



**Mburu v Kipkurui alias Kennedy Ruto (Civil Appeal E022 of 2023)  
[2023] KEHC 25996 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25996 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E022 OF 2023  
RL KORIR, J  
NOVEMBER 28, 2023**

**BETWEEN**

**LAZARUS NJUGUNA MBURU ..... APPLICANT**

**AND**

**GILBERT RUTTO KIPKURUI ALIAS KENNEDY RUTO ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion Application dated 10th May 2023 which sought the following Orders:-
  - I. Spent.
  - II. Spent.
  - III. That there be a stay of execution of the Judgment/Decree in SOTIK SPMC NO. E033 of 2022 pending the hearing and determination of the Applicant's Appeal
  - IV. That costs of this application be provided for.
2. The Application was brought under Order 42 Rule 6 (1) and (6) of the Civil Procedure Rules and it was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Peter Makau on 10th May 2023.

**The Applicant's Case.**

3. The Applicant stated that it had moved the court timeously and that execution of the Decree in SOTIK SPMC NO. E033 of 2022 was imminent. That if the execution was not stayed then the Appeal would be rendered nugatory and this would occasion the Applicant and his insurers to suffer substantial loss.



4. It was the Applicant's case that his Appeal raises substantial issues for determination and the Appeal had a high chance of success.
5. The Applicant stated that based on the Respondent's testimony in the trial court, he was in no position to refund the decretal sum in case the same is paid out to him and the Appeal succeeds.
6. It was the Applicant's case that his insurer (Britam General Insurance Company) was amenable to furnish security pending the hearing and determination of the Appeal.

### **The Response**

7. Through his Replying Affidavit dated 22nd May 2023, the Respondent stated that the trial court in Sotik awarded him Kshs 1,473,257/= as damages and that courts should not make a practice of denying a successful litigant the fruits of their Judgments without a proper cause. The Respondent further stated that the Applicant had not demonstrated that there was imminent execution of the decree in SOTIK SPMC NO. E033 of 2022.
8. It was the Respondent's case that the Applicant had not satisfied the conditions for stay of execution, that he had not demonstrated that he had a good appeal with probability of success or how he would suffer substantial loss. It was the Respondent's case that the Applicant had not demonstrated any special circumstances that would enable this court exercise its discretion in granting the stay.
9. The Respondent stated that the Applicant had not offered any security for the performance of the decree. The Respondent prayed that he be allowed to enjoy the fruits of his Judgment.

### **Applicant's written submissions.**

10. Through his written submissions dated 22nd June 2023, the Applicant submitted that he moved the court without unreasonable delay. That he filed his Memorandum of Appeal on 9th May 2023 which was within the 30 day period and that the present Application was filed on 11th May 2023. He relied on KAM Transporters Savings and Credit Co-op Society Limited & another v Grace Wairimu Wandate (2021) eKLR.
11. The Applicant submitted that he would suffer substantial loss as he was apprehensive that the Respondent would not be able to refund him the decretal sum if his Appeal succeeds. That the Respondents worth and assets are unknown to the Applicant and that once he expressed doubt of the Respondent's inability to refund the decretal sum, the evidential burden shifted to him. The Applicant further submitted that the Respondent had not disclosed any source of income and that his apprehension was justified. He relied on National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another (UR) and KAM Transporters (supra).
12. It was the Applicant's submission that he was amenable to tender security to the court as a condition for having the prayer of stay granted. That he was amenable to paying the entire amount to the court since paying the Respondent half the sum would expose him to substantial loss if the Appeal succeeds.
13. The Applicant submitted that they a meritorious Appeal which raised substantial matters and that he was very keen on having the Appeal heard and determined.

### **Respondent's written submissions**

14. In his submissions dated 16th August 2023, the Respondent submitted that the Applicant had not demonstrated what loss he would suffer if the stay was denied and as such no appeal would be rendered nugatory. The Respondent further submitted that the Applicant had failed to show how the process



- of execution amounted to substantial loss and had also failed to show how he would fail to refund the decretal sum if the Appeal succeeded. He relied on *James Wangalwa & another v Agnes Naliaka Cheseto (2012) eKLR*.
15. It was the Respondent's submission that the Applicant had not made any effort to deposit to court the security for decretal sum or alternatively deposit half the decretal sum into an interest earning account in the joint names of the parties' advocates. He relied on *Nganga Kabae v Kahunyo Kimani (2005) eKLR*.
  16. The Respondent submitted that the Applicant had not demonstrated the existence of an arguable appeal with a high chance of success. That the Respondent being the successful litigant in this case ought to enjoy the fruits of his Judgment and that the present Application was meant to deny him his Judgment. The Respondent further submitted that that the Applicant failed to prove all the conditions necessary for the grant of stay of execution and therefore his Application lacked merit. He relied on *Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia (2021) eKLR*.
  17. It was the Respondent's submission that if the court was inclined to grant the stay then it should order the Applicant to pay him half the decretal sum and the other half to be deposited in an interest earning account in the joint names of the parties' advocates.
  18. I have read through and carefully considered the Notice of Motion Application dated 10th May 2023, the Replying Affidavit dated 22nd May 2023, the Applicant's written submissions dated 22nd June 2023 and the Respondent's written submissions dated 16th August 2023. The only issue for my determination was whether the Applicant had satisfied the requirements for the grant of the Order of Stay of Execution.
  19. The principles that relate to Stay of Execution Orders are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
    1. 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 orders 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".
  20. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant should satisfy the court that:-
    - i) Substantial loss may result to him unless the order of stay is granted.
    - ii) That the Application has been made without unreasonable delay.



