



**Rutto v Korir & another (Suing as the administrator and legal representative of the estate of Isaiah Kimutai Kiplagat) (Civil Appeal E066 of 2022) [2022] KEHC 13226 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E066 OF 2022  
EKO OGOLA, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**VINCENT KIBIWOTT RUTTO ..... APPLICANT**

**AND**

**KELVIN LAGAT ..... 1<sup>ST</sup> RESPONDENT**

**WINNY JEBET KORIR ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF ISAIAH KIMUTAI KIPLAGAT**

*(Being an Appeal from the Judgment and Decree of Hon. C. Kutwa (SPM) in Iten PMCC No. 9 of 2020)*

**RULING**

1. The applicant herein *vide* a notice of motion dated June 30, 2022 seeks the following orders;
  - a) Spent
  - b) Spent
  - c) That this honourable court be pleased to grant order for stay of execution of the judgment and decree made on April 20, 2022 for kshs 2,207,855 pending the hearing determination of the appeal in Civil Appeal No E066 of 2022
  - d) That this honourable court be pleased to allow the appellant furnish security for the entire decretal amount being kshs 2,207,855 by way of bank guarantee
  - e) That costs of this application be provided for.



2. The application is based on the grounds set therein and the contents of the supporting affidavit.
3. The brief facts leading up to the application are that the applicant was the defendant in Iten SPMCC No 4 of 2022 - Sammy Kiptoo Tanui & Julius Jepkosgei Soronei (suing as the administrator and legal representative of the estate of Cyrus Kibiwott v Vincent Kibiwott Kiptoo wherein judgment was entered in favour of the respondents. The applicant was held 100% liable for an accident that occurred on January 28, 2019 involving motor vehicle registration No KBG 035L wherein the deceased lost his life. The trial court awarded the plaintiff a total of kshs 2,207,855/- in damages.
4. The applicant being dissatisfied with the decision of the trial court filed a memorandum of appeal dated May 12, 2022. The applicant proceeded to file the present application seeking stay of execution of the judgment delivered on April 20, 2022.

### **Applicant's Case**

5. The applicant's case is that the judgment herein is substantial and if the respondents proceed with execution he stands to suffer irreparable loss. Further, he contended that the ability of the respondents to refund the decretal sum is unknown.
6. The applicant proposed a bank guarantee of kshs 2,207,855/- and provided an agreement between his insurer and Family Bank with regards to the securing of bank facility as security. He contended that unless stay is granted the appeal will be rendered nugatory. Further, that the respondents would not be prejudiced if the orders sought are granted. He maintained that the application was made in good faith and without delay.

### **Respondent's Case**

7. The respondents opposed the application *vide* a replying affidavit dated July 8, 2022. It is their case that the application is fatally defective and is unmerited. According to the respondents the application does not meet the threshold set by order 42 rule 6 of the [Civil Procedure Rules](#).
8. The respondents contend that the applicant has not explained what loss he will suffer. Further, that the application was filed 70 days after judgment and the delay is not explained. That the intended appeal has no chance of success and the applicant has not asked for typed proceedings for purposes of the appeal and this goes to explain the tactful delay the applicant is employing. The respondents stated that the burden of proof as to whether they will not be able to refund the decretal sum is upon the applicant. They maintained that the application is frivolous and a delay tactic.

### **Issues For Determination**

#### **Whether the orders for stay of execution should be granted**

9. Stay of execution is guided by 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 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”.

10. The upshot of the foregoing is that to determine whether the orders sought should be granted the court must establish; Whether the applicant will suffer substantial loss Whether the application was made without unreasonable delay Security

### **Whether the applicant will suffer substantial loss**

11. I note that the applicant has expressed concerns as to whether the respondents will be able to refund the decretal sum. In *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* (UR) C A 238/2005 when the court was confronted with a similar scenario, it held as follows;

“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 the respondent or lack of them. Once an applicant expresses that 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.”

12. The respondents ought to have filed an affidavit of means to satisfy the court that in the event the appeal succeeds, they will be able to refund the decretal sum. Substantial loss was addressed in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the court held that: -

“No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silvester v Chesoni* [2002] 1 KLR 887, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the court of Appeal in the granting stay of execution, under order 42 of the



CPR and rule S (2)(b) of the court by appeal rules respectively emphasized the centrality of substantial loss thus: -

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss of what has to be prevented by preserving the status quo because such loss would render the appeal nugatory?”

13. In the absence of evidence that the respondents are in a position to refund the decretal sum in the event the appeal succeeds, I find that the applicant stands to suffer substantial loss if the orders sought are not granted.

#### **Whether the application was made without unreasonable delay**

14. The judgment the applicant seeks to appeal against was delivered on April 20, 2022. The application was filed on June 30, 2022. I take judicial notice of the fact that the applicant was granted 30 days stay of execution in the consolidated test suit that the intended appeal arose from before filing the present application. It is my view that the application overcame the unreasonable delay rule.

#### **Security**

15. The applicant has offered a bank guarantee as security. The purpose of security has been discussed in various decisions over time. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, it was said:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

The applicant has proposed a bank guarantee for the decretal sum and provided evidence of an application for the same by the annexing the application by the insurer.

16. However, the appeal intended appears mainly pegged on the reasons that the trial court’s assessment of damages were excessive. In my view, even if the appellant succeeds in the appeal, that success will only reduce the amount of damages payable. In that regard, a part of the decretal sum will still be payable to the respondent.
17. I therefore direct that kshs 800,000/- be paid to the respondent, and the balance of the decretal sum be secured by a bank guarantee. These should be done within 14 days from the date of this ruling.
18. The stay of execution is therefore granted upon the above two conditions.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> OF SEPTEMBER 2022.**

**E. K. OGOLA**

**JUDGE**

