



**Ali v Sanghani t/a Sanghan & Sons & 3 others (Civil Appeal
E014 of 2022) [2023] KEHC 21164 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E014 OF 2022
TM MATHEKA, J
JULY 26, 2023**

BETWEEN

MOHAMED ALI APPELLANT

AND

**NARENDRA KARSAN SANGHANI T/A SANGHAN &
SONS 1ST RESPONDENT**

SANG MARK 2ND RESPONDENT

RICKFIELD ENGINEERING LTD 3RD RESPONDENT

AHMED MOAMED LIBAN 4TH RESPONDENT

RULING

1. What is before me is the application dated February 22, 2023, filed under certificate of urgency and brought under Section 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law. It seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this honorable Court be pleased to grant temporary orders of stay of execution of the judgment and decree of Hon F Makoyo (PM) in Civil Suit No 29 of 2018 at Kilungu Law Courts delivered on January 30, 2023 pending the hearing and determination of the applicant's appeal herein.
 - d. That the costs of this application be provided for.
2. The application is supported by the grounds on its face and the applicant's Affidavit sworn on the same day. He depones that judgment was entered in favour of the 1st respondent against him for a sum



of Kshs 1,561,204.04/=. That he requested for copies of proceedings, judgment and decree through a letter dated February 21, 2023 and he was issued with a copy of the judgment on February 22, 2023. The judgment and letter are exhibited as MA-1 & 2 respectively. He depones that he is yet to be supplied with certified copies of proceedings and decree.

3. He depones further that his oral application for a 30-day stay of execution was granted on January 30, 2023. That appeal is arguable and has a high chance of success hence he will suffer irreparable harm if the orders sought herein are not granted as he will not be able to recover the money from the 1st and if the respondent executes then the appeal will be rendered nugatory. And in any event no prejudice will be suffered by the respondents if the order of stay is granted. The memorandum of appeal is exhibited as MA-3.
4. The application is opposed through the 1st respondent's replying affidavit sworn on March 3, 2023. He depones that the application is incompetent and the plaintiff lacks the necessary locus to seek the orders. That it is premature as no execution has ensued. Further, he depones that the applicant has not demonstrated the substantial loss he is likely to suffer if the orders are declined.
5. He depones that contrary to the applicant's deposition, he will suffer prejudice as the compensation adjudged by the court will be in jeopardy. That he has a right to enjoy the fruits of his hard earned judgment and there is no reason why he should be kept waiting. That in the very unlikely event of the application being allowed, it should be on condition that the applicant pays half of the decretal amount and deposit the balance in a joint interest earning account of the advocates within 14 days.
6. The application was canvassed through written submissions.

The Applicant's Submissions

7. Relying on Order 42 Rule 6(2) of the *Civil Procedure Rules* and the case of *Kiplagat Kotut Jebor Kipngok* (2015) eKLR, he submits that;
 - a. The application must be brought without undue delay,
 - b. The applicant must satisfy the court that substantial loss may result if the order is not granted,
 - c. The applicant must furnish such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
8. The applicant submits that there was no undue delay as he filed the application before the lapse of the 30 days' stay granted by the lower court. He relies on the case of *Utalii Transport Company Ltd & 3 Others vs NIC Bank Ltd & Anor* (2014) eKLR where the court held;

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of each case; the nature of each case, the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality.”

9. With regard to substantial loss, he submits that the appeal will be rendered nugatory if the respondent executes. That in his replying affidavit, the respondent has not stated whether he is willing and capable



of repaying the judgment sum if the appeal succeeds. He relies on the case of Cynthia Achieng' Marere vs Athanas Shibwom Asiavugwa [2015] eKLR where the court stated;

“On the issue of loss, it was the Appellant’s statement that there is a real danger of execution which if undertaken, shall occasion the Appellant substantial loss since the appeal shall be rendered nugatory. The respondent did not contend that it has no intention of commencing execution. If execution is undertaken, then for sure the appeal hearing will be an exercise in futility and shall be rendered nugatory which shall amount to loss on the part of the appellant.”

10. With regard to security, he submits that he is ready to furnish an amount of Kshs 250,000/ within sixty (60) days.
11. I did not find the respondent’s submissions on record.
12. From the foregoing, the only issue for determination is whether the application is merited;

Whether stay of execution should be granted

13. Order 42 Rule 6 of the Civil Procedure Rules, lays down the conditions precedent to the grant or orders of stay pending appeal; are; whether the applicant will suffer substantial loss will occur if stay is not granted, whether the applicant has brought the application without unreasonable delay and whether the applicant has furnished security for the due performance of the decree.
14. Judgment by the trial court was delivered on January 30, 2023 and this application was filed on February 22, 2023. The application was filed within the requisite period hence there was no delay.
15. It is argued for the applicant that the sum involved is substantial and if the same is excused for the respondent may not be in a position to refund the same in the event the appeal is successful. From the Memorandum of Appeal, the applicant contests liability, and the awards of general and special damages. There is no evidence as to the capacity of the respondent to refund the same should the appeal succeed and the applicant’s apprehension is not farfetched.
16. The respondent has offered to as for security to deposit the sum of Kshs 250,000/= within 60 days as against the respondent’s deposition that half the decretal sum be released to him while the other half be deposited in an interest earning account.
17. I have perused the Judgment of the subordinate court together with the memorandum of appeal. There is no dispute that an accident happened. The contest is whether or not the applicant was wholly to blame, and whether or not the respondent proved material damage of the m/vehicle to warrant the award that was made. The applicant has offered security but in my view and in the light of the award made it is on the lower side. In my assessment it would be fair for the appellant to deposit half the decretal sum in a joint interest earning account in the names of both counsel on record.
18. The final orders then are that;
 - i. That a temporary order of stay of execution of the judgment and decree of Hon. F. Makoyo (PM) in Civil Suit No 29 of 2018 at Kilungu Law Courts delivered on January 30, 2023 pending the hearing and determination of the applicant’s appeal herein be and is hereby issued.
 - ii. That half the decretal sum be deposited in a joint interest earning account in the names of both advocates within 60 days hereof
 - iii. In default of (ii) above the stay order to lapse automatically



iv. That the costs of this application to abide the appeal.

19. Orders accordingly

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JULY 2023

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Mumbua T. Matheka

Judge

CA Kyanga Mwiwa

Applicants' Advocates

Jackline Githaiga & Co Advocates

Respondent's Advocates

Chamwada & Co Advocates

