



**Njoroge v Fujo; Marie (Interested Party) (Civil Appeal
E001 of 2021) [2022] KEHC 17060 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 17060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E001 OF 2021
MN MWANGI, J
JUNE 30, 2022**

BETWEEN

JOSHUA NJOROGE APPELLANT

AND

MEALI HUSSEIN FUJO RESPONDENT

AND

WIRZ ANNE MARIE INTERESTED PARTY

RULING

1. The plaintiff's Notice of Motion dated February 25, 2021 has been brought under the provisions of Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* and Order 1 Rule 10(2), Order 12 Rule 7, Order 22 Rule 22 and Order 51 Rule 1 of the *Civil Procedure Rules*. The applicant seeks the following orders–
 1. Spent;
 2. That this Honourable Court be pleased to order stay of execution of the judgment of the Honourable Court dated and delivered on December 2, 2020 by the Honourable Magistrate Omido J M, Principal Magistrate, at Kwale Principal Magistrate's Court pending the hearing and determination of this application;
 3. That the interested party be joined as a 2nd respondent in this suit and service be dispensed with through the applicant Advocate's office;
 4. That this Honourable Court upon grant of orders 1, 2 and 3 above be pleased to grant the applicant leave to file an Amended Memorandum of Appeal; and
 5. That the costs of this application be provided for.



2. The application is premised on the grounds on the face of it and the affidavit sworn on February 25, 2021 by Pauline Waruhiu, learned Counsel for the insurers of motor vehicle registration number KAQ 516A Nissan Matatu, at whose instance this claim is being defended. She stated that she is conversant with the issues relating to this suit and that she had been duly authorized and she was competent to make the said affidavit by dint of the insurer's rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle, or prosecute any claims in the insured's name.
3. The deponent averred that the applicant being dissatisfied with the judgment entered on December 2, 2020, filed a Memorandum of Appeal on January 4, 2021, but inadvertently forgot to include key information that would aid the Court in arriving at a just and conclusive determination. She further averred that it is in the interest of justice for the 2nd respondent in the draft Amended Memorandum of Appeal to be included in the pleadings and for the 2nd respondent to be allowed to participate in the proceedings before this Court since its name is adversely mentioned in the lower Court proceedings that form part of the judgment that is being appealed from.
4. The deponent further deposed that there is imminent danger of execution by the plaintiff/respondent as through a letter dated February 18, 2021, the respondent's Advocates threatened to commence execution proceedings. She stated that if the said proceedings are not stopped, then the motor vehicle registration number KAQ 516A Nissan Matatu will be attached and sold via public auction causing the applicant to suffer irreparable loss. She stated that the sum of Kshs 600,00.00 is substantial and that the applicant will not be able to recover the same amount from the respondent whose source of income is unknown to the applicant.
5. It was also deposed that the instant application had been made timeously and no prejudice would be suffered by the respondent if the orders sought were granted, since the applicant was willing and ready to furnish security in the form of a bank guarantee.
6. The instant application was opposed by the plaintiff/respondent through a replying affidavit sworn on March 24, 2021. He averred that commencement of the execution is a legal process in order for a successful litigant to enjoy the fruits of ligation. He stated that commencement of execution is not a ground for stay of execution.
7. The respondent further averred that the applicant has failed to prove that the execution would render the appeal nugatory. He further stated that the applicant has only asked to be joined as an interested party to the appeal, but has failed to ask for orders of stay pending determination of the Appeal and therefore, the application is destitute of merit.
8. The respondent deposed that the applicant was aware of the suit when it was ongoing but chose to be a bystander, and now has the sole intention of delaying the matter by applying to be joined in the appeal, in order to deny and delay him enjoyment of the judgment.
9. The application was canvassed by way of written submissions. The applicant's submissions were filed on December 3, 2021 by the law firm of Kimondo Gachoka & Company Advocates, while the plaintiff's/respondent's submissions were filed on November 10, 2021 by the law firm of Khatib & Company Advocates.
10. Mr Masolia, learned Counsel for the applicant submitted that this Court has unfettered discretion to allow the instant application as it is mandated to do justice for all the parties before it. Further, he submitted that the right of appeal ought to be safeguarded to avoid the appeal being rendered nugatory



and be balanced against an equally weighty right of the respondent herein to enjoy the fruits of the judgment delivered in his favour.