- iii) The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.
21. Regarding the issue of substantial loss, the Court of Appeal in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another (1986) eKLR, held that:-
- “Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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.”
22. Similarly in James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR, Gikonyo J held 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.”
23. The Applicant stated that it would suffer substantial loss unless the execution of the Decree was stayed. That the decree was for a substantial amount and the Respondent would be unable to refund him the decretal sum in the event that his Appeal succeeded.
24. In my view, the burden is on the Applicant to prove that the Respondent would not be able to refund the decretal sum. Shifting that burden to the Respondent who is the Judgment holder is unjust. I agree with Odunga J. (as he then was) in Michael Ntouthi Mitheu v Abraham Kivondo Musau (2021) eKLR where he held:-
- “Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree.”
25. Similarly in Jamii Bora Bank Limited & another vs Samuel Wambugu Ndirangu, Muchemi J. held:-
- “... It is trite law that a mere claim that the respondent cannot refund the decretal sum is not sufficient. There must be reasonable grounds provided by the applicants to show that the respondent cannot make refund of the decretal sum ... ”
26. Further, the Court of Appeal in Caneland Ltd Malkit Singhpandhal & another vs Delphis Bank Ltd (2000) eKLR held:-
- “We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue ... ”
27. The Applicant stated that from the trial court proceedings, he could tell that the Respondent would be unable to refund him the decretal sum if his Appeal succeeded. He failed to state with certainty



and clarity why he thought the Respondent could not refund the decretal sum. The Applicant did not adduce any evidence or set out factual circumstances to demonstrate that it would suffer substantial loss if the execution was not stayed as was held in *Jamii Bora Bank Limited* (supra).

28. Based on the evidence before me, it is my finding that the Applicant has not proved the substantial loss that it would suffer. Therefore, he failed to prove the first condition for the grant of stay.
29. On the issue of unreasonable delay, In *Republic vs Attorney General & Another, Baps International Limited (Interested Party) Ex parte* (2020) eKLR, Nyamweya J. (as she then was) stated:-

“The concept of what is reasonable time is flexible, and will depend on the circumstance of a case, as held in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR. Relevant circumstance include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision make, and adverse consequences of delay, and the need to ensure fairness ... ”

30. Judgment in the trial court was delivered on 3rd May 2023 and the Memorandum of Appeal was filed on 9th May 2023. The present Application for stay of execution was filed on 11th May 2023. It is my finding that the seven day difference between delivery of the Judgment and filing of the present Application represented a reasonable timeline within which this Application was filed.
31. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

32. Similarly, in *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (2019) eKLR Nyakundi J. observed: -

“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 ... ”

33. The Applicant submitted that he was willing to deposit the entire decretal sum in court as paying the Respondent half the decretal sum exposed him to substantial loss in the event his Appeal succeeded.
34. On the other hand, the Respondent submitted that the Applicant should pay him half the decretal sum and the other half be deposited in an interest earning account in the joint names of the parties’ advocates.
35. It is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that

- “ 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.”

36. Further in the case of *Samvir Trustee Limited vs Guardian Bank Limited* (UR), Warsame J (as he then was), held that:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion”.



37. I have noted that the Applicant's main reason for the prayer of stay of execution is that it was apprehensive that the Respondent would be unable to refund him the decretal sum if the Appeal succeeded. I have also noted that the Respondent was the decree holder who should be enjoying the fruits of the Judgment. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice.

38. This principle was enunciated in the decision of Gikonyo J. in *Absalom Dova v Tarbo Transporters* (2013) eKLR, where he stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation ...”

39. Similarly in *RWW v EKW* (2019) eKLR, the court held that:-

“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 ...”

40. In the final analysis, the Applicant has failed to satisfy all the three conditions for the grant of stay of execution. However, it is my view that the Applicant deserves to be allowed to exercise his right of appeal as enshrined in *the Constitution*. I have also observed that the Applicant's main concern as stated in the attached Memorandum of Appeal was that the award was inordinately high. Balancing the interests of the parties, I find it just and fair to grant stay of execution of the Judgment in *Sotik SPMCC* Number 33 of 2022 on the following conditions: -

- i. The Applicant shall pay the Respondent Kshs 736,629/= being half the decretal sum within 30 days of this Ruling.
- ii. As Security for the due performance of the Decree, the Applicant shall deposit the remaining half (Kshs 736,629/=) in an interest earning account in the joint names of the advocates of the parties within 30 days of this Ruling.
- iii. The Applicant shall file his Record of Appeal and set down the Appeal for Directions within 45 days of today.
- iv. Failure to meet the conditions above shall lead to the automatic lapse of the stay order.

Orders accordingly

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023.**



**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of Ms. Soita holding brief for Ms. Matiri for the Applicant, Ms. Soita for the Respondent

