



**Climax Bus Services Ltd & another v Ogidi (Civil Appeal
E056 of 2021) [2022] KEHC 11745 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E056 OF 2021
GWN MACHARIA, J
APRIL 28, 2022**

BETWEEN

CLIMAX BUS SERVICES LTD 1ST APPELLANT

GEORGE KINYANJUI 2ND APPELLANT

AND

POPE JOHN ODUOR OGIDI RESPONDENT

RULING

1. Before court is the Appellants' Notice of Motion dated 27th October, 2021 brought under Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the Law.
2. The Appellants are seeking stay of execution of the judgment and decree delivered in Naivasha CMCC No. 1096 of 2018: Pope John Oduor Ogidi v Climax Bus Services Ltd & Another pending the hearing and determination of the instant appeal. They also pray that they be allowed to furnish security in the form of a Bank Guarantee from DTB Bank or Family Bank. Lastly, they ask that the costs of this application abide the outcome of the appeal.
3. The application is based on the grounds on its face and supported by the Affidavit of Samuel Mwangi, the Manager of Guardian Coach Limited who are the owners of motor vehicle registration number KBN 686N at whose instance the suit Naivasha CMCC No. 1096 of 2018 was defended. He averred that the Appellants are aggrieved by the judgment delivered on 9th September, 2021 wherein the trial court found them a 100% liable for an accident and awarded the Respondent general damages of Kshs. 500,000/=, special damages of Kshs. 8, 000 plus costs and interest at court rates. That they have since lodged the instant appeal against the judgment and believe that the appeal is arguable and has overwhelming chance of success. Further, that they are reasonably apprehensive that the Respondent may proceed to levy execution for the substantial decretal amount. As such, if stay is not granted, they



- stand to suffer substantial loss since the Respondent's financial capability to refund the substantial amount in case the appeal succeeds is unknown.
4. Further, he averred that their financial status has utterly been compromised by the Corona Virus pandemic hence they can only offer a Bank Guarantee that will be provided by their Insurer, Direct line Assurance Ltd. In this respect, he annexed two bank guarantees from DTB Bank and Family Bank. Lastly, he averred that this Application is made in good faith and will not occasion any prejudice to the Respondent which cannot be compensated by way of costs.
 5. The Respondent opposed the application through Grounds of Opposition dated 3rd November, 2021 and a Replying Affidavit sworn on 4th February, 2022. He contends that the application is incompetent, vexatious frivolous and an abuse of the due process. That the application lacks merit and has been brought in bad faith with the intention of delaying him from enjoying the fruits of the judgment. Further, that he is not agreeable to the deposit of a bank guarantee by the Appellants' as security and that in any case, the ones annexed to the application are neither viable nor properly executed.
 6. The application was canvassed by way of written submissions which I have carefully considered.
 7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules 2010](#) which provide as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 order 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.”
 8. In the instant case, it appears that the only issue in contention is the nature and extent of the security that the Appellants should be ordered to provide in this case for stay of execution to issue.
 9. The Appellants submitted that their Insurer is ready and willing to provide a Bank Guarantee as a security. On the other hand, the Respondent submitted that his main reason for opposing the application is that the Appellants have not offered sufficient security. The Respondent urged that the Appellants be ordered to release half of the decretal sum to him and the balance be deposited in a joint interest earning account in the names of both advocates since the Appellants are only disputing the quantum of damages and not liability. In support of his proposition, he relied on the case of [Obadiah Mugambi v Joyce Ncoro](#) (2021) eKLR where the court made such an order.
 10. In resolving this issue, the court is required to balance the competing interests of both the Appellants and the Respondent. On the one hand, the court must consider the Respondent's right to enjoy the fruits of its judgment. On the one hand, it must consider the Appellants' equally important right to



against the trial court's decision and guard them against the possibility of ending up with a paper judgment. I note that the Bank Guarantees given by DTB Bank and Family Bank may not specifically cover the Respondent and in any event, the Court is not necessarily bound by what is offered and/or proposed by the Appellants as security. (See *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR)

11. Having weighed both interests, I hereby allow the Appellants' application dated 27th October, 2021 in the following terms:

- a. The Appellants shall deposit the entire decretal sum in an interest earning bank account in the joint names of the parties' advocates within 30 days of this Ruling in default of which the stay shall lapse.
- b. The costs of the application shall abide the outcome of the appeal.

12. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 28TH April, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Mr. Thairu for the Appellants/Applicants.

Mr. Owour for the Respondents.

