



REPUBLIC OF KENYA



Okoth (Suing as the Legal Administrator of the Estate of Teresa Achieng Nicholas-Deceased) v Jubilee Insurance Company Limited (Civil Case E002 of 2022) [2023] KEHC 21076 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL CASE E002 OF 2022
KW KIARIE, J
JULY 31, 2023**

BETWEEN

HENRY OKOTH (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF TERESA ACHIENG NICHOLAS-DECEASED) PLAINTIFF

AND

JUBILEE INSURANCE COMPANY LIMITED DEFENDANT

RULING

1. Jubilee Insurance Company Limited the applicant herein, brought two applications by way of Notice of Motion. The first is dated 18th April 2023. It was brought under sections 3, 3A & 63e of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rules 1, 3 & 13 of the *Civil Procedure Rules*. The following orders are being sought:
 - a. That this application be certified as extremely urgent service thereof be dispensed with in the first instance. [Spent]
 - b. That there be a temporary stay of execution of the Ruling/decision dated March 21, 2023 herein and all consequential orders emanating therefrom including proclamations and warrants of attachment pending the hearing and determination of this application inter partes.
 - c. Costs of the application be provided for.
2. The application was premised on the following grounds:
 - a. That the Ruling/decision in favour of the respondent/plaintiff was delivered on March 21, 2023.
 - b. That the applicant /defendant has already filed notice of appeal to the intended appeal to Court of Appeal and requested for proceedings and Certified copy of Ruling.



- c. That it is likely that the typed proceedings and certified copy of the ruling will take time to be supplied to enable the defendant to compile a record of appeal.
 - d. That the preparation of the record of appeal will take time to be prepared.
 - e. That the appeal to be filed to the court of appeal has serious triable issues both in law and fact with overwhelming chances of success.
 - f. That there is no stay of execution in place and there is likelihood and danger that the plaintiff may at any time proceed with execution.
 - g. That the applicant/defendant is ready and willing to abide by any terms and/or conditions that might be given by the court in granting this application.
 - h. That no prejudice shall be occasioned on the part the plaintiff if this application is granted.
3. The second application is dated April 28, 2023. The orders being sought are as follows:
- a. That this application be certified as extremely urgent service thereof be dispensed with in the first instance. [Spent]
 - b. That there be a temporary stay of execution of the ruling/ decision dated March 21, 2023 herein and all consequential orders emanating therefrom pending the hearing and determination of the intended appeal to be filed in the court of appeal.
 - c. That there be a stay of execution of the ruling/decision dated 21st March herein and all consequential orders emanating therefrom pending the hearing and determination of the intended appeal to be filed in the court of appeal.
 - d. Costs of the application be provided for.
4. The application was premised on the following grounds:
- a. That the ruling/decision in favour of the respondent/plaintiff was delivered on the March 21, 2023.
 - b. That the applicant/defendant has already filed notice of appeal to the intended appeal to court of appeal and requested for proceedings and certified copy of the ruling.
 - c. That it is the likely the typed proceedings and certified copy of ruling will take time to be supplied to enable the defendant to compile a record of appeal.
 - d. That the preparation of the record of appeal will take time to be filed.
 - e. That the appeal to be appeal filed to the court of appeal has serious triable issues both in law and fact with overwhelming chances of success.
 - f. That there being no stay of execution in place, the plaintiff has already proclaimed the defendant's properties and there is likelihood that its properties may be carted away any time now and there is likelihood and danger that the plaintiff may at any time proceed with execution.
 - g. That no prejudice shall be occasioned on the part of the plaintiff if this application is granted.
5. The respondent opposed the application and raised the following grounds:



