



REPUBLIC OF KENYA



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Maisha Flour Mills Limited v Kalomut & Kalomut (suing as Administrators of the Estate of the Late Jacob Plimo Kalomut (Deceased) & 2 others (Civil Appeal 1 of 2022) [2022] KEHC 15627 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL 1 OF 2022
AC MRIMA, J
NOVEMBER 23, 2022**

BETWEEN

MAISHA FLOUR MILLS LIMITED APPLICANT

AND

JOSEPH LOROT KALOMUT & GLADYS CHENANGAT KALOMUT (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE JACOB PLIMO KALOMUT (DECEASED) 1ST RESPONDENT

WILLIAM ESOKON 2ND RESPONDENT

DOVE MOTORS LIMITED 3RD RESPONDENT

RULING

1. This ruling is in respect of an application by way of a Notice of Motion dated 2nd March, 2022. It was filed by the Appellant herein.
2. The application sought the following reliefs: -
 1. Spent;
 2. Spent;
 3. That this Honorable Court be pleased to stay execution of the Judgment/Decree in Kapenguria Cmcc No. 5 Of 2017 delivered on 17th January 2022 pending the hearing and determination of the appeal herein.
 4. That costs of this application be provided for.
3. The application was supported by the grounds on its face and further by the duly sworn Affidavit of one Habil Waseka, the Appellant's Accountant.



4. The gist of the application was that by judgment of the Court delivered on 17th January, 2022, the 1st and 2nd Respondents succeeded in their claim on damages arising out of a fatal road traffic accident in Kapenguria CMCC No. 5 of 2017; Joseph Lorot Kalomut & others vs. William Esokon & Another. In the said judgment, the trial Court found the Defendants jointly and severally liable and assessed damages as follows: -
 1. Special damages awarded to the plaintiffs in the sum of Kshs.104,500/=
 2. Pain and suffering in the sum of Ksh.100,000/=
 3. Loss of expectation of life in the sum of Kshs.120,000/=
 4. Lost years totaling to Kshs.4,720,480/=
 5. Liability attaches jointly and severally as against the Defendant, third party and 2nd third party at an assessed percentage of 100%
 6. The plaintiffs are awarded costs of the suit at an interest on the decretal sum from the date of delivery of Judgment until payment in full.
5. The Appellant herein was wholly dissatisfied with the judgment hence preferred the instant appeal.
6. The Appellant posited that it was apprehensive that there was imminent threat of execution by the 1st and 2nd Respondents such that if the stay orders are not granted, it will suffer substantial loss and will be condemned unheard hence prejudiced.
7. The Appellant contended that according to the evidence on record, the 1st and 2nd Respondents were persons of straw thereby incapable of refunding the decretal sum should the stay orders not be granted and the appeal eventually succeeds. The Appellant expressed willingness to furnish such reasonable security as the Court would order. It added that it was in the interest of justice that the application be granted as prayed.
8. The application was disposed of on the basis of the parties' written submissions. According to the Appellant's submissions dated 23rd August, 2022, the application met the threshold set out in Order 42, Rule 6 of the Civil Procedure Rules; that is to say that the application was filed timeously, the Appellant will suffer substantial loss if stay is not granted and that the Appellant was ready and willing to furnish security by depositing one-third of the decretal sum in a joint interest earning account.
9. In further demonstrating substantial loss, the Appellant relied on the testimonies of the 1st and 2nd Respondents at trial. During the hearing of the substantive suit, it was disclosed that the said Respondents wholly depended on the deceased person. From this statement, the Appellant deduced that the Respondents had no other source of income. They would thus be incapable of refunding the decretal sum in the event the appeal is found to be with merit.
10. It further submitted that the appeal raised cogent grounds to warrant an interference from the Court sitting on appeal. To this end, it was submitted, since the amount awarded was colossal, if paid out, would lead to substantial loss.
11. Although the 1st and 2nd Respondents did not respond to the application, they filed written submissions dated 30th August, 2022. They submitted that they were not averse to the application save for the manner in which the security for due performance ought to be discharged. They proposition that one-half of the decretal sum be remitted to them pending the outcome of the appeal.



