



I Spy Africa Limited & another v Njuguna & another (Suing as the administrator to the Estate of the Late John Mbau Mbugua - Deceased) (Civil Appeal E69 of 2022) [2022] KEHC 11917 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E69 OF 2022
GV ODUNGA, J
JULY 26, 2022**

BETWEEN

I SPY AFRICA LIMITED 1ST APPELLANT

DAVID MWALUI 2ND APPELLANT

AND

MARY WANGARI NJUGUNA 1ST RESPONDENT

EUNICE WANJIRU KANJA 2ND RESPONDENT

**SUING AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE JOHN
MBAU MBUGUA - DECEASED**

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Mavoko delivered by the Honourable E. Olwande on the 28th Day of April 2022.)

RULING

1. Vide a notice of Motion Application dated 26th May 2022, the Applicants seek the following orders;
 - a. That the application herein be certified urgent, be heard *ex-parte* in the first instance and service of this Application be dispensed with in the first instance.
 - b. That there be a temporary stay of execution of the Judgment and Decree of the Chief Magistrate's court delivered on 28th April, 2022 in Mavoko CMCC No. 745 Of 2020 – *Eunice Wanjiru Kanja & Another (Suing as the legal representatives of the estate of John Mbau Mbugua – Deceased) vs. I Spy Africa Ltd & Another*, pending the hearing and determination of this Application.



- c. That there be a stay of execution of the Judgment and Decree of the Chief Magistrate's court delivered on 28th April, 2022 in Mavoko CMCC No. 745 Of 2020 – *Eunice Wanjiru Kanja & Another (Suing as the legal representatives of the estate of John mbau mbugua – Deceased) Vs. I Spy Africa Ltd & Another*, pending the hearing and determination of the Appeal herein.
 - d. That costs of this Application be in the cause.
2. The same is supported by the affidavit of David Mwalui, the second applicant herein, sworn on 26th May, 2022. According to the deponent, the Applicants were sued by the Respondents herein in Mavoko CMCC No. 745 Of 2020 – *Eunice Wanjiru Kanja & Another (Suing as the legal representatives of the estate of John Mbau Mbugua – Deceased) vs. I Spy Africa Ltd & Another* which suit emanated from a road traffic accident on 23rd November, 2017 along the Nairobi – Mombasa highway involving the deceased and motor vehicle registration number KCG 767A which was being driven by the 2nd Respondent.
 3. Judgement, according to the deponent, was delivered against the Appellants/Applicants for a sum of Kshs. 2,920,341.00 as the gross award plus interest at Court rates and costs on 28th April, 2022 and the Appellants/Applicants were granted Thirty (30) days stay of execution which lapsed on 28th May, 2022.
 4. Being dissatisfied with the said judgement which awarded a manifestly high damages in the circumstance of the case, the Applicants have lodged this Appeal which in their view, has overwhelming chances of success, is arguable and has merit. In the meantime, it was averred that the Respondents have started the process of execution against the Appellants/Applicants as they and/or their authorized agents and/or servants are in the process of obtaining a decree and warrants of execution in the matter appealed from. It was therefore averred that unless this Application is heard and orders of stay granted, the Appellants/Applicants stand to suffer substantial loss which cannot be compensated if the execution proceeds and in the likely event that the Appeal succeeds in which event the eventual success of the appeal will be rendered nugatory.
 5. It was disclosed that the gross judgment sum of Kshs. 2,920,341.00 awarded by the trial court is colossal and the 1st Appellant/Applicant stands to suffer great hardship in its operations while the deponent stands to suffer great hardship in his life and substantial loss which cannot be compensated if the execution proceeds and in the likely event that this Appeal succeeds.
 6. It was averred that the Respondent's evidence during the hearing before the subordinate Court was that the deceased's estate and his dependants are destitute hence if execution is allowed and the judgment sum paid, the Respondents will not be able to refund the decretal amount if the Appeal eventually succeeds.
 7. The deponent undertook that the Applicants were willing to abide by any conditional terms of stay to be given by this Court and in particular disclosed that they are willing and able to provide security by depositing in Court or a joint interest earning account in the names of the advocates on record the entire decretal amount pending the outcome of the Appeal.
 8. It was further averred that this Application was made in good faith and without unreasonable delay and that the granting of the orders sought herein will not occasion any prejudice to the Respondents which may not be compensated by way of costs if this Application is allowed.
 9. By a further affidavit, the same deponent denied that this application is an afterthought and is meant to preserve the subject matter of the Appeal but insisted that the appeal is merited. It was asserted that the Judgment in Mavoko CMCC No. 745 Of 2020 – *Eunice Wanjiru Kanja & Another (Suing as the legal representatives of the estate of John Mbau Mbugua – Deceased) vs. I Spy Africa Ltd & Another*,



which is the subject of the Appeal herein, is against the Appellants and that M/S Mayfair Insurance Company Limited has no relation whatsoever to the present Appeal or the lower Court matter the subject of the suit herein. Accordingly, any execution of the said decree can only proceed against the Appellants herein as they are the affected parties; hence it is only the Appellants who would suffer from any execution thereof.

