



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kabugu v Kibe (Civil Appeal E133 of 2023)  
[2023] KEHC 22788 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E133 OF 2023  
PM MULWA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**GEOFFREY NJUGUNA KABUGU ..... APPLICANT**

**AND**

**JOHN NJOROGE KIBE ..... RESPONDENT**

**RULING**

1. This application by a Notice of Motion dated May 24, 2023 is made under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), order 22 rule 22, order 22 rule 25, order 42 rule 6 and order 51 of the [Civil Procedure Rules](#). it seeks the following orders:
  - i. Spent
  - ii. There be a stay of execution of the decree and all consequential orders arising from the judgment delivered on 8<sup>th</sup> May 2023 by Honourable V. A. Ogutu pending the hearing and determination of the application and the appeal
  - iii. Costs of the suit be borne by the Respondent
  - iv. Orders that meet the ends of justice.
2. The application is based on the grounds set out on the body thereof and also on the averments deponed by the applicant in the supporting affidavit. The grounds on the face of the application are that if the orders of stay of execution are not granted the appeal will be rendered nugatory and the applicant will suffer substantial loss, there is no unreasonable delay, the appeal has a chance of success.
3. The application was opposed by the Replying Affidavit of John Njoroge Kibe sworn on 18<sup>th</sup> June 2023 wherein he averred that the trial court was proper in finding the applicant liable for the breach of the contract and was ordered to pay the Respondent Kshs. 317, 500/= plus interest and costs, the Respondent is entitled to the fruits of the judgment, and the appeal is frivolous, a tool to buy time and



with no chance of success. It is pleaded the court orders the applicant to deposit the decretal sum of Kshs. 387,030/= in a joint interest-earning account in the names of both advocates.

4. The court directed the application was canvassed by way of written submissions, and these were filed.

#### **Applicant's submissions**

5. Mr. Lokitano, counsel for the Applicant argued that the application is not disputed save for the issue of security of costs.
6. He submitted that Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* outlines the conditions for granting a stay of execution. That if the order of stay is not granted the Applicant will be condemned to pay the decretal sum without being given a right to be heard. The appeal is arguable with a high chance of success.
7. On the issue security for costs, counsel submitted that ordering the Applicant to deposit the entire decretal sum as security for costs is a double injustice as the trial court failed to consider his counterclaim. That the trial court lacked jurisdiction and thus there is no need for security of costs in the instant appeal.

#### **Respondent's submissions**

8. Mr. Kibe, counsel for the Respondent argued the applicant had not complied with the provisions of Order 42 Rule 6(2)(b) of the *Civil Procedure Rule*, that he failed to provide security in due performance for an order of stay of execution, and that he failed to demonstrate the substantial loss to be suffered and that the appeal had slim chances of success.
9. Further, counsel submitted that in the event this court was inclined to breathe air into the oxygen principle and grant the overriding objective principle to grant a stay of execution, the court ought to require the Applicant to deposit the decretal amount plus interest in a joint interest-earning account in the names of both advocates.
10. Mr. Kibe contended that the trial court judgment is valid and enforceable and the process of execution is legal and thus there is need to order that security of costs be deposited.

#### **Analysis of the Issues**

11. I have considered the application for stay, grounds thereof and supporting affidavit. I have also considered the replying affidavit and submissions filed in support of the parties' arguments.
12. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
13. The principles guiding the grant of a stay of execution pending appeal are well settled, and provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides:

“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 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.



14. An applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out, thus;
  - a. that substantial loss may result 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 has been given.
15. In the instant case, the applicant contends that the trial court lacked the jurisdiction to hear and determine the issues raised in the counter-claim and as such the applicant was condemned unheard. and further that the security of costs should not be payable as the trial court lacked the jurisdiction.
16. On the other hand, the Respondent's contention was that the applicant had failed to provide security for costs, the appeal has no chance of success and allowing the application for a stay of execution of the decree is tantamount to denying him the right to enjoyment of the fruits of his judgment.
17. The court, in *RWW v EKW* [2019] eKLR considered the purpose of a stay of execution order pending appeal in the following words: "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.
18. The first requirement is that the intended appeal must be arguable. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. This first ground is therefore met and I will not dwell on the merits of or otherwise of the appeal at this stage.
19. As to whether the application before the court was filed without undue delay, I note that the impugned judgment was delivered on May 8, 2023 and the instant application was filed on June 5, 2023 while the memorandum of appeal was filed on May 22, 2023. There was therefore no undue delay in filing the current application.
20. Will there be substantial loss occasioned to the applicant if stay of execution is not granted. The applicant argued that if the stay of execution is not granted the Respondent will proceed to execute. The Respondent asked the court to order the applicant to deposit security for costs.
21. In *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated: -

"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because...the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."
22. The issue of costs is discretionary, the Respondent prays that if the stay is granted, the court should order the applicants to deposit the decretal sum in a joint interest-earning account in the names of both parties. In the interest of balancing the interest of both parties, this will be the right orders to grant.



23. Consequently, I find the application dated May 24, 2023 is merited and is allowed in the following terms: -

- i. That there be stay of execution against the judgment delivered on May 8, 2023 by Honourable V.A. Ogutu pending the hearing and determination of the appeal herein.
- ii. That the applicant to deposit the entire decretal amount in a joint interest-earning account in the names of the advocates on record for the parties within 30 days.
- iii. That in default of order (ii) above, the orders for stay of execution will be automatically lapse.
- iv. Costs of the application will abide the outcome of the appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**P.M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua/Duale – Court assistants

Mr. Lokitano - for Applicant/Appellant

Mr. Kibe Njoroge - for Respondent

