



REPUBLIC OF KENYA



KENYA LAW
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Mwaniki v Kimura; M/S CK Ungu & Company Associates (Applicant) (Miscellaneous Civil Case E042 of 2021) [2022] KEHC 14571 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL CASE E042 OF 2021
TW CHERERE, J
OCTOBER 27, 2022
IN THE MATTER OF THE ADVOCATES ACT**

BETWEEN

ANN NKIROTE MWANIKI CLIENT

AND

JOSEPH MAINA KIMURA RESPONDENT

AND

M/S CK UNGU & COMPANY ASSOCIATES APPLICANT

RULING

1. By a ruling dated May 5, 2022, this court dismissed the applicant's chamber summons dated November 11, 2021 with costs to the client and the respondent.
2. By a notice of motion dated May 18, 2022 filed on May 19, 2022, applicant seeks the following orders:
 1. Leave to appeal the ruling dated May 5, 2022 dismissed applicant's notice of motion dated November 11, 2021 with costs to the respondent
 2. Stay of execution of ruling dated May 5, 2022 pending the hearing and determination of an intended appeal
3. The application is based on the grounds that Applicant is dissatisfied with the ruling and intends to appeal. Application is additionally supported by Applicant's affidavit sworn on May 18, 2022 in which she reiterates the grounds on the face of the application. Annexed to the affidavit is an unfiled notice of appeal dated May 18, 2022.
4. Opposing the application, the client in her affidavit sworn on June 27, 2022 avers that she is a nurse by profession with a thriving practice and is in a position to refund the costs in the event that the appeal



- succeeds. Respondent filed grounds of opposition dated May 30, 2022 and stated that the order against the Applicant is a negative order incapable of being stayed.
5. I have considered the application in the light of the supporting affidavit, replying affidavit, grounds of opposition and submission filed on behalf of the Applicant.
 6. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

 - (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) An order on an award stated in the form of a special case;
 - (c) An order modifying or correcting an award;
 - (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) An order under section 64;
 - (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) Any order made under rules from which an appeal is expressly allowed by rules.
 7. Order 43 rule (1) of the *Civil Procedure Rules* sets out the orders and rules in respect of which appeals would lie as of right. Order 43(2) provides that an appeal shall lie with the leave of the court from any other order made under the Rules.
 8. The procedure for obtaining leave is provided under order 43(3) which states that: -
 - (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
 9. Applicant moved the court within 14 days of the impugned ruling and I therefore find that leave to appeal is merited.
 10. In *Antoine Ndiaye v African Virtual University* [2015] eKLR, the Court reiterated that a party seeking an order of stay pending appeal must not only meet the conditions set out under order 42 Rule 6 of the Civil Procedure Rules but that proof of substantial loss occurring to the applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution.



11. In *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. 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.

12. In the instant case, the court made an order dismissing the Applicants notice of motion with costs. In the case of *Western College Farts and Applied Sciences v Oranga & others* [1976] KLR 63, the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order and which I fully adopt stated inter alia as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

13. This position was reiterated by the same court In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, where it held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63 at page 66 paragraph C).”

14. Adopting the same reasoning, I find that Applicant seeks to stay a negative order which is one that is incapable of execution, and thus, incapable of being stayed. On costs, there is no evidence that a decree and certificate of costs have been drawn and therefore an application for stay of payment of costs would at this stage be premature. On the other hand, it has not been demonstrated that the Respondent is incapable of refunding the costs of the application in the event the appeal succeeds.

15. Arising from the foregoing, I make the following orders:

1. Applicant is granted leave to appeal this court’s ruling dated May 5, 2022.
2. The prayer for stay of execution of this court’s ruling dated May 5, 2022 is declined

DATED AT MERU THIS 27TH DAY OF OCTOBER, 2022.



TW CHERERE



JUDGE

Appearances

Court Assistant - Morris Kinoti

For Advocate/Applicant - Ms. Ungu for C.K.Ungu & Company Associates

For Client/ Respondent - Mr. Nkunja for Nkunja & Co. Advocates

For Respondent - Mr. Kariuki for Mithega & Kariuki Advocates

