



REPUBLIC OF KENYA



**KENYA LAW**  
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**Langat & another v Adwera (Civil Appeal 27 of 2022)  
[2022] KEHC 11919 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 27 OF 2022  
GV ODUNGA, J  
MAY 20, 2022**

**BETWEEN**

**MILTON KIPKOECH LANGAT ..... 1<sup>ST</sup> APPELLANT**

**ISAAK ANUNDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EVANS ODIWUOR ADWERA ..... RESPONDENT**

**RULING**

1. By a Motion on Notice dated March 17, 2022, the applicants herein seek orders that the court stays the execution of the judgement in Mavoko Chief Magistrate Civil Suit Number 137 of 2020 pending the hearing and determination of this appeal.
2. The application was supported by an affidavit sworn by Nyakundi Joyce, the applicants' advocate. According to the deponent, she received instructions to appeal against the said judgement delivered on February 17, 2022 in which liability was determined at 90:10 against the appellants and the damages assessed in the sum of Kshs 220,000.00 general damages and special damages of Kshs 7,500.00.
3. It was averred that the appeal, which is both against liability and quantum, has high chances of success. However, it was deposed that if paid over to the Respondent, the Respondent would not be in a position to refund the same in the event that the appeal succeeds. Since the Respondent had not disclosed or furnished the Court with any documentary evidence to prove his financial standing.
4. The deponent however averred that the applicants' insurer was ready, willing and able to furnish the Court and/or the Respondent's Advocate with a Bank Guarantee from Family Bank as security for appeal which will mandate the Bank to release the decretal sum to the successful party after the appeal.
5. In response to the Application, the Respondent relied on a replying affidavit sworn by Evans M. Mochama, the Respondent's advocate who deposed that the Appellant had not demonstrated that



- the Appeal has any chances of success as it lacks any merit and has no arguable Appeal or grounds. It was averred that the orders being sought are discretionary and therefore should only be granted if the Appellants show the said Appeal has any chances of success.
6. It was however proposed that in the event that the Court was persuaded to grant the said prayers for stay, it ought to impose conditional stay to the effect that half of the Decretal sum be released to the plaintiff/Respondent's Advocates on record with the balance thereof being deposited in a joint interest earning Account of both Advocates on record till final determination of this Appeal. In the alternative, the whole Decretal sum be deposited in court or any other bank in an interest earning account in joint names of both Advocates on record till final determination of the Appeal.
  7. In the submissions filed on behalf of the Applicant, it was contended that unless stay of execution is granted the Applicants stand to suffer irreparable loss as the decretal sum involved is Kshs 227,500.00 yet the appellants believe that they have an arguable appeal with high chances of success hence risk the appeal being rendered nugatory if the stay sought is not granted.
  8. According to the applicants, the right of appeal is a constitutional right which is the cornerstone of the rule of law and that to deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50(1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution.
  9. According to the applicants, they are appealing both against both liability and quantum as an excessive award was made by the lower court on soft tissue injuries which is not proportionate to the injuries suffered and the evidence that was tabled before court which injuries ought to have attracted a lower award based on the similar recent decided cases. It was therefore submitted that the Memorandum of Appeal herein is arguable and raises serious points of law and fact that warrant the Court's intervention on appeal.
  10. According to the applicant, in applications for stay pending Appeal, in the subordinate courts it is not a requirement to show that the Appeal has high chances of success and that the Applicant only needs to show he has an arguable appeal. This submission was based on the decision of the Court of Appeal in Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR. On that basis it was submitted that the Applicants Appeal herein is merited and is based on very strong grounds with high chances of success and it is therefore paramount and important that the Appellants are given an opportunity to ventilate their Appeal on merits.
  11. It was further submitted that from the supporting affidavit, it has been demonstrated that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants/Appellants Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing. The Respondent, it was noted, in his Replying Affidavit, did not dispute this and/or show that he had means of paying the decretal amount in the event judgment was delivered in favour of the Applicant. However, it is only the Respondent who can specifically show that he has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds and reliance was placed on Edward Kamau & Anor vs. Hannah Mukui Gichuki & Anor (2015) eKLR.
  12. Based on the said decision, it was contended that in the absence of an Affidavit of means the Respondent's financial status is still unknown and has not been proven. There is therefore likelihood that the Respondent has no means to refund the decretal amount. Since there is reasonable apprehension that the Respondent will be unable to repay the decretal amount, pursuant to Section 112 of the Evidence Act, the evidentiary burden is shifted to the Respondent to show that he has



