



**Kyengo v Willy (Civil Appeal E005 of 2022) [2022] KEHC 10554 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10554 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E005 OF 2022  
GMA DULU, J  
JUNE 21, 2022**

**BETWEEN**

**MWOLOLO THOMAS KYENGO ..... APPELLANT**

**AND**

**PHILIP MWIKYA WILLY ..... RESPONDENT**

**RULING**

1. Before me is an application brought by way of Notice of Motion dated 24<sup>th</sup> January 2022 and filed on 25<sup>th</sup> January 2022 under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#), with four (4) prayers two (2) of which have been spent as follows –
  1. (Spent)
  2. (Spent)
  3. That pending the hearing and determination of the appeal, there be a stay of execution of the judgment and decree dated 17/12/2021 by Makindu Senior Principal Magistrate’s court in SPMCC No. 177 of 2020 between the parties herein.
  4. That the applicant do have the costs of the application.
2. The application has grounds on the face of the Notice of Motion, that the applicant will suffer substantial loss unless the stay order is granted as the respondent might not be able to refund the decretal amount, that the application was filed without unreasonable delay, that the appeal raises substantial legal matters on time limitation, and that the applicant is willing to provide security.
3. The application was filed with an affidavit sworn on 18/01/2022 by Mwololo Thomas Kyengo the appellant, wherein it was deponed that judgment was delivered without notice, that the suit was filed more than six (6) years after the accident, and that the evidence on record on negligence was contrary to the trial court’s decision.



4. Annexed to the affidavit, was a memorandum of appeal against the judgment of the trial court.
5. The application has been opposed through a replying affidavit sworn on 1<sup>st</sup> February 2022 by the respondent Philip Mwikya Willy, in which it was deponed that the scheduled date of judgment and adjournment thereto was communicated, and that the application herein was meant to delay the respondent's right to enjoy the fruits of his judgment, and that the court awarded the respondent costs of future medical treatment of Kshs.150,000/=, and further that extension of time was granted by the court to file the civil suit.
6. The applicant, with leave of court, filed a further affidavit sworn on 27/04/2022 by Amritlal Bhagwanji Shah advocate, in which it was deponed that in the judgment herein the trial court did not address the issue whether the ex parte order extending time to file suit was proper. A copy of the judgment of the trial court was annexed to the said further affidavit.
7. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by A.B Shah advocate for the applicant and those filed by P. Wasolo & company advocates for the respondents. I note that both counsel relied on case authorities.
8. This is an application for stay of execution of judgment or decree pending determination of appeal. It is thus governed by the provisions of Order 42 Rule 6, especially Rule 6(2) of the Civil Procedure Rules, which states as follows –
  - 6(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 performance of such decree or order as may ultimately be binding on him has been given by the applicant”.
9. With regard to whether the application was filed without unreasonable delay, I note that judgment in the trial court was delivered on 17<sup>th</sup> December 2021 and this application filed on 25<sup>th</sup> January 2022. I thus find no unreasonable delay in filing of the application.
10. On whether the applicant will suffer substantial loss if the stay orders sought are not granted, it is of note that the decree herein is for a money decree totalling Kshs.714,750/= with interest. The respondent is said by the applicant to be a person of no known financial means. He has not explained his means, nor has he stated that he is a person of means. In my view therefore, the applicant stands to suffer substantial loss if the stay orders sought are not granted, as the respondent might not refund the money if paid to him if the appeal succeeds, in this matter where the jurisdiction of the trial court to entertain the suit is being challenged on appeal.
11. With regard to provision of security by the applicant, the applicant has offered to provide security for the stay, and also suggested that the decretal amount be deposited in a joint interest earning account in the names of both counsel for the parties. In my view, such deposit of the decretal amount suggested, in the circumstances of this case, provides adequate security for honouring the decree.
12. Consequently and for the above reasons, I allow the application and order as follows –
  - i. Stay of execution of the judgment and decree dated 17/12/2021 by Makindu Senior Principal Magistrate's court in SPMCC 177 of 2020 between the parties herein is granted pending determination of appeal.



- ii. The stay of execution granted in (i) above is subject to the applicant depositing into a joint interest earning bank account in the names of counsel for the parties herein, the decretal sum within 60 days from today.
- iii. The costs of this application will abide the decision in the appeal.

**DELIVERED, SIGNED & DATED THIS 21<sup>ST</sup> DAY OF JUNE, 2022, IN OPEN COURT AT MAKUENI.**

.....  
**GEORGE DULU**  
**JUDGE**

