



REPUBLIC OF KENYA



KENYA LAW
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**Njenga v Kimuyu (Civil Appeal E163 of 2022)
[2023] KEHC 23078 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E163 OF 2022
MW MUIGAI, J
SEPTEMBER 28, 2023**

BETWEEN

ALLEN KARANJA NJENGA APPELLANT

AND

PETER MUANGE KIMUYU RESPONDENT

RULING

Pleadings

1. Vide a Notice of Motion dated and filed in court 21st November,2022 brought under Sections 1A (2) 3A, 38A and 51 of the *Civil Procedure Act* and Order 42 Rule 6 (2) of the *Civil Procedure Rules* wherein, the Applicants sought the following orders that:
 1. Spent
 2. Spent
 3. This Court to grant stay of execution of the judgement delivered on 24th October,2022 by the Chief Magistrate’s Court sitting in Mavoko in CMCC 375 of 2021 pending appeal wherein the Honorable court held the Appellant/Applicant 100% liable to pay the Respondent 772,770 together with costs and interest.
 4. Costs of this Application be in the cause.

Supporting Affidavit__

2. The application was Supported by Supporting Affidavit dated and filed in court 21st November,2022, sworn by Joseph Kiarie Njenga, Advocate, he deposed that the Chief Magistrate’s Court sitting in Mavoko on 24th October,2022 entered judgement in the sum of Kshs. 772,770 together with costs and interest.



3. He deponed that the court granted Appellant/Applicant 30 days stay of execution which lapsed on 24th November 2022 and the Appellant being dissatisfied with the entire judgement and has filed a Memorandum of Appeal;
4. He stated that the Appellant/Applicant has requested for copies of proceedings for purposes of filing the appeal and it is likely to take longer than 30 days in which the Respondent might proceed to execute the judgment before the appeal is heard and determined.
5. It was further deposed that unless this application is heard on a priority basis and the orders sought granted, the Appellant/Applicant risks being rendered destitute if the Respondent proceeds to execute the judgement as soon as 30 days stay lapse. Deposing that the application has been made without unreasonable delay.

Replying Affidavit

6. By a Replying Affidavit dated 8th February,2023, sworn by George Karatu, claims Officer at MUA Insurance Kenya Limited wherein he deposed that this suit was instituted by way of Plaint dated 26th May,2021 by the Respondent herein under the doctrine of subrogation.
7. He stated that the matter was filed and proceeded for a full hearing on the 14th June,2022 and as result judgement was entered on 24th October,2022 by Hon. R.W Gitau in favor of the Respondent as against the Appellant at a sum of Kshs. 772,770 plus the costs and interest.
8. He deposed that he is advised by their Advocate that the Hon. Chief Magistrate addressed her mind on the issue of liability after both parties adduced oral evidence and found the Appellant herein 100% liable for causing the accident.
9. He deponed that he is advised by their Advocate that 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 if the appeal is successful is not rendered nugatory. It was deposed that the court in doing so should weigh this right against the right of a litigant who should not be deprived of the fruits of his/her judgement.
10. He deponed that he is advised by their Advocate that Order 42 Rule 6 of the Civil Procedure Rules provides that no order for stay of execution shall be made unless deposit of security for the due performance of the decree has been made.
11. He further deponed that the Applicant has not demonstrated to this court that they are a person of means and that they are capable of paying the decretal sum and without the deposit of the security the Respondent is not assured that they will reap the fruits of the judgement.
12. It was deposed that the deposit of the decretal sum is a form of security and is required to ensure the rights of the respondent are protected throughout the duration of appeal.
13. It was deposed that the respondent stands to suffer loss should the stay be granted without conditions and such loss may not be compensated by an award of damages
14. The matter was canvassed by way of written submissions.



Submissions

The Appellant/Applicant's Submissions

15. The Appellant/Applicant filed his written submissions dated 11th May,2022 and filed in court on 12th May,2023, in which he raised the following issues for determination:
16. On the issue of whether the Appellant has met the threshold required to grant stay of execution pending appeal under order 42 Rule 6 of *Civil Procedure Rules*, reliance was placed on the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, to buttress his position on what conditions that must be satisfied before order for stay of execution can issue as enumerated in Order 42 Rule 6.
17. It was submitted that the Applicant filed the Application without any reasonable delay within the 30 days after the delivery and that the Applicant has satisfied the conditions for grant of stay under Order 42 Rule 6 (2) reliance was placed on the case of *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR, quoted with authority in the case of *WW v EKW* [2019] eKLR.

