



REPUBLIC OF KENYA



**KENYA LAW**  
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**Salei & another v Oguda (Civil Appeal E006 of 2022)  
[2022] KEHC 17076 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 17076 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E006 OF 2022  
MN MWANGI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**GEOFFREY TANUI SALEI ..... 1<sup>ST</sup> APPELLANT**

**KENTON TRADING LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KEVIN OTIENO OGUDA ..... RESPONDENT**

**RULING**

1. The application before this court is a notice of motion dated January 17, 2022 brought under the provisions of sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, order 45 rules 1 and 2 and order 51 rule 15 of the *Civil Procedure Rules* and article 159(2) of *the Constitution* of Kenya. The applicant seeks the following orders -
  - i. spent;
  - ii. spent; and
  - iii. That there be a stay of execution pending the hearing and determination of this appeal.
2. The application is supported by affidavits sworn on January 17, 2021 and February 3, 2022 by Geoffrey Tonui Salei, the applicant herein. In opposition to the application, the respondent filed a replying affidavit sworn by himself on February 22, 2022.
3. The application was canvassed by way of written submissions. The applicant's submissions were filed on March 30, 2022 by the law firm of Birir & Company Advocates, whereas the respondent's submissions were filed on April 21, 2022 by the law firm of Wambo Muyala & Advocates.
4. Mr Ng'eno, learned counsel for the applicant submitted that the applicant has satisfied the principles for grant of orders for stay of execution since substantial loss may result to him unless the order is made.



He also stated that the instant application has been made without unreasonable delay. He stated that the applicant owes the respondent Kshs 100,000/= which he is willing to deposit in a joint account until the appeal herein is heard and determined. Mr Ng'eno stated that the memorandum of appeal herein has four arguable grounds which faulted the learned magistrate's ruling, with one of the major issues being that he did not establish the amount of money that is owing to the respondent. It was stated that the appeal will be rendered nugatory if stay of execution is not granted.

5. Mr Muyala, learned counsel for the respondent submitted that the respondent's suit against the appellants was filed on November 16, 2012, and it is close to 10 years since then, but the applicant has never satisfied the judgment and/or decree of kshs 600,000/= as obtained by the respondent on October 18, 2015. Mr Muyala further submitted that pursuant to the provisions of order 42 rule 6 of the *Civil Procedure Rules*, 2010, the applicant must satisfy this court that substantial loss may result. He stated that looking at the application herein, no substantial loss is evidenced hence the applicant is not entitled to the orders sought. He contended that the memorandum of appeal as drawn, does not raise any arguable appeal.
6. Mr Muyala stated that the applicant had not indicated his willingness to offer security for the due performance of the decree. He relied on the case of *Masisi Mwita v Damaris Wanjiku [2016] eKLR* and stated that the applicant has failed to lay a basis for the grant of stay pending appeal as he has not shown sufficient cause, substantial loss, furnished security and that the intended appeal will be rendered nugatory if the application herein is not allowed.

#### **Analysis and determination.**

7. I have considered the application filed herein, the affidavits filed in support thereof, the replying affidavit by the respondent and the written submissions by counsel for the parties. The issue that arises for determination is whether the applicant has satisfied the conditions set down to warrant grant of an order for stay of execution pending appeal.
8. In the affidavits filed by the applicant, he deposed that he made an application dated June 10, 2021 for rendering of accounts by the respondent but the learned magistrate erroneously dismissed the said application. He averred that from the records, he owes the respondent Kshs 100,000/= which he is ready to deposit in the respondent's account. The applicant stated that the respondent sent Sanjomu Auctioneers of Narok to attach and sell his property despite the fact that he has paid money in several instalments to the respondent, a fact which can be evidenced through bank records and Mpesa statements.
9. The applicant stated that he is yet to clear the decretal sum in issue due to the fact that the financial difficulties he faced which were exacerbated by the Covid-19 pandemic. He averred that from his conduct of regularly paying the respondent, it is obvious that his intention is to settle the decretal sum. He deposed that in the event that the application herein is disallowed, he shall suffer great loss and harm.
10. The respondent in his replying affidavit deposed that the applicant has not been making any regular payments to offset the decretal sum and that he has been making payments only upon being served with court summons. He contended that the applicant's claim that he has offset the decretal sum to the tune of over Kshs 500,000/= is not true, and in any case, the decretal sum continues to accrue interest as well as the cost of execution. The respondent averred that as per annexures GTS-2, the applicant has so far paid a sum of Kshs 350,000/=.
11. The respondent stated that he who seeks equity must do equity and that the applicant had taken inordinately long to repay the money owed to him and he always has to resort to legal action at his own