- financial resources to satisfy the decretal amount. Since the Respondent has chosen not to show that she has financial resources to pay the decretal amount in the event the Appeal already filed succeeds, the court was urged to allow the Application for stay of execution.
13. According to the applicant, judgement was delivered on February 17, 2022 and the appeal was filed within time on March 14, 2022 within the prescribed period. The application for stay was on the other hand filed on March 17, 2022 hence was brought without inordinate delay
  14. As regards security, it was submitted that the Appellants are ready and willing to provide security in the form of a bank Guarantee from Family Bank pending the hearing and determination of the appeal. In this respect, the applicant cited *Selestica Limited vs. Global Rock Development* [2015] eKLR and submitted that the Applicants having satisfied all the conditions set out in Order 42 Rule 6, they should be granted an order of stay of execution pending hearing and determination of the Appeal.
  15. In opposing the Application, the Respondent contended relied on *Victory Construction vs. BM (a minor suing through next friend one PMM)* (2019) eKLR, *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 (1990) KLR 365, *Century Oil Trading Company Ltd vs. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 and *Kenya Shell Limited vs. Kibiru* (1986) KLR 410 and submitted that the appellant had not proved that he is likely to experience a substantial loss should the application fail. The mere fact that he would have to pay the decretal sum does not amount to a substantial loss on its part as the same is witnessed in all cases. It was further contended that the appellant had not proved to that the appeal, if say is granted, has high chances of succeeding.
  16. In opposing the application, the Respondent further relied on Miscellaneous Application No. 42 of 2011, - *James Wangalwa & Another vs. Agness Naliaka Cheseto*, and submitted that the Motion seeking for stay of execution order, as well as the appeal herein, are only meant to deny the respondent the right to enjoyment of his fruits of his judgment.
  17. It was however his position that should the court be persuaded to grant to the appellant a stay of execution, the court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. It was proposed that the application, if allowed, should be on conditions shall the Appellants do release half of the decretal sum to the decree holder's advocates and that the balance of the decretal sum be deposited in a joint interest earning account of both advocates on record till the said Appeal is heard and fully determined. In the alternative, the whole decretal sum be deposited with the court.

### **Determination**

18. I have considered the application, the supporting affidavit and the grounds of opposition to the application and the submissions filed.
19. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides 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 subrule (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. In *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
21. In my view even if it were shown that the respondent is a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success. As was held in *Stephen Wanjohi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.
22. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63* it was held that:
- “ to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”
23. 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 applicant any sums paid in satisfaction of the decree. See *Caneland Ltd. & 2 Others vs. Delphis Bank Ltd.* Civil Application No. Nai. 344 of 1999.



24. I therefore agree with the opinion expressed in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another vs. Agnes Naliaka Cheseto* that:

“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. This is what substantial loss would entail.”

25. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the status quo would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See *Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another* (*supra*).

26. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such large amount may cripple the activities of the Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is not more than Kshs 227,500.00. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers. The Applicant seems to be of the view that in such application, once they make bare allegations that the Respondent's means are unknown the burden shifts to the Respondent to disclose her means. While that may apply to situations where the award is prima facie large, in cases such as this one where the amount awarded is not that large, such a bare averment will not do. The Respondent being the successful party is in the driving seat and therefore to remove her from the seat, satisfactory basis must be laid by the Applicant.

27. To make matters worse the affidavit in support of the application was sworn by the applicants' advocates as opposed to the Applicants themselves. There was no basis for contending that the Respondents would not be in a position to refund the decretal sum once paid over to him.

28. Accordingly, I find that the Applicant has failed proved that substantial loss may result to him unless the order is made. The Motion fails and is dismissed with costs.

29. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20<sup>TH</sup> DAY OF MAY, 2022.**

**G V ODUNGA**

**JUDGE**

Delivered in the absence of the parties.

CA Susan

