



REPUBLIC OF KENYA



KENYA LAW
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**Kyalo v Sile & Sila & 2 others (Civil Appeal 54 of 2021)
[2022] KEHC 10687 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 54 OF 2021**

**RK LIMO, J
JUNE 29, 2022**

BETWEEN

BENSON KYALO APPLICANT

AND

STEPHEN GITONGA SILE & MICHAEL MUTUKU SILA 1ST RESPONDENT

JULIUS MATHI KATHULI 2ND RESPONDENT

EMIRATES BUS COACH LIMITED 3RD RESPONDENT

RULING

1. Benson Kyalo Mwendwa, the appellant/applicant through a Notice of Motion dated 30.07.2021 is seeking the following orders reliefs: -
 - i. Spent
 - ii. Spent
 - iii. That there be a stay of execution of the decree emanating from the judgement delivered on 7th July, 2021 pending the hearing and determination of the intended appeal.
 - iv. Spent
 - v. Costs of this application
2. This application is premised on the following listed grounds: -
 - i. That judgment herein was delivered on 7th July 2021 in favour of the 1st Respondent
 - ii. That the Appellant had lodged this appeal herein against the judgment



- iii. That the Applicant being dissatisfied with the judgment is desirous of filing an appeal to challenge the same
 - iv. That the 30 days stay of execution according to statute is yet to lapse since the judgment was delivered on 7th July 2021
 - v. That unless stay of execution is granted, the Applicant's application to Appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage
 - vi. That the Applicant is ready, willing and able to furnish such reasonable security within such time as the court may direct
 - vii. That the 1st Respondents financial means is not known and this they might not be in a position to refund the decretal amount in the event that execution proceeds
 - viii. That this application will not occasion any prejudice to the 1st Respondent
 - ix. That this application has been done without any unreasonable delay
 - x. That in the interim, the Applicant is willing to deposit the decretal amount in court or in a joint account as security for due performance.
3. The application is supported by the Applicant's affidavit sworn on 30th July 2021. The deponent indicates that he intends to appeal against the trial court's decision on apportionment of liability and the award of damages. He avers that he was ordered to pay 30% of the decretal sum of Kshs 2,298,720/-. He has indicated that he is willing to abide to conditions of stay set by this court, he has also indicated that he is apprehensive that he might not recover money paid to the 1st Respondent in the event his appeal is successful as the 1st Respondent's source of income is unknown.
4. The deponent has also sought leave to file his appeal. This was however necessary in my opinion as it had only been 28 days since the Judgment was delivered by the time this application was filed. Section 79G of the *Civil Procedure Act* provides for the time within which appeals from subordinate courts to the High Court can be filed as follows: -
- “Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
5. In his submissions dated 2nd February 2022 and filed on 7th April 2022 the applicant submits that he has met the threshold required for issuance of orders of stay. He submits that he has already filed an appeal and he is now seeking an order of stay of execution pending the hearing and determination of the appeal.
6. He applicant has expressed apprehension on possibility of recovering sums he was ordered to pay to the 1st Respondent in the event his appeal is successful stating that the 1st Respondent's source of income is unknown hence he would suffer substantial loss. He avers that he is willing to deposit a ¼ of the decretal sum in a joint interest earning account to act as security for due performance and he has relied on the case of Daniel Githaiga versus Thomas Kabui Muituma [2017] eKLR. This is a ruling on a similar application for stay where the Appellant sought to appeal against an ex parte judgment entered against him which he blamed his insurer's failure to instruct an advocate to defend his case. On the issue of substantial loss, the court defined the same any loss, great of small that is of real worth or value.



7. He also on the case of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another* (2006) eKLR where the Court of Appeal granted orders of stay of execution stating that the Appellant had satisfied the court that his appeal was arguable and would be rendered a nugatory if the court declined to grant the orders. The court also faulted the Respondent for failing to demonstrate his means/resources and ability to repay the decretal sum to the court.
8. The respondent has opposed this application through a replying affidavit sworn on 26th September, 2021. He contends that the applicant should pay at least 30% of the decretal sum for stay to be granted. He justifies this demand on grounds that he needs the money to cater for 6 children left behind by the deceased in whose behalf he sued the appellant.
9. The respondent faults the applicant for trying to delaying finalization of this matter arguing that other parties to the suit have not appealed. He contends that liability of 30% is not extremely high.
10. In his written submissions the respondent contends that the applicant was only required to pay 30% of the decretal sum which translates to Kshs. 715,416. He submits that liability is not contested in the appeal as the appeal is only on quantum.
11. He submits that the 1st Applicant has not satisfied conditions set for issuance of orders of stay of execution.
12. He has relied on the following cases:
 - a. *James Wangalwa & Another Versus Agnes Naliaka Cheseto* [2012] eKLR where the court granted stay of execution pending appeal but granted conditions to the applicant which included issuance of a security as due performance of the decree.
 - b. *Macharia t/a Macharia & Co Advocates vs East African Standard* [2002] eKLR where the court dismissed an application for stay stating that the applicant merely repeated the words of the rule that substantial loss would be suffered, but did not set out factual particulars of the kind of loss that would be suffered. The court also noted that the application was filed late without a good cause.
 - c. *Stanely Kiplagat Rono & Anor vs William Kiprotich Cherus* (2021) eKLR where the court granted orders for stay of execution on condition that the applicant deposited a title in court as security for due performance within 14 days.
13. This court has considered this application and the response made.

An application for stay of execution pending appeal does not operate as an automatic stay. The provisions of Order 42 Rule 6 of the *Civil Procedure Rule* is clear it states: -

“

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”
14. An applicant must therefore, satisfy the above conditions particularly the following: -
- a. Demonstrate good cause.
 - b. that substantial loss may result unless stay is granted.
 - c. That the application is made without unreasonable delay
15. The applicant in my considered view filed this application timely. The judgement in the trial court was delivered on 7th July, 2021 and this application was filed on 4th August, 2021 which is roughly 28 days after the judgement was delivered. There was no delay leave alone the contention by the respondent that delay was unreasonable.
16. In the question of good cause, I am convinced that the appellant has shown enthusiasm to access justice through an appeal which was filed on time. The appeal however is only on quantum as rightly put by the respondent which means that at the end of the day the appellant will have to pay a certain amount in compensation. The respondent has stated that he has a heavy burden of caring for the children left behind by the deceased and the pendulum of justice in my view swings in favour of a conditional stay. I am persuaded by the reasoning shown in the case of *Absalom Dova versus Tarbo Transporters* [2013] eKLR where the court held;
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation.”
17. The appellant has stated that he wishes to deposit a ¼ of the decretal amount as security but in my considered view that quarter should go to the Decree holder to assist him cater for the victim’s children and family. I do not think that any substantial loss would be occasioned to the appellant whichever way this appeal is decided because as I have observed, the appeal basically is only on quantum.
18. In the end, this court finds merit in the application dated 30.07.2021. The same is allowed in terms of prayer 3 that is to say there will be a stay of execution of the decree passed against him in Mwingi PMCC No. 112 of 2018 pending appeal but the stay will be conditional. The applicant must satisfy the following conditions namely: -
- i. The decree holder be paid a quarter of decretal amount within 30 days from the date of this ruling.
 - ii. The applicant is given 45 days to prepare the record of appeal and take necessary steps to prosecute his appeal.
- Costs of this application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF JUNE, 2022.



HON. JUSTICE R. K. LIMO
JUDGE

