



**Nariana Enterprise Ltd v EOO & another (Suing as legal representative of the Estate of EOT)
(Civil Appeal E032 of 2022) [2022] KEHC 15733 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E032 OF 2022
JN KAMAU, J
NOVEMBER 28, 2022**

BETWEEN

NARIANA ENTERPRISE LTD APPELLANT

AND

JJT 1ST RESPONDENT

EOO 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF EOT

*(Being an appeal from the Judgment and Decree of Hon S. O. Temu (PM) delivered
at Nyando in Principal Magistrate's Court Case No 5 of 2020 on 28th April 2022)*

JUDGMENT

Introduction

1. In its Notice of Motion dated May 19, 2022 and filed on May 20, 2022, the Appellant sought an order for stay of execution of the judgment/ decree in Nyando PMCC NO 5 of 2020 that was delivered on April 28, 2022 pending the hearing and determination of its appeal.
2. Bernard Ayuko, Legal Manager at Occidental Insurance Company Limited, the Appellant's insurer, swore an affidavit in support of the application on May 19, 2022.
3. The Appellant contended that it instructed its advocates to appeal against the aforesaid judgment and that a Memorandum of Appeal had already been filed herein. It stated that it stood to suffer substantial and irrecoverable loss unless the order it had sought herein was granted. It was apprehensive that if the decree was executed and its Appeal eventually succeeded, it would be impossible to retrieve (sic) the decretal amount from the Respondents whom it averred were not a person of means.



4. It averred that its application had been brought without unreasonable delay and that it was willing to furnish such security as the court would deem fit to order including depositing half of the decretal amount in an interest earning account in the names of both counsel. It was emphatic that its intended appeal had good chances of success and added that the Respondents would not be prejudiced if its present application was allowed and.
5. In opposition to the said application, on June 20, 2022 the 2nd Respondent, the deceased's father, swore a Replying Affidavit. The same was filed on June 22, 2022. He conceded to the Appellant's allegations that he was not a person of means but averred that it would be unfair to the deceased's children if the order for stay was granted as they would not have school fees and provision for their basic needs.
6. He deposed that in the alternative, the application could be allowed on condition that the Appellant released at least fifty (50%) per cent of the decretal sum to cater for the deceased's minors' school expenses and also to cater for their basic needs during the pendency of the Appeal while the rest of the monies were deposited in an interest earning account in the joint names of both counsel.
7. The Appellant's Written Submissions were dated August 8, 2022 and filed on August 15, 2022 while those of the Respondent were dated September 12, 2022 and filed on September 15, 2022. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

8. The Appellant submitted that the Respondent had admitted that he was not a person of means and argued that it would suffer irreparable loss and prejudice since he would not be able to refund the decretal sum paid to him in the event it succeeded in its Appeal. It pointed out that it had perused the fees structure annexed by the Respondent and noted that each school charged Kshs 35,000/= which would be about Kshs 280,000/= in four (4) years and not millions.
9. It was categorical that it had met all the conditions that were set out in Order 42 Rule 6 of the *Civil Procedure Rules* and urged this court to grant the orders it had sought herein and in this regard placed reliance on the cases of *Michael Ntouthi Mitheu vs Abraham Kivondo Musau [2021] eKLR* amongst other cases to support its application.
10. It proposed that it pay the Respondents a sum of Kshs 1,000,000/= while it retained the balance pending the hearing and determination of the appeal.
11. On his part, the Respondent relied on the case of *Antoine Ndiaye vs African Virtual University [2006] eKLR* to argue that the Appellant had not met the threshold of being granted an order for stay of execution pending appeal.
12. Before an order for stay pending appeal under Order 42, Rule 6(2) of the Civil Procedure Rules, 2010 can be granted, an applicant has to demonstrate the following:-
 1. That substantial loss may result unless the order is made.
 2. That the application has been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
13. 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.



14. Notably, the decretal sum of Kshs 4,095,680/= was colossal. The Respondent had conceded that they were not persons of means. Rigours of recovering any sums of money can amount to substantial loss because of the resources that would be put in recovering the same. This very court made a similar finding in the case of *Dr GN Muema t/a Mt View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another (2018) eKLR.*
15. It was for that reason that this court found and held to the conclusion that the Appellant had satisfied the first condition of being granted an order for stay of execution pending appeal.
16. The Judgment the Appellant wished to appeal against was delivered on April 28, 2022. The present application was filed on May 20, 2022. There was no delay in filing the said application. The court found and held that the Appellant had satisfied the second condition for being granted an order of stay of execution pending appeal.
17. The Appellant was ready and willing to furnish security. This court was thus satisfied that it had demonstrated that it had met the third condition for the granting of an order of stay of execution pending appeal.
18. Notably, the Memorandum of Appeal showed that the Appellant had appealed against the quantum that the Respondent herein was awarded. The court was not therefore persuaded that it should order release of half of the decretal sum to the Respondent with the other half being deposited into a joint interest earning account in the names of the parties' advocates. Be that as it may, this court noted that the Appellant had agreed to release a sum of Kshs 1,000,000/= to the Respondent. The court found the same to have been reasonable and did not find any value in analysing the contestations further.

Disposition

19. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated May 19, 2022 and filed on May 20, 2022 was merited and the same be and is hereby allowed in the following terms:-
 1. THAT an order for stay of execution of the Judgment and Decree of Hon SO Temu (PM) that was delivered at Nyando in Principal Magistrate's Court Civil Case No 5 of 2020 on April 28, 2022 be and is hereby granted pending the hearing and determination of the appeal on condition that the Appellant shall pay the Respondents a sum of Kshs 1,000,000/= and further deposit the balance of the decretal sum of Kshs 3,095,680/= into an interest earning account in the joint names of the advocates for the parties herein 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 19(1) hereinabove, the conditional stay of execution shall automatically lapse.
 3. The Appellant be and is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.
 4. This matter will be mentioned on March 22, 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.
20. It is so ordered.



DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2022.

J. KAMAU

JUDGE

