



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Ndung'u (Civil Appeal E166 of 2023)
[2023] KEHC 26657 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E166 OF 2023
FN MUCHEMI, J
DECEMBER 19, 2023**

BETWEEN

CLEMENT MUIRURI KAMAU APPELLANT

AND

DAVID KIMOTHO NDUNG'U RESPONDENT

RULING

1. The application for determination dated October 6, 2023 seeks for orders for stay of execution of the judgment in Thika SCCCOMM No. E1015 of 2022 delivered on 25th May 2023 pending the hearing and determination of the instant appeal.
2. The respondent filed a replying affidavit dated October 27, 2023 in opposition to the application.

The Applicant's Case.

3. The applicant states that judgment in SCCCOM No. E1015 of 2022 was delivered on 25th May 2023 and being aggrieved with the decision, lodged this appeal in the High Court at Kiambu being HCCA No. E183 of 2023. The file was later transferred to this court and given a new number HCCA No. E166 of 2023. The applicant further states that he filed an application dated 14th June 2023 seeking for stay of execution of the judgment before trial court. The ruling was delivered on August 31, 2023 denying him stay of execution thus prompting him to file the instant application.

The Respondent's Case

4. The respondent argues that the application is frivolous, vexatious and an abuse of the process of the court. The respondent states that the appellant made a similar application in the lower court seeking stay of execution of the judgment pending appeal. The trial court delivered its ruling on August 31, 2023 and dismissed the said application because it lacked merit and further that the appellant had not met the conditions to warrant the granting of stay of execution sought. The respondent argues that



the instant application is similar to the one filed in the lower court and thus the said applications have been made to deny him the enjoyment of the fruits of his judgment.

5. The respondent states that the appeal has no chances of success as it does not raise substantial triable issues as the appellant did not dispute owing him the sum of Kshs. 1,200,000/- instead he argued that the lower court did not have jurisdiction in the matter. Furthermore, the respondent argues that the issues raised by the applicant in the appeal were all considered and addressed by the court in its judgment and ruling.
6. The respondent argues that the applicant has not demonstrated what substantial loss he stands to suffer if the order of stay is denied. Further, the respondent states that the trial court delivered its ruling on August 31, 2023 and the applicant filed the instant application on October 11, 2023. The delay of 1 ½ months has not been explained and therefore the delay is inordinate. The applicant has also not demonstrated his willingness to deposit any security for the due performance of the decree herein.
7. The respondent states that the applicant has not demonstrated that in the event that stay of execution is denied, that he will not be able to recover his money from him in the event the payment is made. The respondent argues that he is financially able to refund the decretal sum and thus denying the orders of stay of execution would not render the appeal nugatory.
8. The respondents state that the cause of action arose in June 2020 and he has been deprived the fruits of his judgment for a period of three (3) years. He further states that he is entitled to enjoy the fruits of his judgment and the appellant has not given any plausible reasons why this benefit should be kept away from him. As such, the respondent argues that the applicant has failed to satisfy the conditions warranting the court to exercise its discretion in his favour and grant the stay of execution sought.
9. The respondent states that on the face of the memorandum of Appeal, this appeal is not arguable and thus has no chances of success. In the event the court grants the order of stay pending appeal, the respondent argues that the applicant ought to be ordered to deposit the decretal sum plus interest in court or in a joint bank account in the names of the advocates on record for the parties.

The Applicant's Submissions.

10. The applicant relies on order 42 rule 6 of the [Civil Procedure Rules](#) and the cases of [Nicholas Stephen Okaka & another v Alfred Waga Wesonga](#) [2022] eKLR, [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, [New Nairobi United Services Ltd & another v Simon Mburu Kiiru](#) [2021] eKLR and [Public Service Commission & 72 others v Okiya Omtatah & 4 others](#) [2021] eKLR and submits that the instant court is at liberty to grant an order for stay of execution without prejudice to the fact that the application was made and denied in the trial court.
11. On the issue of substantial loss, the applicant argues that he stands the risk of losing money in the event that he pays the decretal sum to the respondent. The applicant further argues that the respondent did not give any assurance of how he would pay back the money in the event that this appeal succeeds. The applicant argues that it would be a challenge for the respondent to revert the decretal sum once it is paid to him which would lead to further proceedings by the applicant in pursuit of his money if the appeal were to succeed. As such, the applicant argues that the failure to recover the decretal sum if paid to the respondent, in the event that the appeal succeeds, would render the appeal nugatory. Moreover, the applicant submits that the respondent did not show any damage or loss being inferred upon him with the maintenance of *status quo*.
12. The applicant relies on article 169(1)(d) & (2) of the [Constitution](#), the [Small Claims Court Act](#) section 12(3) & (4) and the cases of [Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper](#)



Service [2019] eKLR; *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR; *Family Bank Limited v Shemsa Nassoro Hamdu* [2021] eKLR; and *Joseph Muthee Kamau & another v David Mwangi Gichure & another* [2013] eKLR and submits that the small claims court did not have jurisdiction to determine the matter as the pecuniary value of the subject matter was above the court's jurisdiction. As such, the judgement emanating from a court with no jurisdiction is void *ab initio*. To support his contentions, the applicant relies on the cases of *In the Matter of Interim Independent Electoral Commission* [2011] eKLR; *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR and *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* [2022] eKLR.

