



REPUBLIC OF KENYA



**Bosire & another v Rotich (Civil Appeal E034 of 2022)
[2022] KEHC 13372 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E034 OF 2022
RL KORIR, J
SEPTEMBER 28, 2022**

BETWEEN

RICHARD NYAMWAMU BOSIRE 1ST APPELLANT

RICHARD NYAMANA ONYANCHA 2ND APPELLANT

AND

CAREN CHEPKOECH ROTICH RESPONDENT

RULING

1. The application before me dated July 26, 2022 was filed Under Certificate of Urgency. It is brought (Under section 3,3A of the *Civil Procedure Act* Cap 21 of the laws of Kenya, order 42 rule 6, order 50 rule, 5, 51 rules 1&3, order 22 rule 22 of the *Civil Procedure rules*, 2010 and all other enabling provisions of the law).
2. The application seeks orders that:-
 - a. That this application be certified urgent, service be dispensed with thereof and the same be heard *ex parte* in the first instance. (Spent)
 - b. That this honourable court be pleased to grant stay of execution of the judgment/decree in Sotik CMCC No 82 of 2017 delivered on July 5, 2022 pending the hearing and determination of this application.
 - c. That this honourable court be pleased to grant a stay of execution of the judgment/decree in Sotik CMCC 82 of 2017 delivered on July 5, 2022 pending the hearing and full determination of the appeal in Bomet High Court Civil Appeal No E034 of 2022
 - d. That upon grant of prayer No3 above this honorable court be pleased to order that the applicant do provide sufficient security in the form of a suitable bank guarantee from a reputable financial institution to secure the Judgment of kshs 582,100/=



- e. That costs of this application be in the cause.
3. The application is brought on the main ground that judgment in Sotik CMCC No 82 of 2017 was delivered without notice to the parties which consequently denied the applicants an opportunity to seek stay of execution before the trial court.
4. In the supporting affidavit of Richard Nyamana Onyancha sworn on July 26, 2022, the applicants depone that judgment in Sotik CMCC No 82 of 2017 was slated for May 10, 2022 and on the scheduled date, the court deferred the judgment to be delivered on notice. That the judgment was subsequently delivered on July 5, 2022 without notice to the parties and that the applicant only came to learn of the judgement when they were served warrants of attachment by M/S Kimu Auctioneers. That the respondents had extracted warrants proclamation and attachment without having notified the applicants.
5. The applicants further averred that they had filed their appeal being Bomet High Court Civil Appeal No E034 of 2022 against liability and quantum and that if stay was not granted, they would be greatly prejudiced and the appeal will be rendered nugatory. In their averments reproduced verbatim, they stated that the stay was necessary because:-
 - i. There is no order of stay of execution in force.
 - ii. The decree herein is for a substantial sum of kshs 581,100/= which if paid to be the respondent and the appeal is successful, the applicant will not be able to recover the same from the respondent and the appeal will therefore be rendered nugatory.
 - iii. That I will suffer substantial loss and damage if orders sought herein are not granted and further that the appeal will be rendered nugatory.
 - iv. That this application has been filed timeously.
 - v. That the respondent will not be prejudiced in any way if the orders sought herein are granted.
 - vi. That it is in the interest of justice that the execution of Judgment and/or decree herein be stayed pending the hearing and determination of the appeal.
 - vii. That the respondent is a person of straw and will not be able to refund the decretal sum if he is allowed to execute and the appeal thereafter succeeds.
6. Upon perusal of the application and the certificate of urgency on July 26, 2022 this court granted the following directions and orders:-
 1. That the application is hereby certified urgent.
 2. That the application be served upon the respondents for interpartes hearing.
 3. That the respondent to file a replying affidavit within seven (7) days July 28, 2022.
 4. That the applicant to file and serve submissions within seven(7) days of being served a response and the respondent to file submissions within seven (7) days of being served the applicant's submissions.
 5. That this matter be mentioned on the September 21, 2022 to confirm submissions and issue a ruling date.
 6. That stay of execution of the judgement/decree is Sotik PMCC No 82 of 2017 is granted up to September 21, 2022.