10. It was averred the fact that the motor vehicle was comprehensively insured does not give the Respondents the right to execute against M/S Mayfair Insurance Company Limited as they have no Judgment against them.
11. It was the deponent's case that it is not unfathomable that the Appeal can be determined at 100% liability against the deceased and that the Appellants position is that the deceased was 100% liable for the accident in question as the deceased caused the accident by acting recklessly in utter disregard of his safety and of other road users and that the deceased equally owes a duty to other road users as provided in Highway Code and the *Traffic Act*. It was reiterated that the sums of money involved herein are huge and if the decretal sum is paid out, the deceased's estate will not be able to pay the same back. Therefore, the Appellants stand to suffer substantial loss if execution proceeds as they will be unable to recover the monies as the deceased's estate and his dependants will be unable to pay back the same. On that basis, it was averred that since the deceased's estate and his dependants cannot pay back 50% of the Judgment sum or any part thereof if the Appeal herein succeeds, it is not proper to have the same released to the Respondents. On the other hand, it was averred that the security proposed in the supporting affidavit is sufficient in the circumstances of this case.
12. In the deponent's view, there was sufficient cause for seeking the orders herein hence it is in the interests of fairness and justice that this application be allowed.
13. In response, the Respondents relied on the affidavit sworn by Agnes Wairimu Njoroge the advocate on record for the Respondents in which she denied that execution had been commenced against the Appellant as the decree was yet to be extracted.
14. According to her, this application and the Appeal are an afterthought and only brought to deprive the Respondents of the Judgment sum. In her view, neither the application nor the Memorandum of Appeal demonstrates any merit to warrant the Orders sought.
15. It was disclosed that at the commencement of the suit, it was established that the Appellants' Motor vehicle was comprehensively insured by M/s Mayfair Insurance Company limited on whom a demand letter was served hence the allegations in the supporting affidavit are not factual but are indeed false and a demonstration of the 2nd Appellant's vindictiveness against the Respondents. Being comprehensively insured, it was averred that the Appellants stand to suffer no loss or prejudice as alleged.
16. It was the Respondents' position that going by the evidence adduced, the deceased was a family man and the 1st Respondent, the Widow has been left with three (3) young children of school going age, rendered destitute by the loss of the bread winner who stand to suffer irreparable loss and prejudice if the Respondent cannot access damages awarded on the death of their breadwinner as the said children will be lacking in school fees, related expenses and even basic needs. Depriving the said children of funds that could go into their education, it was averred, will occasion irreparable loss and in fact a grave injustice.
17. In the deponent's view, it is unfathomable that the Appeal can be determined at 100% liability against the deceased and since the fatal accident is not denied to have occurred between the Deceased and the Respondents' motor vehicle, the implication would be that then the 2nd Defendant owes no duty of care at all to other road users.