13. The applicant further relies on order 1 rule 3 and rule 10 of the *Civil Procedure Rules* and the case of *Mike Mbuvi Sonko v Evans Odhiambo Kidero & another* [2016] eKLR and submits that he ought not to have been sued in the matter in the lower court as the money which is the subject of the loan contract that formed the basis of the suit was advanced to Fine Touch Auto Garage Ltd, which is a separate legal entity with the capacity to sue and be sued.

The Respondent's Submissions

14. The respondent submits that the applicant has failed to satisfy the conditions for stay of execution pending appeal in line with Order 42 rule 6 of the *Civil Procedure Rules*. The respondent relies on the cases of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee)* [2019] eKLR and *Machira t/a Machira & Co. Advocates v East African Standard* [2002] 2 KLR 63 and submits that the applicant has failed to demonstrate how he stands to suffer substantial loss.
15. The respondent submits that the ruling in the lower court on the application for stay pending appeal was delivered on August 31, 2023 but the applicant filed the instant application on October 11, 2023 after the respondent was issued with a notice to show cause on September 14, 2023. The respondent further submits that the delay of more than 1 ½ months in filing the instant application has not been explained by the applicant and thus the delay is inordinate.
16. On the issue of security, the respondent argues that the applicant has not demonstrated his willingness to deposit any security for the due performance of the decree herein and that the lower court in declining to issue orders for stay took note of the fact that the applicant had not demonstrated his willingness to deposit any security in court, which position the respondent contends has not changed.
17. The respondent relies on the case of *Meteine Ole Kilelu & 10 others v Moses K. Nailole*, Civil Appeal No. 340 of 2018 and submits that no evidence has been availed to demonstrate that he will be unable to repay the decretal sum in the event the appeal succeeds. Furthermore, the respondent argues that the applicant has not demonstrated any reason why he should be denied the right to enjoy the fruits of his judgment.

Analysis & Determination

i) Whether the applicant has met the prerequisite for grant of stay of execution pending appeal.

18. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under order 42 rule 6(2) *Civil Procedure Rules*. 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 1st 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. Thus under order 42 rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
20. Substantial loss was clearly explained in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR:-

“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.
21. The applicant contends that he stands to suffer irreparably if the respondent levies execution against him. The respondent argues that the applicant has not demonstrated the substantial loss he stands to suffer. On perusal of the applicant’s supporting affidavit, It is noted that the applicant has not demonstrated how he stands to suffer substantial loss if the orders sought are not granted. The applicant merely states that he filed a similar application for stay in the trial court but the same was dismissed. It is only in his submissions, does the applicant raise the issue of suffering irreparable damage as the respondent will not be financially able to repay back the decretal sum in the event the appeal succeeds. It is my considered view that the applicant cannot bring up the issue of the respondent being unable financially to pay back the decretal sum in his submissions. The applicant ought to have raised that contention in his affidavit to give the respondent a chance to respond and produce evidence of his financial abilities. It is therefore my considered view that the applicant has not demonstrated substantial loss he stands to suffer.

Has the application has been made without unreasonable delay.

22. Judgment was delivered on May 25, 2023 and the applicant has brought the present application on October 11, 2023. It has taken the applicant about 4 months and 16 days between the date of judgment



delivered in the trial court and the time when it filed the instant application. The applicant filed an application for stay of execution of the said judgment on June 14, 2023 in the trial court and the same was dismissed on August 31, 2023. Thus the applicant took over 1 month and 11 days to file the current application. The applicant is silent on the issue of why it took him over 1 month to file the present application. In the absence of an explanation, it is my considered view that a delay of 1 month and 11 days is inordinate and excusable.

Security of costs.

23. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR the court stated:-

“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 the 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.

24. Evidently, the issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and noted that the applicant has not demonstrated any willingness to deposit any security which is a core requirement under the law.

25. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“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 judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

26. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that there exists arguable points of law. Although the applicant has not satisfied the threshold of granting stay of execution pending appeal, the grounds of appeal raised are arguable as they touch on the issue of jurisdiction. In balancing the rights between the parties, it is my considered view that stay of execution ought to be allowed on some conditions.

27. In conclusion, this application is allowed and orders for stay of execution granted on condition that the applicant deposits Ksh.600,000/= in court within 45 days and in default, these orders to be vacated.

28. The costs of this application shall abide in the appeal.

29. It is hereby ordered.



DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2023.

F. MUCHEMI

JUDGE

