



**Kigada v Juma (Civil Appeal E032 of 2021)
[2022] KEHC 14318 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E032 OF 2021
JN KAMAU, J
OCTOBER 25, 2022**

BETWEEN

BENARD KIGADA APPELLANT

AND

VICTOR ODHIAMBO JUMA RESPONDENT

RULING

1. In his notice of motion dated May 20, 2022 and filed on May 26, 2022, the appellant herein sought an order for stay of execution of the judgment/decree that was delivered on March 12, 2021 in Kisumu CMCC NO 483 OF 2018 for Kshs 200,000/= together with costs and interest pending the hearing and determination of his appeal be granted.
2. On May 20, 2021, Joan Turgutt, his advocate, swore an affidavit in support of his application. It was his contention that he was aggrieved by the entire judgment of the learned trial magistrate and that his application for stay orders at the trial court was dismissed.
3. He contended that the subject matter was substantial and in the event of the execution proceeding, he would suffer irreparable loss and prejudice as his appeal which raised triable issues would be rendered nugatory. He was emphatic that his appeal was meritorious and had a high chance of success.
4. He further averred that he was ready and willing to furnish security in form of a bank guarantee and thus urged this court to allow his application.
5. In opposition to the said application, on June 29, 2022, Dorcas Oluoch advocate, swore a replying affidavit on the respondent's behalf. The same was filed on even date.
6. The respondent stated that he was not opposed to the application being allowed on condition that half the decretal amount was released to him within (30) days and the balance being deposited as security in a joint interest-earning account within thirty (30) days, in default of which execution should issue.



7. When the matter came up for *inter partes* hearing on June 29, 2022, only the respondent was present in court. He informed the court that he would not file any written submissions but would rely on his replying affidavit. In the absence of the appellant, the court proceeded to reserve a date for ruling in respect of the present application.
8. The ruling herein is therefore based on the parties' respective affidavit evidence which they both relied upon in their entirety.

LEGAL ANALYSIS

9. The present application was brought under order 42 rule 6 of the *Civil Procedure Rules, 2010* which empowers a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.
10. Under the said order 42 rule 6 of the *Civil Procedure Rules*, an applicant has to demonstrate the following:-
 - a. That substantial loss may result unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree has been given by the applicant.
11. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
12. Having said so, as the respondent was not opposed to the appellant's application provided that the appellant deposited the decretal sum as aforesaid, this court did not therefore find it necessary to analyse the affidavit evidence though it noted the same.
13. This court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of a bank not honouring the bank guarantee as the bank issuing the same would not be a party to the suit therein making it difficult for a successful appellant to enforce any orders he or she would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished herein would be in form of money.
14. As the respondent did not file any affidavit of means to demonstrate that he was able to refund the appellant the decretal sum in the event the appellant was successful in the appeal, this court was not persuaded that it should order that half of the decretal sum be released to the respondent herein despite the said sum not being colossal.
15. Even if the court were to have found that the respondent had the ability to refund the decretal sum as aforesaid, it would still not have ordered the release of the decretal sum as the appellant had appealed against both liability and quantum.
16. Notably, deposit of monies is intended to safeguard the interest of both the appellant and the respondent. On one hand, the appellant is able to exercise his or her right of appeal as guaranteed in article 50(1) of the *Constitution* of Kenya, 2010 without the risk of having his or her appeal rendered nugatory as a result of execution being levied against him or her. On the other hand, it guarantees the respondent that in the event the appeal was to be unsuccessful, the decretal sum would be at easy reach so that he or she can enjoy the fruits of his judgment.



DISPOSITION

17. For the foregoing reasons, the upshot of this court's ruling was that the appellant's notice of motion application dated May 20, 2022 and filed on May 26, 2022 was merited and the same be and is hereby allowed in terms of prayer no (3) therein on the following conditions:-
1. That there shall be a stay of execution of judgment that was delivered by Hon M Agutu (SRM) on March 12, 2021 in Kisumu Civil Suit No 483 of 2018 Victor Odhiambo Juma vs Benard Kigada pending the hearing and determination of the appeal on condition the appellant shall deposit in a joint interest earning account in the names of his advocates and the respondent's advocates the sum of Kshs 200,000/= within thirty (30) days from the date of this ruling.
 2. For the avoidance of doubt, in the event, the appellant shall default on paragraph 17(1) hereinabove, the conditional stay of execution shall automatically lapse.
 3. The appellant be and is hereby directed to file and serve his record of appeal within one hundred and twenty (120) days from the date of this ruling.
 4. This matter will be mentioned on February 7, 2023 to confirm compliance and/or for further orders and/or directions.
 5. Costs of the application herein will be in the cause.
 6. Either party is at liberty to apply.
18. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2022

J KAMAU

JUDGE

