



REPUBLIC OF KENYA



**Blue Jay Investments Ltd & another v May & another (Suing on behalf of the Estate of Mwanza May) (Civil Appeal E071 of 2022) [2023] KEHC 25827 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E071 OF 2022  
TM MATHEKA, J  
NOVEMBER 24, 2023**

**BETWEEN**

**BLUE JAY INVESTMENTS LTD ..... 1<sup>ST</sup> APPLICANT**

**ANDREW MUNGARA KIARIE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WILLINGTON MWANGANGI ..... 1<sup>ST</sup> RESPONDENT**

**JACOB MUUO MWANGANGI ..... 2<sup>ND</sup> RESPONDENT**

**SUING ON BEHALF OF THE ESTATE OF MWANZA MAY**

**RULING**

1. What is before me is the application dated 16<sup>th</sup> December 2022 brought under certificate of urgency under section 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law. It seeks the following orders;
  - a. Spent.
  - b. That pending the hearing and determination of this application inter parte, stay of execution of the judgment/Decree delivered on 17/11/2022 in Kilungu Chief Magistrate's Court Civil Suit No.151 of 2021 be granted ex-parte in the first instance.
  - c. That upon hearing this application, there be stay of execution of the aforesaid judgment pending the hearing and determination of the appeal lodged by the appellant herein in Civil Appeal No. E071 of 2022.
  - d. That the costs of this application be provided for.
2. It is supported by the grounds on its face and the Affidavit sworn by Colleta Wambua, advocate on the same day. She depones that the appeal has a chance of success and will be rendered nugatory if



stay is not granted. A copy the judgment of the subordinate court and Memorandum of Appeal are exhibited as CW-1 & 2 respectively. She depones that the intended appellant is ready to furnish security for the due performance of the decree as shall be directed by this court and that the application has been brought without any delay.

3. The application is opposed by the 1<sup>st</sup> respondent's vide the replying affidavit sworn on 24<sup>th</sup> February 2023. He depones that the application is misconceived, bad in law, an abuse of court process, vexatious and should be dismissed with costs. That the subject judgment is sound, fair and reasonable and the appeal has no chances of success. That if the court is inclined to grant a stay, the applicants should release half of the decretal sum to his advocates and the balance be deposited in a joint interest earning account of both advocates on record.
4. He depones that the appeal on liability is made in bad faith as the applicants' proposal before the trial court was that liability should be apportioned equally. The applicants' submissions are exhibited as GWM-1. That the applicants did not call any witness in defence of their position and hence the 100% finding of liability against them was unchallengeable.
5. That with regard to quantum, the total sum admitted and submitted by the applicants was Kshs 1, 564, 798/= . Consequently, he depones that they cannot leave the court empty handed.
6. Further, he depones that this matter was part of a series and the applicants were held 100% liable in one of the matters. The relevant documents in the said matter (Kilungu PMCC No. 226 of 2020) are exhibited as GWM 2a, b, c, d & e. That in that matter the applicants have paid the decretal sum.
7. The application was canvassed through written submissions.

### **The Applicants' Submissions**

8. The applicants have identified the following as the issues for determination;
  - a. Whether the application was made without unreasonable delay
  - b. Whether the appeal will be rendered nugatory and would cause the applicants/appellants irreparable loss if stay is not granted.
  - c. Whether the appeal presents arguable grounds with appreciable chances of success.
  - d. Whether the applicants/appellants have provided such security as to costs.
9. On whether the application was made without unreasonable delay they submit that they were unable to seek stay in the subordinate court due to a downtime in the Teams system. However, they filed the application timeously on 20<sup>th</sup> December 2022 after filing the appeal on 16<sup>th</sup> December 2022 and the judgment appealed against had been delivered on 17<sup>th</sup> November 2022.
10. On whether the appeal will be rendered nugatory and would cause the applicants/appellants irreparable loss if stay is not granted issue, they submit that the respondents are free to execute the judgment to their detriment. They are apprehensive that the respondents will be unable to reimburse any amount so paid if the appeal succeeds. They rely *inter alia* on the case of [G.N Muema p/a \(sic\) Mt. View Maternity & Nursing Home -vs- Miriam Maalim Bisbar & Anor \[2018\]](#) eKLR where the court stated as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the



decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

11. They submit that the judgment is of a substantial amount hence they are justifiably apprehensive that they will suffer prejudice if the respondents are paid.
12. On whether the appeal presents arguable grounds with appreciable chances of success issue, they submit that all what they are required to demonstrate is that at least one of the issues for determination in the appeal presents an opportunity for this court to pronounce its decision. They set out the issues raised on appeal and rely on [\*Michael Opiyo –vs- Solomon Kimeli Bor & Anor \[2021\]\*](#) eKLR where the court) stated;

“It is now trite that an arguable appeal is not necessarily one that must succeed; and that even one arguable point is sufficient for purposes of section 79G of the [\*Civil Procedure Act\*](#).”

