



REPUBLIC OF KENYA



KENYA LAW
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**Kamanu v Kahono (Civil Appeal E119 of 2022)
[2023] KEHC 22875 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E119 OF 2022
SM MOHOCHI, J
SEPTEMBER 29, 2023**

BETWEEN

HENRY KARIUKI KAMANU APPELLANT

AND

MOSES WANYIRI KAHONO RESPONDENT

RULING

1. On the February 28, 2023 this matter came up for mention where parties by consent agreed that the Appellant shall deposit 95% Kshs 342, 543/- of the Principal Sum (kes 360,572/-) in a joint interest earning account in the names of both law firms on record, within 45 days and in default execution was to issue. The Court further fixed a mention date after the 45 days on the 27th of April 2023 and when the matter came up for mention the Appellant had failed without any reason to comply and the Appellant duly sought the lifting of the order of stay against judgment/decree in Nakuru CMCC 625 of 2018
2. The Appellant failed to attend the mention on the 27th of April 2023 and despite their absence the Court directed that parties file written submissions' as to why the Court should vacate order of stay against judgment/decree or why it should not. Parties had 14 days to file the same.
3. The Appellant has not filed any written submissions while the Respondent filed its written submissions that I find persuasive.
4. Stay of execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides 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 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 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.

(3) Notwithstanding anything contained in sub rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

5. A cursory reading of the above section infers that the power of a Court to grant stay of execution is discretionary. The Court does have power to deny the same or vacate the same when a party fails to abide by the mandatory requirements outlined by the law.

6. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in [*RWW vs EKW*](#) (2019) eKLR stated as follows on the issue: -

- i. "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.
- ii. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however must balance the interests of the Appellant with those of the Respondent."

7. Furthermore, the Court of Appeal in [*Visbram Ravji Halai vs, Thornton & Turpin*](#) Civil Application No, Nairobi 15 of 1990 [1990] eKLR, outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the [*Civil Procedure Rules*](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

8. The Respondent submits that, the Appellant has failed to fulfill the third requirement of furnishing security when seeking stay pending appeal. As was held by the Court of Appeal the High Court's jurisdiction to grant stay is fettered by Order 42 rule 6 and we opine that failure by the Appellant



to abide by these requirements implies that this Court should not grant the stay and the said orders should be vacated.

9. The applicant ought to satisfy the condition of furnishing security. In the persuasive decision of *Gianfranco Manenthi & Anor Vs Africa Merchant Assurance Co Ltd* 120191 eKLR the Court observed: -

- i. "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.
- ii. 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...
- iii. Thus the objective of the legal provisions on security was never intended to better 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."

10. Having failed to fulfil a condition precedent for the grant of the stay order, the Appellant cannot continue to enjoy the same. This Court thus finds that the Appellant is undeserving of an order of stay against the execution of Judgment.

11. In the circumstances, this Court allows the Respondent's plea as follows: -

- a. The Order of Stay against judgment/decree in Nakuru CMCC 625 of 2018 is hereby vacated.
- b. The Respondent is free to proceed with execution.
- c. Costs of the Application dated November 25, 2022 are awarded to the Respondent.

It is so Ordered.

DATED, SIGNED AND DELIVERED IN NAKURU ON THIS 29TH DAY OF SEPTEMBER, 2023

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MOHOCHI S.M

JUDGE OF THE HIGH COURT

