



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Nguma & another (Civil Appeal 131 of 2022)  
[2023] KEHC 23077 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23077 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 131 OF 2022  
MW MUIGAI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**ROSE NJERI KAMAU ..... APPELLANT**

**AND**

**ROBERT VICTOR MWANZIA ..... 1<sup>ST</sup> RESPONDENT**

**CHRISPUS MWOVE NGUMA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Senior Principal Magistrate, the  
Honorable D.Orimba Delivered at Kangundo Law Courts on the 14th July 2021)*

**RULING**

**Notice Of Motion**

1. Vide an application dated 30.08.2021 filed under Article 159 2 (a) and (d) of the [Constitution of Kenya](#) Section 3A,79G of the [Civil Procedure Act](#) and Order 21 rule 1b, Order 22 rule 22, order 42 Rule 6, Order 50 rule 6, Order 51 Rule 1 and 3 of the [Civil Procedure Rules](#), the Applicant sought the following orders, that;
  - a. Spent
  - b. Spent
  - c. There be a Stay of Execution of the ruling in CMCC No.252 of 2018 pending the inter-parties hearing of the application.
  - d. There be Stay of Execution of the Ruling in CMCC No 252 of 2018 pending the hearing and determination of this Application.



- e. This Honourable Court be pleased to Stay the Execution of the Decree obtained in CMCC No. 252 of 2018 pending the hearing and determination of the Applicant's Appeal filed at the Court of Appeal Machakos HCCA N0 131 of 2021.
  - f. The Lower Court file namely CMCC No.252 of 2018 be move forthwith to the High Court to facilitate the expedient hearing and determination of HCCA No.131 of 2021
  - g. The costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the Affidavit of Rose Njeri Kamau deposed on 30.08.2021 who stated that via a Notice of Motion dated 9.12.2020 through her Advocates made an application to seeking to set aside an interlocutory judgement entered on 3.11.2021 and to stay an execution of decree issued on 19.11.2020.
  3. It was deposed that the honourable Court directed that the Applicant deposit part of the decretal amount of kshs. 500,000 as a security for condition for stay of execution of the decree pending inter-parties hearing of the application.
  4. The application proceeded for hearing and it was allowed on grounds that the Applicant be ordered to pay half of the decretal sum to the respondent and that she deposits the balance in a joint interest earning account in the name of the Advocates for the respective parties.
  5. According to the applicant, it was on the basis of the said orders including that she pays half of the decretal sum to the respondent that she appealed.
  6. It was deposed that the 1<sup>st</sup> respondent applied for release of the security amount deposited in court contrary to the orders of the court and this was an attempt to defeat justice and punish the applicant/appellant who had demonstrated good faith by depositing the amount as ordered pending the hearing and determination of the suit.
  7. According to the Applicant/Appellant, the 1<sup>st</sup> respondent does not stand to suffer any prejudice should the application succeed and that the applicant was a woman of means and her motor vehicle registration number KCD 110R was still in good condition and could be used to settle the balance of the decretal amount in the event that the Appeal does not succeed.

## **Response**

8. In opposition the Application, the Respondent filed a replying affidavit deposed on 22.09.2021 in which it was opined that the Appellant filed an application dated 9.12.2020 for prayers of stay of execution of the Court's decree dated 9.12.2020 and the Court gave a ruling on 14.07.12.
9. Further that the Appellant having been dissatisfied with the Ruling filed a memorandum of appeal dated 4.08.2021 being an appeal against the ruling of the Trial Court and simultaneously filed an application dated 5.08.2021 in the Trial Court praying for stay of execution of the decree issued on 14.07.2021
10. According to the 1<sup>st</sup> Respondent, the appellant has been using delaying tactics by filing applications with the same facts in different courts in bid to delay and defeat justice.
11. It was deposed that the appellant's application was based on untrue and unfounded evidence and was a waste of the Court's time and should be dismissed with cost.
12. The application was canvassed by way of written submissions.