11. On the issue of deposit of security, Mr Masolia submitted that security in the form of a bank guarantee is the best, stable and a fiscally healthy mode of securing the decretal sum herein which balances the interests of the parties.
12. On the issue of delay in bringing the instant application, he submitted that there was no proper handing over of the file from the previous Advocate to the current one thus occasioning the delay. He stated that the current Advocate however rushed to this Court at the earliest time seeking protection. He urged that the mistakes of an Advocate should not be visited on a client since the mistake on the part of the previous Advocate was inadvertent.

Analysis And Determination

13. I have considered the application herein, the affidavit in support and in opposition to the application, the submissions filed as well as the authorities relied upon. There are two issues for determination-
 - (i) Whether the order for stay of execution should be granted; and
 - (ii) Whether the applicant should be joined as the 2nd respondent.

Whether the applicant can be joined as the 2nd respondent

15. The substitution and addition of parties to a suit is governed by Order 1 Rule 10(2) of the Civil Procedure Rules. It provides as follows-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

16. The above provision states that parties may be joined to proceedings at any stage. It has been held that in certain circumstances, a party may be joined to a suit at appeal stage. The Court of Appeal in *David Kiptugen v Commissioner of Lands, Nairobi & 4 others* [2016] eKLR held thus:

“We agree with Ms Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”

17. In this instance, the applicant was a party in the Trial Court. However, the respondent herein withdrew his claim against the applicant herein through a Notice of withdrawal of suit dated October 8, 2020 and the withdrawal was endorsed by the Court on October 14, 2020. In this instant appeal, my understanding is that the applicant is protesting and challenging its withdrawal from the proceedings in the Trial Court without its permission. I therefore find that the applicant is a necessary party in the appeal herein and that failure to join the applicant in these proceeding will be against the rules of natural justice, since the applicant has the right to be heard. Consequently, the application by the interested party to be joined as the 2nd respondent in the appeal is hereby allowed.



18. The principles guiding the grant of a stay of execution pending appeal are well settled. They are provided under Order 42 Rule 6(2) of the Civil Procedure Rules, which provides as follows:

“(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 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.

(3)

19. In *Visbram Ravji Halai vs Thornton & Turpin* [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.

20. On the first principle, as to what substantial loss is, it was stated in *James Wangalwa & another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“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. Similarly, Platt, Ag JA (as he then was) in *Kenya Shell Limited vs Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.



On the part of Gachuhi, Ag JA (as he then was) at 417 he held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

22. In this case, the applicant has stated that it is likely to suffer substantial loss as the respondent has no known source of income. This has not been controverted by the respondent. Be that as it may, where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See [*Caneland Ltd & 2 Others vs Delphis Bank Ltd*](#) Civil Application No Nai 344 of 1999.
23. In this case, apart from a bare allegation, the applicant has 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 600,000/= . It has not been alleged that the payment of the said sum may adversely affect the financial position of the applicant (insurers). I hold that the applicant has failed to satisfy the Court that it will suffer substantial loss if the decretal amount is paid.
24. On the issue of unreasonable delay, the applicant asserted that the application has been brought without unreasonable delay. In the applicant’s submissions, it was stated that the delay in bringing the application was the fault of the previous Advocate who took time to hand over the file. The respondent never controverted the issue that there was no unreasonable delay in bringing the instant application. I have considered the argument by the applicant on the issue of unreasonable delay and it is my finding that the delay of nearly three months in bringing the instant application is not inordinate and the same is excusable.
25. On the issue of security, a Court can order that security be deposited on application by either party or on its own motion. The Bank Guarantee given by the applicant from Diamond Trust Bank may not specifically cover the respondent. However, the Court in fashioning the security is not necessarily bound by what is offered by the Applicant. In [*Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd*](#) [2019] eKLR, the Court stated as follows-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to *status quo* on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent



in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

26. In *Focin Motorcycle Co Limited vs Ann Wambui Wangui & another* [2018] eKLR, it was stated that-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

27. From the above decisions, it is clear that the issue of security is discretionary and it is upon the Court to determine the same. Taking all relevant factors into account, and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party, I hereby grant a conditional stay of execution of the decree herein.

28. In the result, I hereby make the following orders-

- (i) That the applicant shall be joined to this appeal as the 2nd respondent;
- (ii) That the applicant will file and serve an Amended Memorandum of Appeal within 60 days;
- (iii) That the applicant shall obtain a bank guarantee specific to this appeal for the whole duration of the appeal, for purposes of securing payment of the decretal amount together with costs and interest from a reputable financial institutions within 60 days of this ruling;
- (iv) That the costs of the application herein will abide the outcome of the appeal; and
- (v) Copies of the ruling hereof shall be supplied to the Advocates for the parties herein.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Mr Oliver Musundi – Court Assistant.

