



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthee v Ndegwa & another (Civil Appeal E018 of 2021)  
[2022] KEHC 14345 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E018 OF 2021  
JN NJAGI, J  
OCTOBER 26, 2022**

**BETWEEN**

**FREDRICK MUTHEE ..... APPELLANT**

**AND**

**PETER MAINA NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**PETER WAIRIA MAHENIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant/applicant has filed an application dated June 9, 2021 seeking for stay of execution pending the hearing and determination of the appeal filed herein. The application was based on grounds on the face of the application and supported by the affidavit of the applicant sworn on the even date and the further affidavit of his advocate Ms. Martha Mugo sworn on August 3, 2021.
2. The grounds in support of the application are that the lower court entered judgment against the applicant on the April 26, 2021. That the 1<sup>st</sup> respondent has extracted a decree and commenced the process of execution. That he is apprehensive that the 1<sup>st</sup> respondent might proceed to execute the decree to his detriment. That the decretal sum is substantial and if paid to the 1<sup>st</sup> respondent he would not be in a position to refund the same if the appeal is successful as he has not furnished the court with his financial standing. That the applicant is willing to secure the decretal amount liable to the 1<sup>st</sup> respondent by a bank guarantee. That the applicant has a strong and an arguable appeal with high chances of success and if the orders sought are not granted he stands to suffer irreparable damage and loss.
3. The application was opposed by the 1<sup>st</sup> respondent on the basis that he was a passenger in a motor vehicle belonging to the 2<sup>nd</sup> respondent when the vehicle was involved in an accident with the vehicle belonging the applicant. That judgment was rendered in his favour with the court finding each of them to blame for the accident. That the memorandum of appeal filed in the case does not challenge



a finding of liability against him as he was a passenger. That there is no likelihood of any or substantial or irreparable loss accruing from settling the decree and hence there is no justification for keeping him away from the fruits of the judgment. That assuming that the appeal will succeed it would only be against the 2<sup>nd</sup> respondent as either of them was liable for his loss. That he is willing to pay the decretal sum and provide such security as may be necessary in the unlikely event of an appeal against him being made.

#### **Submissions -**

4. The application was canvassed by way of written submissions. The advocates for the 1<sup>st</sup> respondent, Nderi & Kiingati, submitted that the 1<sup>st</sup> respondent was a passenger when the accident occurred. That as pertains to liability he cannot be called in contribution. That fundamentally the appeal is between the owners of the two motor vehicles on who between them is likely to be adjudged as blameworthy to compensate the 1<sup>st</sup> respondent. Therefore, that this cannot be a proper case for issuance of an order of stay of execution of judgment. That since neither of the appellant and the 2<sup>nd</sup> appellant is a man of straw, it is unlikely that any loss will be occasioned to the appellant by a refusal of an order to stay execution of the decree.
5. Counsel submitted that the case calls for the balance of the right to enjoy the fruits of the judgment against the discretion to order stay of execution -see *FMW vs LWW* (2021) eKLR. Counsel submitted that the balance in the circumstances of this case should tilt in favour of the 1<sup>st</sup> respondent. That the application has no merit and ought to be refused.
6. The advocates for the appellant, Kimondo Gachoka & Co. Advocates, on the other hand submitted that the appellant has satisfied all the conditions as set out in Order 42 Rule 6 for granting of stay of execution which are that the applicant must prove that he has an arguable appeal; that he will suffer substantial loss unless the application is granted; that the application is done without unreasonable delay and that the applicant has to offer security for due performance of the decree.
7. The applicant submitted that he has an arguable appeal. That he is appealing on both liability and quantum. That he produced witnesses during the trial to challenge the evidence adduced by the respondents and therefore that it is only fair and just that this court relooks into the evidence and grants appropriate orders.
8. It was submitted that the 1<sup>st</sup> respondent did not furnish the court with any documentary evidence to prove his financial status so as to show that he has the means of refunding the decretal sum in the event that the appeal was successful. That the decretal sum is Ksh230,300/= plus costs and interest which is a substantial sum for which the applicant will sufferer irreparable damage in the event that the respondent is unable to repay the same. Counsel relied on the case of National Industrial Credit Bank Limited v Aquinas Francis Wasike, Court of Appeal Civil Application No.238 of 2005, where the court held that the duty to show that the respondent has the means to pay back lies on him once the applicant expresses reasonable fear that the respondent would be unable to pay back the decretal sum. Therefore, that this is a suitable case for the court to exercise its discretion and order stay of execution.
9. It was further submitted that the memorandum of appeal was filed within one month of the delivery of the judgment while the application for stay of execution was filed on 9/6/2021. Therefore, that both the memorandum of appeal and the application were filed without delay.
10. It was further submitted that the applicant is ready and willing to provide security in the form of a bank guarantee pending the hearing and determination of the appeal.



