



REPUBLIC OF KENYA



KENYA LAW
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**Ojwang v Maalim (Civil Appeal E112 of 2022)
[2023] KEHC 22779 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E112 OF 2022
RPV WENDOH, J
SEPTEMBER 29, 2023**

BETWEEN

ALLAN ROBERT OJWANG APPLICANT

AND

KERROW MAALIM RESPONDENT

RULING

1. The applicant, Allan Robert Ojwang, filed the Notice of Motion dated 29/9/2022 seeking the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That this court be pleased to grant an order of stay of execution of the judgement/decree delivered on 12/9/2022 pending the hearing and determination of the appeal in Migori High Court Civil Appeal No. 112 of 2022;
 - d. That upon grant of prayer no. 3 above, this court be pleased to order that the applicant do provide security in the form of a suitable bank guarantee from a reputable financial institution to secure the judgement delivered on 12/9/2022;
 - e. Costs of this application be in the cause.
2. The application is premised on the grounds on its face and the supporting affidavit of Allan Robert Ochieng, the applicant herein. The applicant deposed that judgement in Migori CMCC No. 83 of 2020 was delivered on 12/9/2022; that liability was entered at 100% against the defendant, general damages of Kshs. 1,000,000/=, costs and interest of the suit. The applicant contended that he was aggrieved by the said judgement and decree on quantum and liability and instructed his Counsel to file a memorandum of appeal which was filed on 3/10/2022.



3. It was deposed that his insurer Directline Assurance Limited is ready and willing to furnish security by providing a bank guarantee security for the whole decretal sum; that unless this application is heard and stay granted, the respondent will proceed with the execution and render the application together with the intended appeal nugatory.
4. The application was opposed. The respondent filed a replying affidavit dated 17/10/2022. The respondent deposed that if the application is allowed, he will suffer irreparable harm as he has incurred expenses costs of prosecuting this suit; that she is a businesswoman of means and the applicant's apprehension does not hold water; that it would be just and reasonable to release at least half of the decretal sum awarded as general damages being Kshs. 500,000/=. The respondent urged the court to find that the application is bad in law, an abuse of the court process and it should be dismissed with costs to the respondent.
5. Directions on the hearing of the application were taken and it was canvassed by way of written submissions. The applicant filed written submissions dated 24/1/2023 and the respondent filed written submissions dated 11/1/2023. I have duly considered both submissions.
6. The applicant is asking for orders of stay of execution pending the hearing and determination of the instant appeal. Order 42 Rule (6) (1) and (2) of the [*Civil Procedure Rules*](#) provides for stay pending appeal. An applicant must establish the following before grant of the orders: -
 - a. He shall suffer substantial loss if stay is not granted;
 - b. That the application has been filed without unreasonable delay;
 - c. The applicant is willing to furnish security for the due performance of the decree;
 - d. The applicant has an arguable appeal.
7. On whether the applicant will suffer substantial loss, substantial loss is the cornerstone for granting a stay. It is what has to be prevented. In [*Kenya National Highways Authority vs Ahmednasir Maalim Abdullabi*](#) (2020) eKLR it was held: -

“It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.”
8. The applicant argued that if a stay order is not issued, the respondent will proceed to execute and since his means are unknown, the respondent will not be capable of refunding the decretal amount in the event the appeal succeeds. The respondent in response contended that she is a businesswoman and she is capable of refunding the decretal sum in the event the appeal success. However, the respondent did not avail to this court any form of financial record or affidavit of means or other evidence to demonstrate her financial capabilities to warrant release of the decretal sum either partly or wholly to her.
9. The power to grant stay of execution pending appeal is discretionary in that the court when granting a stay, needs to balance the interest of the applicant with that of the respondent. The assurance that the applicant has that he will not suffer substantial loss, is the ability of the respondent to refund the



decretal sum if the appeal succeeds. In *Superior (Homes) Kenya Limited vs Musango Kithome* (2018) eKLR the Court of Appeal held as follows:-

“...The law, however, appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum.”

10. From the applicant’s submissions, the applicant is willing to release some of the undisputed decretal sum to the respondent, but he did not propose the undisputed amount he is willing to release. It is this court’s view that in the absence of cogent evidence on the financial capabilities of the respondent, the applicant is likely to suffer substantial loss if the decretal sum is released to her and therefore I decline to grant an order releasing the decretal amount to the respondent.
12. On whether the application was filed within reasonable time, the judgement and decree in the trial court was delivered on 14/9/2022. The instant application was filed on 3/10/2022, 21 days after delivery of the judgement and decree in the trial court. I find that this was not unreasonable delay.
13. On whether the applicant is willing to furnish security for the due performance of the decree, when granting the interim orders pending the hearing and determination of this application, this court directed that the applicant do deposit the decretal amount within 21 days from the date of this court’s order. The applicant has indicated in the submissions that the full decretal was deposited in court by the insurer which fact was not disputed. Therefore, this court directs that the decretal sum be deposited in a joint earning interest earning account of both Counsel in a reputable bank within 14 days hereof. In the event the applicant fails to comply, the respondent will be at liberty to execute the decree.
14. On whether the applicant has an arguable appeal. In the grounds of appeal, the applicant mainly challenges the quantum as inordinately high. This is arguable.
15. I find that the application has merit and the following orders do issue: -
 1. An order of stay of execution of the judgement and decree issued on 12/9/2022 is hereby granted pending the hearing and determination of this appeal on condition that;
 - a. The Applicant to deposit the full decretal sum in an interest earning account of both Counsel of the parties within 14 days hereof;
 2. In default of compliance with order no. 2 above, the respondent will be at liberty to execute;
 3. The Applicant to prepare, file and serve a record of appeal within 60 days hereof;
 4. Thereafter, matter to be mentioned before this court for the appeal to be admitted and take directions on the hearing;
 5. Costs to abide the outcome of the appeal.
 6. Mention before the Deputy Registrar on 29/11/2023 to confirm compliance.

DATED DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023.

R. WENDOH



JUDGE

Ruling delivered in the presence of: -

No appearance for the Applicant.

Ms. Amondi for the Respondent.

Emma & Phelix Court Assistants.

