



Lords Promise Church v Njogu & 2 others (Suing as the Legal Representatives of the Estate of the Late Simon Muriuki Njogu) & another (Civil Appeal E216 of 2023) [2023] KEHC 24196 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E216 OF 2023
M THANDE, J
OCTOBER 27, 2023**

BETWEEN

LORDS PROMISE CHURCH APPELLANT

AND

EUNICE WAGITHI EUNICE WAGITHI NJOGU, MICHAEL MUNENE NJOGU & PETER ZAKAYO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE SIMON MURIUKI NJOGU) 1ST RESPONDENT

FELIX KITHOME 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 16.8.23, the Appellant/Applicant seeks stay of execution or further action, of the decree arising from the judgment delivered in favour of the Respondents, on 30.9.22 in Mariakani SRMCC No. 165 of 2019. The Application is supported by the grounds on its face and in the supporting affidavit of Nicholas Misango Shitambanga, the registered trustee and a minister of faith of the Appellant/Applicant, sworn on even date.
2. The Appellant/Applicant is aggrieved that the trial court entered an ex-parte judgement and apportioned liability at 100% against it. Further, that the trial court awarded damages for pain and suffering at Kshs. 50,000/=, loss of expectation of life at Kshs. 150,000/=, loss of dependency at Kshs. 2,450,196/= special damages at Kshs. 340,050/=, costs of the suit and interest. The Appellant/Applicant's application for stay of execution was on 27.7.23 dismissed by the lower court on grounds that no triable issues were raised. This is despite the fact that the Appellant/Applicant being registered under the *Societies Act* is not a legal entity with capacity to be sued. Being dissatisfied with the said ruling, the Appellant/Applicant filed a memorandum of appeal dated 11.8.23.



3. It was further averred that the execution process has commenced through Fantasy Auctioneers, and motor vehicle registration no. KCJ 025 R Toyota van, belonging to the deponent, has been attached. It is the Appellant/Applicant's case that its appeal is meritorious with good chances of success as it raises serious questions of both law and fact and that the same will be rendered nugatory in the event the orders sought are not granted. The Appellant/Applicant expressed willingness to abide by such terms and/or conditions that this Court may impose for the grant of the orders. Further that the Respondents do not stand to suffer any prejudice and any, may be compensable with an award of costs. On the other hand, the Appellant/Applicant stands to suffer grave prejudice and substantial loss if the Application is not allowed. The Court was urged to exercise its discretion in favour of the Appellant/Applicant in the interests of justice.
4. The Respondent opposed the application vide a replying affidavit sworn on 30.8.23 by Michael Munene Njogu, one of the Respondents. He stated that the Application is misconceived, unmerited and bad in law for the reason that summons and documents in the suit in the lower court for recovery of damages, were duly served upon the Appellant/Applicant on 23.9.19 and on 12.2.2020. On being satisfied that service was effected, the lower court endorsed the request for interlocutory judgment and fixed the matter for assessment of damages. Thereafter damages were assessed and judgment entered on 30.9.22. Entry of judgment was served on Nicholas on 15.11.22 but he refused to sign a copy thereof. Proclamation notice was served on 20.4.23 by Fantasy Auctioneers, but was never acted upon. The Appellant/Applicant was only awakened when the Auctioneer went to take away the motor vehicle.
5. It is the Respondents' case that execution is a lawful process. Further that there is no evidence of substantial loss that is likely to be occasioned to the Appellant/Applicant should stay not be granted and therefore the appeal cannot be rendered nugatory. The Application is an afterthought, intended to circumvent the rights of the Respondent to obtain the fruit of a valid and legal judgment. The respondents however state that should the Court be inclined to grant the orders sought herein, then the Appellant/Applicant should be condemned to pay throw away costs and auctioneer's charges and further deposit the entire decretal amount in a joint interest earning account in the names of the parties' advocates. The Respondents urged that the Application be dismissed with costs.
6. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the *Civil Procedure Rules*. Sub-rule 2 provides:
 - (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
7. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. Where the Court is called upon, as in the present case, to exercise its discretion in any application, it must do so judicially, the overriding objective being to ensure that the ends of justice are met.



8. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in the *Butt v Rent Restriction Tribunal* [1982] KLR 417, as follows:
1. . The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 that appeal court reverse the judge's discretion.
 3. 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.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. 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 for costs as ordered will cause the order for stay of execution to lapse.
9. Flowing from the cited decision, it can be discerned that while considering an application for stay, the discretion of the Court must be exercised in a manner that will not prevent an appeal or render an appeal nugatory; the Court will consider whether there is any overwhelming hindrance for the grant of stay; whether good grounds have been advanced; existence of any special circumstances and unique requirements. Lastly the Court may order security for costs.
10. The law requires that an application for stay of execution be filed without unreasonable delay. The decision appealed against was made on 27.7.23 while the Application herein is dated 16.8.23. I am satisfied that the Application was made without undue delay. On substantial loss and the appeal being rendered nugatory, no material was placed before the Court to support this contention. The Court has however considered the willingness of the Appellant/Applicant to abide by whatever conditions may be imposed for the grant or the orders sought. The Respondents are also amenable to conditional stay and there is no overwhelming hindrance for the grant of stay.
11. It is trite law that the purpose of stay of execution is to preserve the substratum of the matter in dispute. In the case of *RWW v EKW* [2019] eKLR, Ongeri, J. stated:
- 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.



12. Having considered the foregoing, I am persuaded that in the wider interests of justice, it is necessary to preserve the status quo pending the hearing and determination of the appeal. Accordingly, I allow the Application dated 16.8.23 and grant stay of execution pending appeal, on the following terms:
- i. The record of appeal shall be filed within 21 days.
 - ii. The entire decretal amount shall be deposited in Court by 17.11.23.
 - iii. In default, the stay granted herein shall lapse.
 - iv. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 27TH DAY OF OCTOBER 2023

.....

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant/Applicant**

..... **for the Respondents**

.....**Court Assistant**

