



**Njue v Ondieki (Civil Appeal E006 of 2022)
[2022] KEHC 15690 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E006 OF 2022
RB NGETICH, J
NOVEMBER 17, 2022**

BETWEEN

ALEXIUS STEPHENE NJUE APPLICANT

AND

JOSEPH ARISA ONDIEKI RESPONDENT

RULING

1. This is a ruling on the appellant’s application dated on January 12, 2022 seeking orders of stay of execution and setting aside the ruling and order of 25th November 2021 by the Chief Magistrate Hon MW Wanjala in Thika Civil Suit No 574 of 2014.
2. The application is premised on the grounds that the appellant was dissatisfied with the judgment of the trial court of November 25, 2021 where the court allowed the plaintiff’s claim and awarded damages of Kshs 602,000 with costs for the injuries sustained in the accident.
3. That vide a ruling of July 7, 2017 the appellant had deposited the decretal sum of Kshs 652,000 in a joint interest earning account in the names of both advocates. The appellant is dissatisfied with the said judgment and has preferred an appeal. The applicant was apprehensive the respondent will proceed with execution rendering the appeal nugatory.
4. The application is supported by the annexed affidavit of Alexius Stephene Njue sworn on January 12, 2022. He averred that unless stay orders are issued, the amounts will dissipate upon execution by the respondent/plaintiff. He contends the application was filed timely and the respondent will suffer no prejudice.
5. On 18th May 2022, directions were taken to dispense the application through written submissions. Both parties complied.



Applicant/appellant's Submissions

6. Counsel for the applicant/appellant filed submissions on behalf of the applicant on 17th June 2022. He submitted that the applicant had complied with the conditions for granting stay as outlined in *Butt Versus Rent Restriction Tribunal* (1979) and had demonstrated the appeal was arguable and has high chances of success and if the orders are not granted, the intended appeal will be rendered nugatory.
7. The applicant submitted that the trial Magistrate's judgment was irrational; applied wrong principles and applicant merited in the circumstances.
8. Counsel further submitted that the appeal will be rendered nugatory if the orders of stay are not granted as there is a risk that the respondent will execute the judgment and utilize the security deposited in the joint interest earning account. It is submitted that the Applicant had already offered security of Kshs. 652,000 for the due performance.
9. Counsel urged the costs of the application to follow the outcome of the appeal.

Respondent's Submissions

10. The respondent's counsel filed submissions on July 20, 2022. He submitted on the issues raised in the appeal, he did not submit in respect to the application for stay of execution.
11. Counsel submitted that the suit was filed on July 23, 2014, the appellant/defendant failed to enter appearance and judgment was delivered on December 21, 2016. The Applicant got wind of the execution of Kshs 782,995 and filed an application for stay of execution which was granted on condition that the Applicant deposited the decretal amount of Kshs 652,000 on July 7, 2017. Dissatisfied with the ruling of July 7, 2017 the applicant filed a further application for the stay of the orders which application was dismissed.
12. Counsel urged the court not to interfere with the award of the trial court. He submitted that the evidence of the plaintiff/respondent was not controverted in the trial court and the case had been in the court corridors since 2014. Counsel stated the prayer sought in the appeal is not realistic, the prayers do not meet the end of justice. He urged the court to dismiss the appeal and uphold the lower court's judgment.

Analysis and Determination

13. I note that the respondent did not file a response to the application and submissions filed are in respect to the appeal.
14. I have considered ground of the appeal and averments in the supporting affidavit together with the submissions filed. The issue for determination is whether the application meet the threshold for grant of stay of execution pending appeal.
15. Order 42 rule 6 provide as follows: -

“No order of stay shall be made under sub-rule (1) unless;

- a. The court is satisfied that substantial loss may result to the 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.”

16. The applicant has stated that substantial loss will be suffered as the respondent will execute the judgment and dissipate the monies held in the account as security.
17. He further contends that the application is brought without any delay. From the record, judgment was delivered on November 25, 2021 while the application was filed on January 13, 2022. The Memorandum of Appeal was filed on January 3, 2022, a period of 25 days.
18. In my view the delay of twenty five (25) days cannot be said to be unreasonable. I also note that the issue of security has already been settled as advocates have agreed to have the decretal amount of Kshs 652,000 deposited in a joint interest earning account continue to be utilized as security.
19. In the circumstances I do allow the application for stay of execution of the judgment of the trial court of 25th November 2022.

Final Orders: -

1. Stay of execution do issue pending hearing and determination of the appeal herein.
2. Kshs 652,000 deposited in the joint interest earning account to remain in the account as security until hearing and determination of this appeal.
3. Costs of this application to abide by the outcome of this appeal.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 17TH DAY OF NOVEMBER, 2022

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RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua/Martin – Court Assistant

Mr. Kamunda for Appellant

Ms. Wanjiru holding brief for Maina for Respondent

