



Boyi & another v Adhiambo & Odhiambo ((Suing as the legal representative of the estate of Reuben Adhiambo Magero)) (Civil Appeal E088 of 2021) [2022] KEHC 10433 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E088 OF 2021
RPV WENDOH, J
JUNE 23, 2022**

BETWEEN

FABRICE BOYI 1ST APPELLANT

MATHEW ONIALA 2ND APPELLANT

AND

**JANE AKOTH ADHIAMBO & KENNEDY ONYANGO
ODHIAMBO RESPONDENT**

**(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF REUBEN
ADHIAMBO MAGERO)**

RULING

1. The application for consideration is one dated 25/10/2021 filed on 26/10/2021 by the appellants. The appellants are seeking a stay of execution of the judgement and decree of Hon. E.N. Areri (PM) in Migori CMCC No. 56 of 2020 dated and delivered on 7/10/2021 pending the hearing and determination of this appeal.
2. The grounds upon which the application is premised are found in the body of application and the supporting affidavit of Fabrice Boyi, the 1st appellant. The appellant deponed that he was aggrieved by the decision of the trial court and filed the instant appeal which has high chances of success; that the judgement in the trial court was delivered in the absence of his advocates; that stay of execution was not issued hence exposing him to the eminent threat of execution; that this application has been filed timeously and if stay of execution is not granted, he will suffer substantial loss of Kshs. 1,203,534/= and the appeal will be rendered nugatory. The appellant further deponed that he is willing to provide a bank guarantee as security of the whole decretal sum.



3. The application was opposed. The respondents filed a replying affidavit jointly sworn by Jane Akoth Odhiambo & Kennedy Onyango Odhiambo dated 5/11/2021. The respondents deponed that the instant application is a mere afterthought intended to keep them away from enjoying the fruits of their judgment; that in the event the court grants stay, they should be paid at least three - quarters of the decretal sum to enable them to pay their advocates and to at least enjoy the fruits of their judgement; that the remaining quarter be deposited in a joint interest earning account; that there is no evidence that the judgement debtor being an insurance company will suffer substantial loss if the stay is not granted since it is a corporation whose employees are insured against injuries sustained at work and other related risks.
4. The application was canvassed by way of written submissions. Both parties complied and I have considered the submissions. I have read thoroughly and understood the submissions by the respondent. It seems like the submissions were filed in response to the appeal as opposed to the application dated 25/10/2021. In their submissions, the respondents have analysed the findings of the judgement and decree of the trial court. I will therefore consider the submissions of the appellants.
5. The application is one of stay pending appeal. Order 42 Rule (6) (1) and (2) makes provision for stay pending appeal 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 ultimate be binding on him has been given by the applicant.”
6. The four (4) salient ingredients that the applicant should establish for orders of stay of execution orders to issue are: -
 - a) The applicant will suffer substantial loss if stay is not granted;
 - b) That the application has been filed without unreasonable delay;
 - c) The applicant is willing to furnish security for the due performance of the decree;
 - d) The applicant has an arguable appeal.
7. On the issue of substantial loss, it is the appellants’ submission that the respondents cannot repay back the money as they have not disclosed or furnished this court with any evidence to prove their



financial standing. In the case of *Silverstein v Chesoni* (2002) 1 KLR 867 cited in *Superior Homes (Kenya) Limited vs Musango Kithome* (2018) eKLR the Court of Appeal held as follows:-

“...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”

8. The assurance that the appellants have that they will not suffer substantial loss is the ability of the respondents to refund the decretal sum if the appeal succeeds. In *Superior (Homes) Kenya Limited vs Musango Kithome* (supra), the court held:-

“...The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

9. A similar finding was made in *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua* (2001) eKLR as follows:-

“...Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient.”

10. The grounds of appeal challenge the assessment of quantum on general damages at Kshs. 933,544/= which they contend was overly excessive in the circumstances of the case. The respondents prayed that this court orders three - quarters of the decretal sum be released to them, to enable them pay the advocates fees as well as enjoy the fruits of their judgment.
11. The whole decretal sum is in contention. In the absence of proof from the respondents that they have the means to repay the decretal sum in the event that the appeal succeeds, the court cannot order the release of any decretal amount as this would render the whole appeal nugatory. I find that substantial loss will be suffered by the appellants if stay is not granted.
12. On whether there was unreasonable delay in bringing this application, Section 79G of the *Civil Procedure Act* provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement in the lower court was delivered on 7/10/2021. The instant appeal was filed on 19/10/2021 after a period of 12 days. I therefore find that the appeal was filed timeously and there was no delay. I have perused the original trial court file. The proceedings have been typed and they are ready. The appellants should endeavour to expedite this appeal by filing the complete record of appeal.



13. On security for the due performance of the decree. On 26/10/2021, this court directed that the appellants deposit a sum at Kshs. 500,000/= in a joint interest earning account with Counsel for the respondent within 14 days as a condition for stay. The appellants have confirmed in their submissions that the same was complied with. I find that the appellants have fulfilled this condition and provided security for the due performance of the decree.
14. Whether the applicant has an arguable appeal: the appellants are disputing the assessment of quantum on general damages at Kshs. 933,544/= which they contend was overly excessive in the circumstances of the case. This is arguable. Since the appellants have already provided security for the due performance of the decree, then the respondents will not suffer any prejudice.
15. In the end, I allow the application and make the following orders: -
 1. There be a stay of execution of the decree and/or judgement delivered on 7/10/2021 in CMCC NO. 56 of 2020 Jane Akoth Odhiambo & Another vs Fabrice Boyi & Another pending the hearing and determination of this appeal;
 2. The sum already deposited in an interest earning account of the counsel to serve as security.
 3. The appellants do file and serve a record of appeal within 21 days hereof failure to which the stay orders lapse automatically;
 4. The appeal be canvassed by way of written submissions.
 5. The appellants do file and serve their written submissions within 14 days from service of the record of appeal;
 6. Upon service, the respondents to file their submissions within fourteen (14) days;
 7. Costs of this application do abide the outcome of the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 23RD DAY OF JUNE, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Ndolo holding brief for Mr. Okwoyo for the Appellants

Mr. Odero holding brief Ms. Migai for the Respondent

Nyauke- Court Assistant

