



REPUBLIC OF KENYA



KENYA LAW
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**Songor & another v Sang (Civil Appeal E005 of 2023)
[2023] KEHC 24233 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E005 OF 2023
RB NGETICH, J
OCTOBER 25, 2023**

BETWEEN

ANDREW SONGOR 1ST APPELLANT

BARINGO COUNTY GOVERNMENT 2ND APPELLANT

AND

SUSAN SANG RESPONDENT

RULING

Background

1. The applicants filed Notice of Motion dated April 17, 2023 brought under the provisions of sections 1A and 3A of the *Civil Procedure Act*, 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6(2), Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to issue an order for stay of execution of the decree issued in Kabarnet CMCC NO.65 of 2018- Susan Sang Vs Andrew Songor and County Government of Baringo pending the hearing and determination of the appeal.
 - d. That costs of this application be provided for.
2. The application is supported by the affidavits of Julius Tarus County Attorney, Baringo County for the 2nd appellant/applicant and Andrew Songor the 1st appellant/applicant herein.
3. This application was filed pending hearing and determination of appeal against judgment delivered in Kabarnet CMCC NO.65 of 2018- Susan Sang vs Andrew Songor and County Government of Baringo where judgment was delivered on the February 22, 2022 in favor of the respondent against the



appellants and decree issued in the sum Of Kshs. 1,132,610.00/=. The trial court granted 30 days stay of execution which was lapsed on or about the March 23, 2023.

4. Ground on the face of the application is that the subject matter of the judgment being substantial, the applicants are likely to suffer irreparable loss and prejudice if prayer for stay is denied while the Respondent on the other hand will not suffer any prejudice that cannot be adequately compensated by way of costs. Further that the appeal herein raises triable issues and if stay of execution is not granted the appeal stands to be rendered nugatory.
5. The applicants aver that they are ready and willing to provide security as may be directed by this court as a condition for stay of execution pending the hearing and determination of this appeal and that the application has been filed without delay.
6. In response, the respondent filed replying affidavit dated June 20, 2023 and argue that the application is an afterthought and no sufficient grounds have been advanced to warrant allowing the application. The respondent submits that the appellant did not challenge liability and appeal will not therefore be rendered nugatory if half the decretal amount and costs are paid to the respondent and balance deposited in court or in a reputable bank in the names of both counsels for the parties; that the applicants have offered to provide security and it is only fair that the appellants be required to pay portion thereof and deposit the balance in court or in a reputable bank.
7. The respondent avers that the present application is only meant to deny the respondent enjoyment of the fruits of her judgement and sought that it be dismissed.

Applicant's Submissions

8. The applicant restates averments and ground in support of the application, cites the case of [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) (2020)eKLR and submit that the amount in question is substantial and they risk substantial loss if the stay of execution orders are not granted; further the respondent is a person of unknown means and the appellants are apprehensive that they may not be able to recover their money if the decree is executed; that the Respondent has not demonstrated that she is a person of means; has failed to adduce any evidence in the form of affidavit of means to demonstrate her ability to refund any sum that may be paid to her in case the appeal succeeds.
9. That the appellant is challenging award for damages as the trial magistrate erred in awarding general damages of Kshs. 1,000,000 which was inordinately high for the injuries sustained by the respondent; and further awarded special damages of Kshs. 132,610/= was neither pleaded nor proven; that the appeal raises triable issues with high chances of success.
10. That the application has been made without unreasonable delay as judgment was delivered on the February 22, 2023 and the appellants/applicants filed their memorandum of appeal on March 22, 2023 and the application herein on the May 17, 2023.

Respondent's Submissions

11. The respondent filed written submissions on the July 20, 2023 and argues that the prerequisite conditions for the grant of stay of execution are well encapsulated in order 42 Rule 6 of the [*Civil Procedure Rules*](#). That the conditions are: -
 - i. must demonstrate that substantial loss may result in the event that the order for stay of execution is denied;
 - ii. the application must be made without undue delay and



- iii. the security for costs must be furnished and or provided for.
12. In respect to substantial loss, the respondent cited the case of *Antoine Ndiaye v African Virtual University*{2015}eKLR and in the case of *Machira t/a Machira & Co. Advocates* where it was held that:-
- “Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court’s interference with the ordinary course of justice and the process of law”.
13. And submitted that the applicants have not established any substantial loss that they may suffer in the event that the order for stay is denied but only argue that the appeal has high chances of success; that the applicants have not demonstrated substantial loss they will suffer if the orders sought are not granted and that it is not sufficient for the applicants to state that they will suffer substantial loss with no evidence to support the assertion.
14. The respondent is submitted that the application is an afterthought and has been filed very late in the day, almost three months later and there is no substantial reason that has been advanced why this was so. It is submitted that there is no substantial explanation that has been given to explain the delay.
15. The respondents submits that the deposit for cost is germane to the proceedings since the appeal is on the issue of quantum only. That the appeal will not be rendered nugatory if ½ the decretal sum and costs are paid to the plaintiff/respondent and the other ½ deposited in an interest earning account in the names of the 2 advocates firm; and in so doing, requirements under Order 42 Rule 6 of the *Civil Procedure Rules*.
16. On the issue of costs, the respondent submits that costs normally and ordinarily follow the event. That the application being an afterthought, the respondents urges the court to dismiss the same with costs.

Determination

17. I have considered averments by parties herein and submissions filed. I wish to consider whether the application meets the threshold for orders sought
18. Order 42 rule 6(2) of the *Civil Procedure Rules* provides as follows:-
- “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.
19. Further to the above, in view of overriding objective as provided under order 1A and 1B of the *Civil Procedure Act*, the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions and ensure the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”



20. From the foregoing the applicant is required to demonstrate that substantial loss may result to the applicant unless the order is made, the application has been made without unreasonable delay, and such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
21. In respect to substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:
- “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.”
22. In the instant case, the applicants aver that they stand to suffer substantial loss of over Kshs. 1,132,610.00/= as well as costs and interest if stay of execution is not granted on ground that the respondent may not be able to refund the sum if the appeal succeeds.
23. I take note of the fact that the appellants are not challenging liability. Their basis of appeal is the award under general damages is high and special damages were not proved.
24. In the case of *RWW v EKW* [2019] eKLR, the court stated the purpose of stay of execution as follows:-
- “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.
- Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.
25. As submitted by the respondent, affidavit of means has not been filed by the respondent. However in view of the fact that liability is not being challenged, there is no doubt that respondent is entitled to damages. The only challenge by the appellants is the amount. Record also show that there was no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the February 22, 2023 and the Memorandum of Appeal filed on the March 22, 2023 and the application herein filed on the May 17, 2023.
26. As to security of costs, the appellants have pleaded that they are able to comply with any order as to security of costs as ordered by the court. That they are amenable to security being deposited in the court or a joint account in a reputable bank registered in the names of both parties.



27. From the foregoing, I find that it would be in the interest of justice to release half of the decretal amount to the respondent and the remaining half to be deposited in an interest earning account.

28.

Final Orders: -

1. Stay of execution do issue on condition that half the decretal amount be paid to the respondent and half to be deposited in an interest earning account in the names of both Advocates.
2. Order 1 above to be complied within 30 days from the date of this ruling.
3. Failure to comply with order 1 & 2 above, execution to issue.
4. Costs of the appeal to abide by the outcome of the appeal herein.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 25TH DAY OF OCTOBER 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Elvis – Court Assistant.

Mr Mbiyu for Respondent.

Ms Muyuka holding brief for 1st & 2nd Appellant.