cost, to jostle the applicant into making payment. The respondent urged that the applicant does not deserve the orders sought herein since he has come to court with unclean hands and in addition, his appeal has slim chances of success.

12. The court's power to grant an order for stay of execution is discretionary and the said discretion must be exercised judiciously. When a court is dealing with an application for stay of execution, it must not go into the merits of the appeal as a court's duty is to safeguard and to preserve the subject of the appeal. This was the position taken by the court in *Siegfried Busch vs MCSK [2013] eKLR* where it was held that-

' A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...'

13. The principles that govern the grant of an order for stay of execution pending appeal are provided for under order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#) as hereunder-

' No order for stay of execution shall be made under sub rule (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. In *Feissal Amin Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co Ltd [2014] eKLR*, judge Kasango held that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security.

15. In considering the instant application, this court must weigh the likely consequences of granting stay of execution or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome, by considering the twin overriding principles of proportionality and equality of arms, which are aimed at placing the parties before the court on equal footing. This was the position by the court in [Absalom Dova v Tarbo Transporters \[2013\] eKLR](#) where it was held as hereunder-

' 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...'

16. It is not disputed that the respondent's suit was filed on November 16, 2012, and the applicant is yet to fully satisfy the judgment and/or decree of Kshs 600,000/= as obtained by the respondent on October 18, 2015. The main dispute between the parties herein is the balance that is due and owing to the respondent. The applicant contends that he is yet to clear the decretal sum due to financial



difficulties he faced that were exacerbated by the Covid-19 pandemic. In *Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR*, the court of appeal stated that courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a man of straw but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.

17. On the issue of substantial loss, the court in the case of in *Silverstein vs Chesoni [2002] 1 KLR 867* held that-

' 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'.

18. In addition, in the case of *Victory Construction v BM* (a minor suing through next friend one PMM) [2019] eKLR, the court made the following observation in regard to substantial loss-

' The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani) HCMCA NO 1561 OF 2007* where he stated that:

'...in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal...'

19. In this matter, the applicant did not put forth his current financial position and how the same will be affected in the event that stay of execution is not granted. He did not state that he might not be able to recover the decretal sum if paid to the respondent since the decretal sum is a substantial amount.
20. The respondent on the other hand, did not demonstrate his financial capacity to this court to demonstrate his ability to refund the applicant the money in the event that he is successful in the appeal. This court however finds that the respondent had no duty to provide the said information since it was not alleged by the applicant that the respondent was incapable of refunding the decretal sum in the event the he was successful in his intended appeal.
21. It is this court's finding that the applicant has not satisfied this court to the required standard that he is likely to suffer substantial loss in the event that stay of execution is not granted.
22. The application herein was filed on January 17, 2022 whereas the ruling before the trial court was delivered on December 8, 2021. That is approximately forty five (45) days from the date of delivery of the trial court's ruling. The applicant has not rendered any explanation as to why the application was filed forty-five (45) days after the ruling in issue was rendered, if at all there was any imminent threat of execution. This court finds that there was unreasonable delay in filing the instant application.
23. In *Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR* the court held that-
- ' The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012* the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court



holding that, the application ought to have come before expiry of the period given to vacate the land.'

24. The applicant herein has not offered any security to guarantee the due performance of such decree or order as may ultimately be binding on the him. In *Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR*, the court stated as follows-

' The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants.'

25. In light of the foregoing, it is evident that the applicant has not satisfied any of the conditions set down to warrant the grant of an order for stay of execution.

26. The upshot is that the application dated January 17, 2022 is devoid of merit and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 30th day of September, 2022. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Ngéno Birir for the appellants/applicants

Mr. Muyala for the respondent

Mr. Oliver Musundi – Court Assistant.

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