- a. That the instant application is free frivolous, vexatious, unmeritorious and untenable in law and/or lacks in legal basis: the same ought to be dismissed in limine;
- b. That the respondent objects to applications as they offend the principles guiding grants of stay of execution pending appeal which was well provided for pursuant to Order 42 Rule 6(1), (2) and Rule (4) of the Civil Procedure Rules and Rule 77(2) of the *Court of Appeal Rules, 2022* to the extent that: -
 - i. The applicant has not demonstrated to the court to what extended they shall suffer substantial loss if the execution proceeds.
 - ii. The applicant has not demonstrated to the court that they have the decretal amount and costs of the suits ready, and they are willing to deposit the same to court should the court issue conditional stay;
 - iii. Further the application has been brought with the unreasonable delay as the instant applications was an afterthought and was motivated and /or informed by the fact that the decree holder proceeds with the execution of the decree to recover the decretal amount and costs;
 - iv. The applicant has not complied with the provisions of Rule 77(2) of the Court of Appeal Rules, 2022 as the notice of appeal was filed out of time as contemplated under the said Rules. The said notice of appeal is therefore incompetent and cannot be relied upon by the applicant as basis for the intended appeal, as there are no orders made for its validation neither has the applicant approached the court for leave to file the same out of time. The notice of appeal is thus defective and incompetent and the same demonstrates that the applicants have no intentions of lodging an appeal having secured no orders for leave.
- c. That further to the afore mentioned, it is trite law that stay of execution is granted when the applicants demonstrate sufficient cause which is contrary to our instant case as the judgement debtor has failed to demonstrate any sufficient cause to warrant stay of execution of the decree and costs herein. The reasons given by the judgement debtor does not meet any threshold thereof and less to say, the intended appeal via the notice of appeal filed by the applicant is irregular.
- d. That it is established in law that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute, in this case the decretal amount and the cost awarded by the court; and the applicant has not demonstrated to the court in balancing his right of appeal, that they have the total amount being the decretal amount and cost readily available to safe guard also the rights of the Decree holder who should not =be deprived the fruits of his judgement. The Decree holder/respondent calls upon the court to ensure that he does not suffer prejudice when determining these applications.
- e. That the applications bear incurable defects and offence the rules of procedures which are the handmaidens of justice as the applicant files the notice of appeal out of the prescribed timeliness, which they rely on to demonstrate to this court that they intend to lodge an appeal to the Court of Appeal; further, there is no substantive appeal duly filed. The applications have no competent, tenable appeal to warrant this honourable court the discretion to order stay of execution of the judgement since there are no memorandum of appal file in court and the notice of appeal as filed failed to comply to the law on timeliness.



- f. That these instant applications are abuse of the court process and has no substance as the threshold for granting the orders has not been satisfied. They have not filed a substantive appeal and annexed the memorandum of appeal to the application to enable the court to appreciate the intentions the applicant has towards, indeed, filing the purported appeal. Further, the court cannot appreciate if at all the intended appeal raises any triable issues with high chances of success or not. It is the respondent's opposition that even if the court disallows the instant applications, there is not substantive appeal that will be rendered nugatory since none will proceed for determination.
- g. That in as far as these applications are concerned; the lethargy depicted by the applicant in pursuing this matter completely disentitles them from asking the court to exercise its discretion in its favour, the averments made in the said applications are lies infested and are not grounded on any evidence neither have they been substantiated, further, applicant has failed to keep the court abreast that through their counsel on record, they did offer to have the matter settled post judgement via telephone conversation, hence they irregularly purported intended appeal which has been an afterthought to justify the instant applications and deprive the decree holder from enjoying the rights to the fruits of his judgement.
- h. That the application has been filed in bad faith since the applicant stays informed that pursuant to Section 27 of The *Civil Procedure Act*, they are reliable to pay costs which informed the basis for the instant suit culminating into the decree the applicant purports to appeal against. The applications therefore amount to an abuse of the court processes and their sole purpose and intention thereof, is to continue dragging the parties herein to a protracted legal battle in a matter that should have determined had the applicant paid cost in Homa Bay High Court Civil Appeal No. 3 of 2017.
- i. That the orders as framed in the said application dated April 18, 2023, and particularly orders under paragraph C of the said application, cannot issue as the applicant has neither filed an appeal nor demonstrated to do so. The respondent at the court cannot be held hostage by the applicant who has no intentions of filing a substantive appeal. Further, should the court issue such orders and the applicant fail to file the appeal as they claim to intent, the decree holder will be greatly prejudice as they will be subjected to wait in eternity. Therefore, the applications are unnecessary and made to disrupt the course of justice.
- j. That from the foregoing, therefore, the applications have drawn are not worthy of a grant of the orders sought therein and deserves to be dismissed with costs.
6. Rule 77 (1) & (2) of the Court of Appeal Rules, 2022 provides as follows:
- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
- (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.
7. The impugned ruling was delivered on March 21, 2023 and the Notice of Appeal is dated March 24, 2023. This was within the stipulated time.
8. It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the Civil Procedure Rules states 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 appeal case of 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.
9. In the case of *RWW vs. EKW* [2019] eKLR, the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:
- The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
10. In the instant case, in the interest of justice, I will allow the applications on conditions that the applicant/appellant deposit the decretal amount in an interest earning account in the joint names of the advocates on record within 30 days of this ruling. Failure to comply, the respondent may be at liberty proceed with execution.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

