



Salim N. Yamani t/a Mbao & Allied Enterprises Limited v Jubilee Insurance Company of Kenya Limited (Civil Appeal E830 of 2022) [2023] KEHC 21463 (KLR) (Civ) (14 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E830 OF 2022
AN ONGERI, J
AUGUST 14, 2023**

BETWEEN

**SALIM N. YAMANI T/A MBAO & ALLIED ENTERPRISES
LIMITED APPELLANT**

AND

JUBILEE INSURANCE COMPANY OF KENYA LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 24/11/2022 brought under order 51 rule 1 and 40 (1), (1), (3) and (4) of the civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act chapter 21 Laws of Kenya, the Inherent powers of the court and all enabling provisions of the Law and section 299 (a), (b), 25(1) and 35(1) of the Land Registration Act 2012 Laws of Kenya seeking the following orders
 - i. spent
 - ii. That this honourable court be pleased to issue interim orders staying execution of the judgment and decree delivered by Hon. E. M. Kagoni (PM) on 1st September, 2022 pending the hearing of this application interpartes.
 - iii. That after the interpartes hearing this honourable court be pleased to stay execution of the judgment and decree issued by Hon. E. M. Kagoni (PM) and the certificate of costs dated 12th October, 2022 pending the hearing of the appeal filed herewith.
 - iv. That the costs of this application be provided for.



2. The application is based on the grounds on the face of it and supported by the affidavit of the applicant Salim Yamani sworn on 24/11/2022 in which he deposed that judgement in CMCC No. 6609 of 2022 was delivered on 21st September 2022 in favour of the respondents herein and the applicant being dissatisfied with the judgement preferred an appeal before this court which has a high chance of success.
3. He deposed that the nature of the suit at the magistrate's court was a breach of terms of contract which led to the respondent refusing to pay a legitimate hospital bill. He added that he is still ailing and requires further treatment and financial support.
4. The respondent filed a replying affidavit sworn on 6/2/2023 by the respondent's legal officer Sarah Oneya in which she deposed that judgement dismissed the applicants suit as it was devoid of merit. The judgement and the resultant orders were hence negative in nature and therefore incapable of execution save for orders for costs.
5. She further averred that the application is not meritorious as the appeal is not arguable, the applicant has not established substantial loss and has failed to offer security. That in view of the foregoing the applicant has thus failed to satisfy the prerequisites of the orders sought.
6. The parties filed written submissions as follows; the applicant submitted that execution is a lawful process and the respondent having been awarded costs is fully entitled to execute. The applicant argued that he has a right to appeal which has been filed promptly and timeously. That further he is willing to abide by the directions of the court as regards security.
7. The respondent submitted that there is no decree before this court that is capable of being stayed as the appellant's case was dismissed with costs and only a certificate of costs was issued. In support they cited the court of appeal in [Jennifer Akinyi Osodo v. Boniface Okumu Osodo and 3 others](#) [2021] eKLR where the court held that;

“With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated July 30, 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:

“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

Similarly, in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not



an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

8. The respondent argued further that the appeal is not arguable and is a weak one with a minimum chance of success. The applicant has not explained how the failure to grant the orders sought would render the appeal nugatory or cause substantial loss. That further the applicant has failed to offer security for costs for the due performance of the certificate of costs.
9. The respondent added that judgement was delivered on September 21, 2022 and the application was filed on November 24, 2022. There was therefore a delay that the applicant has not explained which constitutes undue delay. That consequently the applicant has failed to satisfy the requirement for the grant of stay and the application must therefore fail.
10. The sole issue for determination is whether the applicant is entitled to stay of execution pending appeal.
11. The governing principle in order 42 rule 6 which 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.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the Applicants 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 Applicants”.
12. In an application for stay, the 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.
13. The appellant’s suit was dismissed. There is no monetary decree to warrant deposit of security for costs.
14. It is in the interest of justice that the appellant be granted an opportunity to exercise his right of appeal.
15. I grant the applicant stay pending appeal on condition that the appeal be prosecuted within 60 days of this date.



16. The costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
14TH DAY OF AUGUST, 2023.**

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A. N. ONGERI

JUDGE

