



REPUBLIC OF KENYA



KENYA LAW
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**Machine v Kalii (Civil Appeal E219 of 2023)
[2023] KEHC 27414 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E219 OF 2023
DO CHEPKWONY, J
NOVEMBER 30, 2023**

BETWEEN

ERASTUS KARANI MACHINE APPELLANT

AND

VERONICA NDAMBUKI KALII RESPONDENT

RULING

1. What is before the court is the Notice of Motion Application dated 29th June, 2023, filed pursuant to Sections 1A, 1B and 3A, all of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1, all of the *Civil Procedure Rules*. The Application seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. There be stay of execution of the judgment delivered by Hon. C. Asuna (PM) on 15th June, 2023; Ruiru CMCC No. E471 of 2022, *Veronica Kalii Ndambuki –or- Erastus Karani Machine* pending the hearing and determination of the Appeal.
 - e. The costs of this application be provided for.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Erastus Karani Machine sworn on 29th June, 2023. The Applicant holds that the Respondent obtained Judgment against him following a road traffic accident case which was delivered by the trial court on 15th June, 2023. He holds that the trial court issued 30 days stay which would lapse on 15th July, 2023.
3. Being aggrieved with the Judgment, the Appellant has lodged the present appeal which he holds is meritorious with a high probability of success since the trial court awarded Kshs 2,000,000/=, and



special damages of Kshs. 562,154/= yet the injuries were only fracture of the pubis, fracture of the right malleolus, head injury, soft tissue injuries and bruises.

4. Further, he argues that he is willing to furnish security as a condition for stay of execution orders and has urged the court to grant the orders sought in the Application.
5. In response, the Respondent Veronicah Kalii Ndambuki filed her Replying Affidavit which was sworn on 18th July, 2023 wherein she has stated that the Appeal is not meritorious since the trial court relied on the material evidence that was adduced before the trial court and the injuries which she had suffered.

Analysis and Determination

6. Having read through the Application alongside the grounds as set out on its face and Supporting Affidavit and the Replying Affidavit filed in support of the prayers being sought and find the main issue for consideration being whether the application has merit to warrant its granted.
7. The law on stay of execution is enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:-

Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“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”
8. It is trite law that for the court to grant stay of execution three conditions must be met:-
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss.
 - c. The Applicant has offered security for due performance of the decree.
 9. The purpose for which an application for stay of execution pending appeal is made was articulated by the court in [RWW –vs- EKW](#) [2019] eKLR, held:-

“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.

10. On the first condition, the Judgment herein was delivered on 15th June, 2023 and the present application filed on 6th July, 2023 which was timely and without unreasonable delay, hence this condition had been fulfilled.
11. On the second condition of substantial loss, the applicant has only stated that he is likely to suffer substantial loss. He contends that if the court fails to grant stay of execution orders in this case, the Respondent is likely to execute and this will cause him substantial loss. The position of the court is



that there must be proof of substantial loss. In the case of *Kenya Shell Limited –vs- Benjamin Karuga Kibiru and Another* [1986] eKLR, the court held that:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

12. In this instant case, the court agrees with holding in the said case of Kenya Shell supra that without any evidence of the nature of substantial loss to be suffered by a party, it is difficult to grant stay orders. It is trite law that a Respondent should be kept away from enjoying fruits of a successful Judgment without good reason.

13. Lastly, is the issue of an Applicant providing security for the due performance. In his affidavit, the Applicant has stated that he is willing to provide reasonable security in order to fulfil this condition, but has not specified the nature or form of security. The issue of security was discussed in the case of *Gianfranco Manentbi and Another –vs- Africa Merchant Assurance Company Ltd* [2019] eKLR, where it has 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 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 fails...”

14. In this case, the court finds that the Applicant has not fulfilled the three conditions to issue stay of execution orders since he has not proved the substantial loss he is likely to suffer or shown the security that he is willing to offer. However, in the interest of balancing the rights of each party particularly those of the Respondent who should not be kept away from the fruits of her Judgment, the court is inclined to grant the stay of execution orders.

15. In the circumstances, the Notice of Motion application dated 29th June, 2023 is allowed on conditions that:-

- a. The Applicant to pay ½ of the decretal sum together with costs and interest of the suit within thirty (30) days from the date of this ruling to the court as security for the Appeal.
- b. The Applicant to file and serve a Record of Appeal within forty-five (45) days from the date hereof.
- c. The Deputy Registrar to call for and avail the original record of proceedings in Ruiru CMCC. No.E471 of 2022, Veronica Kalii Ndambuki –vs- Erastus Karani Machine.
- d. The costs of the Application shall be in the cause.
- e. Mention on 24th January, 2024 to confirm compliance and take directions on the disposal of the Appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF NOVEMBER, 2023.



D. O. CHEPKWONY
JUDGE