“These cases considered the purpose of a stay of execution order pending appeal, which is to preserve the subject 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 judgement. The court is also called upon to ensure no party suffers prejudice that cannot be compensated by an award of costs.”
18. It was submitted that unless stay is granted, the Applicant will suffer substantial loss and the appeal will be rendered nugatory. As to what substantial loss is, reliance was placed on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, similarly reliance was placed on the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR relied on *Visbram Ravji Halai v Thornton & Turpin* Civil Application No. Nai 15 of 1990 [1990] KLR 365, to buttress the point that the high court jurisdiction to grant stay of execution pending appeal under Order 42 Rule 6 of *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
19. On the issue of whether the Respondent will suffer prejudice if stay is granted, it was stated that the Respondent in his Replying Affidavit has not shown how an order of stay will prejudice his interest. The Applicant contended that unless stay is granted the Respondent will move swiftly to execute which will render the Appeal nugatory.
20. It was finally submitted that the application has met the three conditions required for grant of stay of execution pending appeal and the court was urged to exercise its discretion and grant the orders sought.

Respondent's Submissions

21. The Respondent in his submissions dated and filed in court on 16th May,2023, reliance was placed on the case of *Equity Bank Limited v Taiga Adams Co. Ltd* [2006] eKLR, which case gave the following tenets for the Application to succeed:
 - a. The application must establish a sufficient cause/ an arguable appeal.
 - b. The court must be satisfied that substantial loss would ensue from a refusal to grant stay.



- c. The Applicant must furnish security.
- d. The Application must be made without unreasonable delay.
22. On the issue of whether the Applicant established sufficient Cause/ an arguable appeal, it was submitted that the police officer from Athi River Police Station testified that they blamed the applicant's driver for ramming into the Respondent's motor vehicle from behind. It was also submitted that the Appellant/Applicant did not file any document in court blaming the Respondent for causing the accident, in fact the Appellant filed a police abstract blaming his motor vehicle for the accident hence the Applicant has not established an arguable appeal.
23. On the issue of substantial loss, counsel relied on the case of *Gemstar Importers & Anor v Edward Nthiwa Mutiso* [2019] eKLR, the case observed that:
- “... a substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected to when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to or differently from that.....”
24. It was submitted that in order for the appellants to prove that they will suffer substantial loss if stay is not granted, the Appellant ought to table evidence before this court how payment of the decretal sum will adversely affect his financial standing irredeemably, however the Appellant failed to do so as no such evidence has been tabled.
25. The court was therefore urged to find that the appellants have not demonstrated that they will suffer substantial loss if the stay is not granted
26. On the issue of furnishing of security, it was emphasized that the Respondent in this matter is bonafide and he is a successful litigant, the court is called upon to balance the interest of both parties. Reliance was based on the Gemstar Importers case [supra] to buttress the doctrine of furnishing security.
27. Reliance was placed in the cases of *Macharia t/a Macharia & Co. Advocates v East African Standard No. 2* [2002] KLR 63, *Hilaa Abdullab Amin v Saumu Umazi Binzi & Another* [2021] eKLR and Order 42 Rule 6. It was submitted that the court should order that half of the decretal sum be paid to the respondents and the other half be deposited in a joint interest earning account and that the substance of the suit filed at the Trial Court was brought under the doctrine of subrogation by the MUA insurance Company which is licensed to carry out insurance business and is financially capable to refund the decretal amount should the appeal succeed.
28. The Court was urged to dismiss the Applicant's application for stay of execution pending appeal or in the alternative grant conditional stay and order that half the decretal amount be paid to the Respondent and the other half be deposited in a joint interest earning account pending hearing and determination of the Appeal.

Determination

29. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.



30. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules,2010 provides that:-

“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.

31. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

32. The Court, in RWW v EKW [2019] eKLR, addressed its mind to 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.”

33. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

34. On the first condition, the court in Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation) (2004) EALR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”



35. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

36. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory.

37. The Applicant's contention is that the Respondent had already initiated the process of execution and will proceed to execute unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.

38. Odunga J. in *George Kimotho Ilewe Anastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business.” See in Bungoma High Court Misc. Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto* and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.

39. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at 417 held:

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”



40. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
41. The Court notes that despite that Respondent not stating in his affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicants have not demonstrated what substantial loss they will suffer. The Respondent in his replying affidavit contended that the Applicant had not demonstrated to the court that he is a person of means and are capable of paying the decretal sum and without deposit of the security the Respondent is not assured that he will reap the benefits of the judgment.
42. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground fails.

Unreasonable Delay

43. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 24.10.22 with a stay of execution granted for 30 days and the application was filed On 21. 11.22. The application has been brought within the 30 days.
44. The Court finds that there is no undue delay in filing the application herein.

Furnish Security

45. The Applicant is silent with regard to the issue of whether they are willing to furnish security for due performance of such decree
46. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

47. It follows therefore that it is the discretion of the court to determine the security.

Disposition

48. In the premises: -
 - a. There will be a stay of execution pending the said appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum be deposited in a joint account of both the Applicants and Respondent’s advocates or deliver a bank guarantee within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
 - b. Upon compliance with the terms, LCF shall be retrieved and Record of Appeal obtained, served and filed.
 - c. The costs of this application abide the outcome of the Appeal.



It so ordered.

RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 28TH SEPT 2023. (VIRTUAL/ PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the presence of:

Ms Cherono - For The Appellant/applicant

Ms Wafula - For The Respondent