12. Order 42, Rule 6 of the [Civil Procedure Rules](#) provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
- i. The application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and
 - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
13. It is not lost that the purpose of stay pending appeal as held in the case of *RWW vs. EKW* [2019] eKLR, is as follows: -
- ... 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.
14. The application shall, hence, be determined under the three parameters captioned above.

Whether the application has been filed timeously:

15. This can be determined from the transpirations in the matter.
16. Judgment at trial was entered on 17th January, 2022. Thereafter, the Appellant filed its Memorandum of Appeal before this Court on 11th February, 2022. This was within the stipulated time frame as provided in statute.
17. The Appellant then filed the present application on 9th March, 2022. While noting that the present application did not accompany the Memorandum of Appeal or soon thereafter, it appears from the facts that execution had not commenced.
18. This Court, therefore, finds and hold that the filing of the application was not inordinate.

Whether the Applicant will suffer substantial loss:

19. The aspect of substantial loss was discussed in [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR as follows: -
- ... 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 ... 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.



20. The Appellant raised two grounds in support of the fact that substantial loss would occasion in the event stay is not granted; the 1st and 2nd Respondents lacked financial muscle and the substantial amount awarded in judgment.
21. On the Respondents' inability to settle the decretal sum, the Appellant relied on their evidence at trial disclosing that they wholly relied on the deceased. The Respondents did not disclose that they had alternative sources of income.
22. The Court of Appeal, while considering a scenario where the Applicant relied on the allegation of lack of financial muscle to prove substantial loss in *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another* [2006] eKLR held thus: -

... This court has said before and it would bear repeating that while the local 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 a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum the evidential burden must then shift to the respondent to show resources he has since that is a matter which is peculiarly within his knowledge.
23. In this matter, it was incumbent upon the 1st and 2nd Respondents to thus demonstrate that they had the financial strength and were persons of means. That was not the case herein. Instead, they beseeched this Court, in submissions, to order that the Appellant does deposit half of the decretal sum to their favor.
24. The Respondents, therefore, did not discharge the evidential burden of proof by failing to controvert the Appellant's position that they shall be unable to refund the judgment amount in the event the appeal succeeds.
25. On the preponderance of probability, the Appellant, therefore, demonstrated the likelihood of suffering substantial loss if stay is not granted.

Whether the Applicant is willing to furnish security:

26. The Appellant proposed to deposit one-third of the decretal sum in a joint interest earning account of the parties Counsel. Conversely, the Respondents through Counsel urged this Court to order that one-half of the decretal sum be deposited to their favor.
27. It is worth-noting that the Appellant has been ready, able and willing to furnish such security for due performance. However, the parties are at extreme ends of the spectrum in terms of the mode of deposit of such security.
28. Given the uncontroverted position that the 1st and 2nd Respondents are not likely to refund the sums once paid, then to thus order the decretal sum deposited to their favor would create precariousness on its refund. Any sums may better be deposited in joint accounts of the parties' Counsel.
29. Having so said, this Court finds that the application is merited and it is determined in the following manner: -
 - a. There be a stay of execution of the judgment and decree in Kapenguria CMCC No. 5 of 2017 on condition that the sum of Kshs. 2,000,000/= be deposited in a joint-interest earning account in the names of the Advocates for the Appellant herein and the 1st and 2nd Respondents herein.



- b. The said deposit shall be made within 30 days of this ruling.
- c. In the event of default on the part of the Appellant, the order of stay of execution of the judgment and decree will automatically lapse and the Respondents shall be at liberty to execute for the entire decretal sum.
- d. In the event the default is occasioned by the Respondents, the Appellant shall instead deposit the said sum of Kshs. 2,000,000/= into Court and the order of stay shall forthwith subsist.
- e. The lower Court file be availed before this Court.
- f. Matter shall be fixed for directions on the main appeal.

30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 23RD DAY OF NOVEMBER, 2022.

A. C. MRIMA

JUDGE