## Analysis and determination –

11. The applicant herein is seeking for stay of execution pending the hearing and determination of his appeal. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:
  1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders 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 1<sup>st</sup> 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.
12. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
13. This court is therefore obligated to determine whether the above stated conditions were met in the instant application.
14. It has to be noted that the power to grant or refuse an application for stay of execution is a discretionary power. In *Butt vs Rent Restriction Tribunal (1979)* the Court of Appeal set out the general principles for granting such an application and stated as follows:
  1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
  3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon



application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

15. In the first place an applicant is required to show that he will suffer substantial loss unless the prayers sought are granted. It is such substantial loss which should be averted by the grant of the prayers. An applicant should therefore show the particular loss he is bound to suffer if the prayers sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No.2) (2002) KLR* the Court of Appeal held as follows:

“In this kind of application for stay, it is not enough for the application to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court; the court will not grant stay... This legal burden does not shift to the Respondent to prove he is possessed of the means to make a refund.

16. In the case of *James Wangalwa & Another v Agnes Naliaka Chesetoit (2012)eKLR* it was held that:

“...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.... 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 ... 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.”

17. The applicant herein states that the decretal sum is substantial to the tune of over Ksh.230,000/=. That he is apprehensive that if the money is paid to the respondent he may not be in a position to refund it in the event that the appeal is successful as he has not filed an affidavit of means to show that he is in a position to refund the money. Indeed, the 1<sup>st</sup> respondent did not show that he has the financial resources to refund any money that may be paid to him in the event that the appeal is successful. All he said in his replying affidavit is that he is able to refund the money and did not file any document to show that he is in a position to do so. The burden of prove was on him to prove so once the applicant had raised the issue – see *National Industrial Credit Bank Limited v Aquinas Francis Wasike (supra)*. The respondent did not discharge that burden. The amount owing is not a small amount of money. In the premises the applicant has shown that he stands to suffer substantial loss if the decretal sum is paid to the 1<sup>st</sup> respondent as he may not be in a position to refund the money in the event that the appeal is successful.
18. The second condition is whether the application has been filed without delay. It was pleaded that judgment in the matter was delivered on 26/4/2021 and that the appeal was filed on 19/5/2021.
19. Section 79G of the *Civil Procedure Act* requires appeals to the High Court to be filed within 30 days of the delivery of the order or ruling. In this case the appeal was filed within the statutory period of 30 days. The instant application was filed on 9/6/2021. It has been established that the application was filed without undue delay.



20. The third condition is in respect to security. The purpose of payment of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR where the court stated that:-

“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 the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

21. In the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR the it was observed that:

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals...”

22. The applicant in the instant case is offering security in form of a bank guarantee. This is a clear indication that the application is not just meant to delay the hearing. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* (2018) eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment.”

23. The duty of the court at this stage is to balance the interests of the two parties which are that the 1<sup>st</sup> respondent has on the one hand a lawful judgment in his favour and he should therefore not be denied the fruits of the judgment and the appellant on the other hand who has a right of appeal against the said judgment. I have noted that the applicant is appealing on both liability and quantum. Though the appeal is factually between the appellant and the 2<sup>nd</sup> respondent, it is better for the 1<sup>st</sup> respondent to wait for the determination of the appeal before execution takes place. In view of the fact that the



applicant is offering to deposit the decretal sum in court, I find no good reason to deny him the right to exercise his right of appeal.

24. The upshot is that the application herein is merited and is thereby allowed. I order that the applicant deposits into court a bank guarantee of his 50% share of the decretal sum within 14 days from the date hereof.

Costs of the application to be in the cause.

**SIGNED THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**J. N. NJAGI**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT NYERI THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

By:

**HON. JUSTICE M. MUYA**

**JUDGE**

**In the presence of:**

Kimoth Gachuka: for Applicant

Mr. Nderi : for 1<sup>st</sup> Respondent

**Court Assistant: Kinyua**

30 days R/A.

