



**Rwaken Investment Limited & another v Mudagale (Suing as
Administrator of the Estate of Phidelis Sindavi) (Civil Appeal
E524 of 2021) [2022] KEHC 11746 (KLR) (Civ) (30 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 11746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E524 OF 2021

SJ CHITEMBWE, J

MARCH 30, 2022

BETWEEN

RWAKEN INVESTMENT LIMITED 1ST APPLICANT

KELVIN MOKABONDO OMBASA 2ND APPLICANT

AND

BEATRICE KADAGO MUDAGALE RESPONDENT

SUING AS ADMINISTRATOR OF THE ESTATE OF PHIDELIS SINDAVI

RULING

1. The appellant filed an amended motion dated 29th September 2021 seeking the following orders;
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this appeal, the honorable court be pleased to issue an order staying part of the order that was issued by Hon. Mbeja (PM) in Milimani CMCC No. E3939 of 2020 on 13th August 2021 that required the appellant to deposit the decretal amount in the subordinate court account
 4. That the costs of this application be in the cause.
2. The application was based on the grounds on it and on the supporting affidavit of C. K. Kiplagat. The appellants indicated that on 13th August Hon. Mbeja (PM) issued an order setting aside an exparte judgement that had been entered against the appellants and ordered them to appear and file its defence within 21 days. The court further issued an order that the appellants deposit the entire decretal



amount in court within 21 days notwithstanding that it had set aside the said judgement. The appellant thereafter proceeded to file (electronically) an application dated 23rd August 2021 in CMCC E3939 seeking to stay/suspend the implementation of part of its order made on 13th August 2021 requiring the appellants to deposit the entire decretal sum in court. The application was not considered and thus exposed the appellants to a real threat.

3. The appellant then lodged the appeal herein against part of the subordinate court's order dated 13th August 2021 on requiring the appellants to deposit the entire decretal amount in court on the basis that the lower court having set aside the *ex parte* judgement there was no decretal sum left. The respondents have now proceeded to obtain a proclamation notice, warrants of attachment and warrants of sale against the appellants exposing them to execution on judgement that had been set aside.
4. The appellants submitted that they would suffer irreparable loss if the respondent proceeds to execute and sell the appellants proclaimed motor vehicles registration numbers; KCJ 134X, KCJ 128X, KCJ 124X, KCJ 125X, 126, KCA 557Z, KCF 339Y, KCA 556Z, KCF 340Y, KCC 223F, KCA 553Z and KCA 554Z worth Kshs. 9,400,000. The appeal has a high probability of success and it may be rendered nugatory if the amount of Kshs. 2,869,939.78 is paid to the respondent as it will occasion irreparable damage and immense loss as the said properties are the appellants' only tools of trade.
5. The respondents have also not demonstrated his financial position or his ability to pay back the decretal amounts should the appeal succeed. The application has also been made without undue delay as the ruling was delivered on 13th August 2021. On providing security for due performance they submitted that they are ready and willing to furnish the court with security.
6. The application was opposed by the replying affidavit of Beatrice Kadage Mudagale. The respondent indicated that the appellants have failed to comply with the orders from the lower court and as such they do not qualify to be granted a stay according to Order 42 rule 6 of the [Civil Procedure Rules 2010](#). The application herein was only as a reaction to the execution proceedings that had commenced against the judgement debtors. The respondents argued that the right to stay must be balance equally with the right of the successful party to enjoy the fruits of his judgement as equity only aids the vigilant and not the indolent.
7. Counsel for the respondent submitted that the appellants have not demonstrated that the respondent will be unable to repay the decretal sum if the appeal is successful and just because the appellants appear to have stronger financial muscle does not make the respondent a pauper. They have therefore not proven that they would suffer substantial loss if the stay of execution is not granted. It was argued that the appellants have not offered any security in the application and as such the application must therefore fail. They added that in the event that the court considers it appropriate to grant the application of stay, the application be made on condition that 50% of the decretal amount be paid to the respondent and the balance of 50% be placed in a joint interest earning account.

Analysis and Determination

8. The only issue for determination herein is whether to grant a stay of execution pending the hearing and determination of the appeal. The principles guiding the courts in granting or refusing stay of execution are stated in the case of [Butt vs Rent Restriction Tribunal](#) [1979], where the court of appeal held that the discretion of the court should be exercised in such a way that it does not prevent an appeal, secondly, so that an appeal is not rendered nugatory, consideration to the special circumstances of each case and finally the court should not refuse a stay for the reason that a better remedy might become available to the applicant at a later stage of the proceedings. Further reliance has been placed in the case of [Samvir Trustee Limited vs Guardian Bank Limited](#) Nairobi HCCC 795 of 1997 where Warsame J.



reiterated the principles for granting or refusing an application for stay. In *Stephen Wanjohi v Central Glass Industries Ltd*, Nairobi HCCC No. 6726 of 1991, the Court identified three conditions that must be established to include;

- a) Sufficient cause
- b) Substantial loss
- c) No unreasonable delay
- d) Security and the grant of stay is discretionary”.

9. The ruling that is subject to the appeal was delivered on 13th August 2021 and the application herein was filed on 23rd August 2021 and later amended on 29th September 2021 therefore there was no unreasonable delay. The appellants have argued that the appeal has a high chance of success and will be rendered nugatory unless a stay is granted. That if execution should proceed, it will cause substantial loss as the proclaimed cars are the appellants’ only tools of trade. The appellants additionally indicated that they are ready and willing to provide security.
10. The court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:-

“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.”

It is this court’s view that it would be in the interest of justice to grant a stay of execution pending the hearing and determination of the appeal. The application dated 23rd August 2021 and later amended on 29th September 2021 is hereby granted in the following terms:-

1. Execution is hereby stayed pending the hearing and determination of the pending Appeal.
2. The appellant to deposit Kshs. 2,869,939.78 the decretal sum either in a joint interest earning account of both advocates or in court within 45 days hereof.
3. In default of the above, orders of stay of execution shall stand vacated and the Respondent shall be at liberty to execute.
4. Costs of the application shall abide by the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MARCH, 2022

S.J. CHITEMBWE

JUDGE