13. On whether the applicants/appellants have provided such security as to, they submit that they are willing to furnish security of a bank a guarantee for the due performance of the decree. They rely on [\*Khalsa Schools & 2 Others –vs- Samuel Odhiambo Otieno \[2021\]\*](#) eKLR where the court stated;

“As was stated by Parker LJ in *Rosengren v Safe Deposit Centres Ltd* (1984) E ALL ER 198 which has been quoted widely with approval in many cases in Kenya, security for the due performance of a decree ought to be given in a way that is least disadvantageous to the party giving security and may be in many forms including a bank guarantee. What is important is that it must be adequate and binding.”

### **The Respondent’s Submissions**

14. The respondents submit that the finding of 100% liability cannot be easily challenged as the applicants did not call any witness in the trial court. They have relied on [\*Hyder Nthenya Musili & Another \(Suing as the legal representative of the Estate of Collins Mumo Mbindyo\) v China Wu Yi & Another \[2019\]\*](#) eKLR on the proposition that where the defendant had not called any witness on issue of liability, to succeed on appeal would be an uphill task also on [\*Kioko Peter –vs Kisakwa Ndolo Kingo’ku \[2019\]\*](#) eKLR where the court stated;

“While appreciating that the amount herein was awarded to an estate of the deceased, it is clear that there was no evidence adduced by the applicant challenging liability before the trial court. Accordingly, a challenge as to the applicant’s liability is bound to be an uphill task.”

15. They submit that the applicants have only satisfied only two of the conditions of filing the application timeously and willingness to furnish security. They contend that the condition requiring the applicants to demonstrate that the appeal will be rendered nugatory has been satisfied partly. That even on appeal, it is indisputable that they will be awarded some damages. It is unlikely, they submit, that this court will slash the judgment sum of Kshs 9,420, 286/= by over a half. They rely on [\*Amal Hauliers Ltd –vs- Abdulnasir Abubakar Hassan \[2017\]\*](#) eKLR where the Court stated;

“20. In the case at hand, the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. Indeed, the Respondent’s averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum



were the Applicant's appeal to succeed. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed....

23. A perusal of the memorandum of appeal shows that the Applicant is appealing against the decision on liability and quantum. Much as I do not want to speculate on the outcome of the appeal, I do not think that the Respondent will leave this court empty-handed. He says he needs the money for treatment. His proposal that he gets half the decretal amount is therefore reasonable.”
16. They submit that it is reasonable for them to be given half of the decretal amount.
17. Having looked at the application, the supporting affidavit, the replying affidavit and the rival submissions, the issue for determination are whether the stay of execution should be granted and if so on what conditions.
18. This court is guided by Order 42 Rule 6 of the Civil Procedure Rules, on the requisites for the granting of the orders sought; that substantial loss will occur if stay is not granted, that the application has been filed without unreasonable delay and that the applicant has furnished security for the due performance of the decree.
19. The respondents have acknowledged that the conditions of; timely filing of the application and willingness to furnish security have been met.
20. As for substantial loss, the applicants do not seem to appreciate that it is also one of the conditions however; they have mentioned their apprehension about the respondents' inability to refund the decretal sum. The memorandum of appeal shows that the applicants are dissatisfied with the awards on both liability and quantum. The trial Magistrate found the applicants 100% liable and awarded the respondents Kshs 9, 122, 936/= under the Fatal Accidents Act and Law Reform Act.
21. From the submissions of the applicants in the trial court, they had proposed that liability be apportioned in the ratio of 50: 50. This means that even if this court is to agree with them and apportion liability equally, they will still be obligated to pay half the decretal sum. In the circumstances the only fair and just thing to do is make the following orders;
  - a. The application for stay of execution pending the hearing and determination of the appeal is allowed.
  - c. The other two thirds be deposited within 30 days hereof in joint interest earning account in the names of the advocates for the parties as security for the performance of the decree.
  - d. The applicants to file and serve the record of appeal within 30 days hereof
  - e. In default of (b) and (c) the stay to lapse and the application to stand dismissed with costs to the respondents.
  - f. Otherwise the costs to abide the outcome of the appeal

**DATED SIGNED AND DELIVERED VIA EMAIL THIS 24<sup>TH</sup> DAY OF NOVEMBER 2023**

.....

**Mumbua T Matheka**

**Judge**

CA Mwiwa



**Applicants' Advocates**

Humphrey & Co. LLP Advocates

**Respondents' Advocates**

Mutavi & Associates Advocates