7. The respondent filed a replying affidavit dated August 16, 2022 sworn by Caren Chepkoech Rotich. She deponed that the judgment delivered on July 5, 2022 was proper and regular and that the application was just a deliberate attempt to delay the course of justice and frustrate her from enjoying the fruits of the judgment. That paragraph 9 of the supporting affidavit contained false allegations with no evidence.
8. The respondent further deposed that the appellant/applicants had admitted the occurrence of the accident and there was no chance of their appeal succeeding. That the suit had been in court since 2017 and that she would be prejudiced by any further delay.
9. Finally, the respondent averred that should the court be inclined to grant the orders, then the applicant will be required to pay her half the decretal sum and deposit the balance in an interest earning account in the names of both advocates pending the outcome of the intended appeal.

Analysis

10. This matter came up for compliance with the court's directions on September 21, 2022. By that date however, neither of the parties had complied with the court's directions to file written submissions. This court therefore directed that the matter would proceed to ruling on the basis of the affidavits on record.
11. The law governing stay of execution pending appeal is premised on order 42 rule 6 of the [Civil Procedure rules](#) which states 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 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit, a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

12. In this case the applicant has deposed that they were unaware of the judgement in Sotik CMCC No 82 of 2017 delivered on July 5, 2022 and that is why they failed to seek stay from the trial court. That notwithstanding the law as stated in paragraph 10 above was applicable whether the application was before the trial court or this court. In *Halai & another v Thorton and Turpin*(1963) Ltd (1990) KLR 365, the Court of Appeal Stated:-

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd* (2013) eKLR and *Hassan Guyo Wakalo v Straman FA Ltd* [2013/eKLR in which it was held thus;

‘In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.’”

13. In this case the decretal sum contested is kshs 582,100/= . It is the applicant’s case that if stay was not granted and the respondent executed against this amount, they (applicants) would suffer substantial loss. They further aver that should the appeal be successful, then they would not be able to recover the monies paid out to the respondent whom they allege was a person of straw.
14. It is the respondent’s case that the applicant had admitted the occurrence of the accident and therefore there was no chance of applicant’s succeeding. That applicant’s application was only intended to delay payment or recovery of decretal sum.
15. I have considered the rival averments on issue of substantial loss. Other than stating that they would suffer loss if stay was not granted, the applicants have not demonstrated their assertion. They have only alleged that the respondent was a person of straw There is no fact or evidence that the respondent was a person of straw. It is also my finding that the respondent should not be denied the fruits of their judgment. I however see no prejudice if the respondent did not get the full decretal sum. Pending final determination on appeal. (See *George Kimotho Ilewe v Anastacia Wanza Muthuka & Joseph Mutuku Ngewa (Suing as Legal Representative of the Estate of Judy Kioo Wanza – deceased)* [2012] eKLR.
16. On whether the application was brought without delay, both parties admit that judgment was rendered on July 5, 2022. The respondent has not contested the applicant’s averment that there was no notice of judgement and that they only learnt of the judgment upon being served warrants of proclamation and attachment dated July 18, 2022. It is my conclusion that in the circumstances of this case, the delay was not unreasonable.



17. I have considered the grounds of appeal. They raise both matters of fact and Law. I find the matters of fact and the appeal arguable.

18. As stated earlier, the applicant has not satisfied the element of substantial loss. The grant or denial of stay is however predicated on judicial discretion. In exercising such discretion the court must weigh the applicants' right to pursue their appeal against the right of the respondent to enjoy the fruits of their judgment without hindrance. As stated in *RWW v EKW*[2019] eKLR,

“Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

19. In the final analysis I exercise discretion to grant prayer on the face of the notice of motion on condition that the applicant pays the respondent half the decretal sum and provides a bank guarantee of the balance from a reputable bank within 21 days of this ruling. Further, the applicant shall file the record of appeal within 45 days of today.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF SEPTEMBER, 2022.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr.Ndolo for the applicant, N/A for the respondent and Kiprotich (Court Assistant)

