidavit dated November 24, 2022, the applicant's written submissions dated January 16, 2023, the respondent's written submissions dated December 23, 2022 and the only issue for determination is whether the Applicant has made out a case for the grant of the orders sought.
23. The principles upon which the court may grant stay of execution pending appeal are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 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 orders 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.

24. Thus, 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.

25. In the case of *Jamii Bora Bank Limited & another vs Samuel Wambugu Ndirangu* (2022) eKLR, Muchemi J held that: -

“These principles were enunciated in *Butt vs 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.



26. To prove substantial loss, the applicant must clearly state what loss, if any, he stands to suffer. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997, Warsame, J (as he then was) expressed himself as hereunder: -

“.....For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.....”

27. Similarly, in the oft-cited case of *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) 1 KAR 1018, the Court of Appeal stated that: -

“It is usually a good rule to see if order 41 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 jurisdiction for granting stay”

28. The Applicant submitted that he was convinced that the Respondent would not refund the decretal sum if his appeal was to be successful. That the Respondent was a person of humble means which rendered her incapable of refunding the decretal sum. The Respondent on the other hand did not submit on her ability or inability to refund the decretal sum but she only stated that she had been having difficulty accessing medical care due to financial challenges.

29. I am persuaded by Gikonyo J. in *Antoine Ndiaye vs African Virtual University* (2015) eKLR, where he held that: -

“.....The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown. See what the Court said in the case of *Machira t/a Machira & Co. Advocates vs. East African Standard (No 2)* (2002) KLR 63, that;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means....”



30. The Applicant has not demonstrated by any cogent evidence that the Respondent was unable to refund the decretal sum if the Appeal was successful. However, there was prima facie evidence that the Respondent would be unable to refund the decretal sum. The Respondent admitted that she was unable to get any further medical attention due to lack of finances. This admission created a doubt in my mind about the Respondent's ability to refund the decretal sum. It is my finding therefore that the Applicant would suffer substantial loss in the event of a successful appeal.
31. On whether the Application was made without unreasonable delay, Judgment in the trial court was delivered on 14th January 2022. The present Application was filed on 7th July 2022. The delay period is more than six months. The Applicant explained this delay by stating that he was represented in the trial court his Insurance Company's advocate who failed to update him on the progress of the case. He stated that the mistake of his advocate should not be visited upon him.
32. From the pleadings, the Applicant only filed this Application when he was faced with imminent execution. I am not convinced by the Applicant's explanation that his advocate failed to inform him of the progress of the case. He was a party in the trial court and he knew about the existence of the suit. It is equally the responsibility of the Applicant to be active in his case. It smirks of indolence from both the Applicant and the advocate.
33. The failure to get an update has not been explained well as this could have been triggered by any number of reasons. Merely claiming inaction on the part of its advocate is not sufficient reason and this is a position that was also taken by Odunga J. (as he then was) in *Dilpack Kenya Limited vs William Muthama Kitonyi* (2018) eKLR which decision I cite with approval. He stated that:-
- “In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in *Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.”
34. It is my finding that the delay in filing the present Application was inordinate and the delay has not been satisfactorily explained.
35. On the issue of security for the performance of the Decree, Nyakundi J. in the persuasive decision of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* (2019) eKLR 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.”

36. Similarly in *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* (2014) eKLR Gikonyo J. 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. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a 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.”

37. In their submissions, the Applicants stated that he was willing to offer security if called upon by this court to do so. The Respondent on the other hand prayed that if stay was granted, the court should order the Applicant to pay her half the decretal sum and deposit the other half in a joint interest earning account.

38. I am minded that the power to grant the stay is discretionary. The justice of this case demands that I balance the interest of both parties. On one hand, I should not drive away the Applicant from having his day in court and on the other hand, I should not frustrate the Respondent who has a Judgment and should be enjoying its fruits. *In Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held 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 judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. 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 courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

39. In the final analysis and in view of the above, it is my considered view that on a balance of interests, since the Applicants is willing to deposit the decretal sum and the Respondent is amenable to half the decretal sum being deposited, I am convinced that the fair balance would be for the Applicants to pay



the Respondent half the decretal sum and deposit the balance in a joint interest earning account in the name of the parties' advocates.

40. Consequently, I find that this Application has merit and allow it in the following terms: -
- i. That stay of execution against the Judgement delivered on January 14, 2022 in Sotik Magistrate's Court Suit No. 63 of 2020 is hereby granted.
 - ii. That the Applicant shall pay the Respondent half the decretal amount and deposit the other half in an interest earning account in the joint names of the advocates on record for the parties within 30 days of today.
 - iii. The Applicant is hereby granted leave of 30 days to file his Appeal.
 - iv. That in default of compliance with the payment and deposit of the decretal amount, the order for stay will be automatically vacated.
 - v. That should the Applicant fail to file his Appeal within 30 days, the order for stay will be automatically vacated.
 - vi. That the Applicant will meet the costs of this application

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 25TH DAY OF MAY, 2023

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr.Maina for the Applicant, N/A for the Respondent and Siele (Court Assistant)