18. In the circumstances, it was urged that this application ought to be dismissed with costs. However, it was urged in the alternative that the Court could grant stay on condition of payment of 50% of the Judgment sum to the Respondents pending the hearing and determination of the Appeal.
19. In the applicants' submissions, reliance was placed on *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, where it was held that to show that the Appellant stands to suffer substantial loss, it must be demonstrated that the Respondent will not pay the money back if the Appellant succeeds in his Appeal. It was submitted that the Applicant had shown that the Respondent will not be able to pay the principal sum back if the same is paid to him and the Appeal herein succeeds.
20. It was submitted that the Respondents have not contradicted the Appellant's/Applicant's assertion that they will be unable to pay back the decretal sum if the same is paid to them and the Appeal herein succeeds or supplied any evidence of their wealth. They, instead, confirmed the Appellants/Applicants assertions in the Replying Affidavit. As such, the Respondents have not discharged their evidential burden of proof that they can pay back the decretal sum if the Appeal herein succeeds. Reliance was placed on *Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa* [2016] eKLR.
21. On whether the Application was filed without undue delay, it was submitted that the Application was filed on 30th May, 2022, one (1) month after the Judgment the subject of the Appeal herein was rendered and on the day the temporary stay of execution granted by the lower court lapsed, a period which the applicant submitted is reasonable.
22. Lastly, it was submitted that the Appellants/Applicants have made a reasonable offer of security for the stay pending Appeal in the form of depositing in Court or a joint interest earning account in the names of the advocates on record the entire decretal sum pending the outcome of the Appeal herein.
23. Regarding the Respondents' proposal that the Court place's as a condition for stay of execution that the Appellants/Applicants pay 50% of the decretal sum, it was noted that the Appeal is on the lower court's apportionment of liability and assessment of quantum payable, the Appellants/Applicants position being that the accident in issue was caused by the deceased hence he ought to have been found 100% liable. Accordingly, as the liability of the Appellants in causing the accident is the subject of the Appeal and the Respondents have admitted to being destitute and therefore not able to pay back the proposed 50% of the Judgment sum or any part thereof, it was submitted that the Appellants will be but at a loss if the Appeal succeeds and they will be unable to recover the same from the Respondents. On the other hand, it was submitted that if the Judgment sum is deposited in Court or a Joint interest earning account in the name the parties' advocates as proposed by the Appellants/Applicants, the Respondents are guaranteed payment of the same as they can access the sums vide a court order for release of the sums upon the conclusion of the Appeal herein. This will protect the interests of both parties herein as none stands to suffer from such an arrangement irrespective of the outcome of this Appeal.
24. In the circumstances therefore, the Court was urged to find that the Appellants/Applicants have satisfied the conditions for grant of the Orders sought and allow the Motion as prayed.

Determination

25. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.



26. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:

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.

27. 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. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. According to section 1A(2) of the [Civil Procedure Act](#) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

28. On the first principle, 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".

29. On his part Gachuhi, Ag.JA (as he then was), at 417, held that:

"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."



30. Dealing with the contention that there was no evidence that the Respondent would be able to refund the decretal sum if paid over, Hancox, JA (as he then was) in the above cited case when he expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”

31. Therefore, the mere fact that the decree holder is not a man or woman 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”.

32. 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.

33. 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. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See *Kenya Posts & Telecommunications Corporation vs.*



Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; *ABN Amro Bank, N.K. vs. Le Monde Foods Limited* Civil Application No. 15 of 2002.

34. I therefore agree with the position advanced in by the Court of Appeal Nairobi Civil Application No. 238 of 2005 - *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another* (UR) where it expressed itself as hereunder: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

35. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man 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. Suffice to say as was held in *Stephen Wanjobi 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.
36. In this case, the applicants have asserted that before the trial court the Respondents testified that they were destitute. This contention was supported by the replying affidavit in which learned counsel for the Respondents reiterated that the Respondents needed the decretal sum since they were destitute and were unable to meet their basic amenities as the deceased was the family’s sole breadwinner. However, as far as the Court is concerned the Respondent is the successful party and has a right to enjoy the fruits of his judgement unless the circumstances dictate otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgement that ought to prove that those circumstances do exist.
37. In these circumstances, there exist two rivalling positions: the applicant’s exercise of their right of appeal and the Respondent’s right to enjoy the fruits of their judgement. It would make no sense if the Appellants succeeded in their appeal and by that time the decretal sum would have been placed beyond the reach of the Appellants by the same being fully utilised by the Respondents who admit that they are financially disadvantaged. On the other hand, if the sum is locked in an account and the children of the deceased are unable to continue with their education or fend for themselves, the said sum may be of no use to them if the appeal eventually fails.
38. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business



of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

39. In this case however, the decree sum is over Kshs 2 million. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account. With respect to the issue whether or not the applicant stands to suffer substantial loss in Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005 the Court of Appeal citing Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999 held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.



40. While in this case, it is not contended that the applicant's insurers are likely to fold up, the amount herein was awarded to an estate of the deceased. The Respondents, in the replying affidavit, have admitted that there are in financial hardship.
41. In the premises, this is a matter where a stay ought to be granted on condition. In the premises, the order that commends itself to me and which I hereby issue is that there will be a stay of execution pending this appeal on condition that the Applicants pay one third of the decretal sum to the Respondents and deposits the balance in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the parties herein within 30 days from the date hereof. In default execution to proceed.
42. The costs of this application are awarded to the Respondents in any event.
43. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF JULY, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kaminza for the Appellant/Applicant

CA Susan