### **Applicant's Submissions Dated 10.09.2021**

13. The Applicant submitted that the honourable Court has a duty to re-evaluate the evidence on record and come to its own conclusions but with the caution that it did not have the advantage of observing the witnesses during testimony in court as established in the case of *Samuel Kamere v Land Registrar Kajiado* Civil Appeal No. 28 of 2008.
14. It was submitted that the Trial Court erred by giving a condition that the appellant pays half of the decretal amount to the 1<sup>st</sup> respondent and the other half be deposited in an interest earning account despite the fact that none of the parties had pleaded or submitted on the same. Reliance was placed on the case of *Malawi Railways Ltd. v Nyasulu* to emphasize that parties are bound by their pleadings and urged that the Trial Court be found to have erred in considering an issue that neither of the parties had placed before it.
15. Secondly, the Applicant submitted that the Ruling of the Subordinate Court delivered on 14.07.2021 was tantamount to condemning the appellant unheard as it meant that the appellant was liable thus should deposit kshs. 500,000 without putting into consideration that the appellant may succeed in her defence and may not be able to get a refund of the money from the 1<sup>st</sup> Respondent.
16. It was submitted failure to observe the 21 days of compliance was a mistake of the appellant's Advocate and that the delay was not unreasonable as it was only one day late. Reliance was placed on the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR where it was held that in determining whether to exercise the discretion in a party's favor, the court pays regard to the damage sought to be forestalled vis-à-vis the prejudice to be visited on the opposing party. It was submitted that the 1<sup>st</sup> respondent stood to suffer no prejudice by the claim proceeding on merit. On the other hand, the appellant was denied justice for a claim it maintains it has a good defence to.
17. According to the appellant, her failure to enter appearance was not due but malice as she expected her insurance Company to enter appearance and defend the suit on her behalf. It was contended that the condition given to the appellant pays half of the decretal sum to the 1<sup>st</sup> respondent and deposit the balance in a joint interest earning account meant that it had already been proved which was not the case. This position was guided reliance being placed on the case of *Kenya Power & Lighting Co Ltd v Abdulhsakim Abdulla Mobammed & another* [2017] eKLR where the appellant submitted that the concern of the courts is to do justice to the parties and not to impede justice or to drive away parties from the seat of justice by imposing onerous conditions.
18. It was deposed that the application for setting aside the interlocutory judgement raised triable issues and that the appellant ought to have been given a chance to present her case as she had been condemned unheard and that her draft defence raised issues that had high chances of success and the court was urged to allow the appeal and grant orders sought therein

### **1<sup>st</sup> Respondent Submissions Dated 01.02.2022**

19. The 1<sup>st</sup> Respondent submitted that the appellant was served with the relevant pleadings and was expected to defend the suit within the stipulated time which she failed to do and blamed her insurance whom she expected to defend the suit on her behalf. It was contended that the appellant failed to exercise due diligence as to ascertain whether the suit had been defended and it was only fair that she pays the decretal sum then claim from the insurance



20. On the condition of depositing the decretal sum, it was submitted that the appellant failed to file her defence in court so as to argue the issues on merit and that the appellant was trying to bring the case freshly which had been already been dealt with on merit.
21. Thirdly, it was contended that failure by the appellant to comply with the conditions granted within 21 days warranted the dismissal and that the appellant should not be allowed to benefit from her own mistakes as justice favors the vigilant.

### **Determination**

22. The court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution.
23. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

24. The three conditions to be fulfilled can therefore be summarized as follows;
  - a. that substantial loss may result to the applicant unless the order is made
  - b. application has been made without unreasonable delay
  - c. security as the court orders for the due performance
25. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
  - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.



- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

### Substantial Loss

26. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 that:

“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.”

27. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

### Arguable Appeal

28. The Appellant submitted that she has a strong arguable appeal which had high chances of success that will be rendered nugatory if the orders sought are not granted. Further, that the 1<sup>st</sup> Respondent will be unable to refund the decretal sum if the appeal is successful. The Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

29. This was emphasized in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits



of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

30. The 1<sup>st</sup> Respondent in this case has not provided any evidence to show that he is capable of refunding the decretal sum. This was the position in the case of *Stanley Karanja Wainaina & Another v Ridon Ayangu Mutubwa* Nairobi H.C.C.A. 427/2015 where it was stated that:

“..... It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge.”

31. The 1<sup>st</sup> Respondent has not demonstrated that he is capable of refunding the decretal sum should the appeal succeed. The appellant on the other hand in her supporting affidavit stated that she is a woman of means and her motor vehicle registration number KCD 110R was in good condition and could be used to settle the remaining decretal amount in the event that the appeal does not succeed.

### **Undue Delay**

32. As to whether the Application has been filed without undue delay, Ruling was delivered 14.07.2021 and this application was filed on 4.08. 2021. The Court finds that the Application has been filed without undue delay.

### **Security**

33. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“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.

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..

Thus the objective of the legal provisions on security was never intended to fetter 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.”

34. This court is persuaded by the submissions of the Appellant that she had a triable case but nevertheless still met the condition of depositing the Kshs. 500,000 in favor of the 1<sup>st</sup> Respondent in Court in accordance with the Ruling. This demonstrates good faith on her part and is granted more time to comply with the rest of the conditions.

### **Disposition**

35. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
- a. Stay of execution is granted hereby granted and extended to comply with the Trial Court’s conditions within 90 days of this Court’s Ruling.
  - b. Thereafter, the matter be heard and determined on merit.
  - c. Costs are hereby granted to the Appellant.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 26/9/2023.  
(VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

**In the presence of:**

Mr. Kinyanjui H/B/ Mr. Kinyua - for the Appellant

No Appearance - for the Respondents

Geoffrey/Patrick - Court Assistant(S)

