



REPUBLIC OF KENYA



Kiprop v Wafula (Civil Appeal E175 of 2022) [2023] KEHC 20865 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E175 OF 2022
RN NYAKUNDI, J
JULY 28, 2023**

BETWEEN

ABEL KIPLIMO KIPROP APPLICANT

AND

EMMANUEL WAFULA RESPONDENT

(Eldoret HCCA No. E175 OF 2022)

RULING

1. Before me for determination is the Applicant's Notice of Motion dated 24/11/2022 and filed in Court on 1/12/2022 seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That there be a temporary stay of execution of the judgment and decree of Kshs.206,000/=plus assessed costs and interest delivered in Eldoret SCCC No. E148 of 2022; Emmanuel Wafula Vs. Abel Kiplimo Kiprop pending the hearing and determination of this application inter-partes.
 4. That there be stay of execution of the judgment and decree of Kshs.206,000/=plus assessed costs and interest delivered in Eldoret SCCC No. E148 of 2022; Emmanuel Wafula Vs. Abel Kiplimo Kiprop pending the hearing and determination of Eldoret HCCA No. E175 OF 2022; Abel Kiplimo Kiprop V Emmanuel Wafula.
 5. That as a condition of 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.



6. That the costs of this application be provided for.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Abel Kiplimo Kiprop, the Applicant on 24/11/2022.

The Applicant's case

3. The Applicant case is that on 28/10/2022, judgment was delivered in favour of the Respondent in Eldoret SCCC No.150 of 2022 where by the Respondent was awarded Kshs.200,000/= as general damages, Kshs.6,000 as special damages plus costs and interests thereon. Liability was assessed at 80%: 20% in favour of the Respondent.
4. Aggrieved by the said judgment the Applicant has since lodged an appeal against the findings on both liability and quantum.
5. The Applicant contended that the financial ability is unknown and thus in the event the appeal succeeds then the likelihood of the Respondent to refund the decretal amount is unknown. The Applicant is apprehensive that he stands to suffer substantial loss and that the appeal is likely to be rendered nugatory if stay orders are not issued.
6. The Applicant is willing and ready to offer security in the form of a Bank Guarantee issued by Family Bank Limited.

Respondent's Case

7. The application is opposed. The Respondent filed a Replying Affidavit dated 6th December, 2022, in which he deposed that this instant application has been made in bad faith and with the view of denying him from enjoying the fruits of his judgment.
8. The Respondent contends that the mere filing of an appeal does warrant the issuance of orders of stay of execution.
9. The Respondent maintains that the Applicant has not demonstrated to this Court the substantial harm he is likely suffer if stay orders are not granted.
10. The Respondent further deposed that the averments by the Applicant that he would not be able recover the decretal amount in the event that the appeal succeeds are unsubstantiated.
11. The Respondent is agreeable to the security being provided by the Applicant in the form of a Bank Guarantee. The Respondent is apprehensive that he has no control over the agreement that was entered into between the bank and the Applicant herein.
12. The Respondent contends that from a cursory look, the Memorandum of Appeal does not show any high chance of success and thus issuance of the orders sought will only be an exercise in futility.
13. The Respondent maintains that in event that this Court decides to grant the Applicant orders of stay of execution, then the Applicant should pay three-quarters of the decretal amount.
14. The Respondent urge the Court to dismiss this instant application with costs.

Determination

15. I have carefully considered the application for stay, grounds thereof, supporting affidavit and the response thereof. The main issue for determination is whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited.



16. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(1) of the Civil Procedure Rules 2010 which stipulates as follows:

"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.

17. 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.
18. The power of the court to grant stay of execution pending appeal is a discretionary.
19. In the case of *Halai & Another -v- Thornton & Turpin* (1963) LTD, [1990] KLR 365, the Court of Appeal held *inter-alia*: -
- "The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."
20. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
21. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.
22. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.



23. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

24. The Applicant herein is apprehensive that the Respondent would not be a position to refund the decretal amount in the event that the appeal succeeds and thus he would suffer substantial loss. Unfortunately, the Respondent save for mentioning that the Applicant's claims regarding the refund of the decretal amounts were unsubstantiated, he did not make an effort to show that he would be a position refund the said amount in the event that the appeal succeeds. The Applicant on the other hand is willing and ready to furnish the court security in the form of a Bank Guarantee issued by Family Bank Limited.

25. Regarding the issue of Security, it is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. There is an agreement exhibited between Family Bank and the directors of Directline Assurance Company Limited, who are the insurers of the Applicant. The same is for a sum of Kshs.50,000,000/=. After keenly perusing the said agreement I note that the Applicant is not a party to the said agreement and that there is no evidence that the said guarantee is for the benefit of this matter specifically.

26. This application was timeously filed.

27. Having carefully considered the instant Application, the Court finds and holds that the Applicant has met the threshold to warrant the Court exercise of its discretion in its favour.

28. In the end the Notice of Motion dated 24th November, 2022, is found to be meritorious. Consequently, I allow it in the following terms: -

- a. That stay of execution against the judgement of delivered on 28th October, 2022 in Eldoret SCCC No. 148 of 2022, is hereby granted.
- b. That the Applicant do deposit the full decretal amount in an interest earning account in the joint names of the parties Advocates on record for the parties within 45 days.
- c. That in default of compliance with the deposit of the decretal amount, the orders for stay will be automatically vacated.
- d. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JULY 2023.



In the Presence of

Mr. Wanyonyi for the Respondent

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R. NYAKUNDI

JUDGE

