



REPUBLIC OF KENYA



KENYA LAW
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**Waweru & another v Kangethe (Civil Miscellaneous E684 of 2022)
[2022] KEHC 16820 (KLR) (Civ) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS E684 OF 2022

JK SERGON, J

DECEMBER 21, 2022

BETWEEN

CHRISTOPHER GICHUHI WAWERU 1ST APPLICANT

JACKSON NDUNGU MUTHONI 2ND APPLICANT

AND

STEPHEN KINUTHIA KANGETHE RESPONDENT

(Being an application for stay of execution of the judgment of the Honourable CW Ndumia delivered on October 7, 2022 in Milimani Small Claims Civil Suit Number E2235 of 2022.)

RULING

1. The subject matter of this ruling is the motion dated November 7, 2022 taken out by the applicants whereof they sought for *inter alia*:
 - i. That this application be certified as urgent and be heard *ex parte* in the first instance.
 - ii. That this honourable court be pleased to stay the execution of the judgment of the Honourable CW Ndumia delivered on October 7, 2022 in Small Claims Civil Suit Number E2235 of 2022 Milimani between the parties herein pending the hearing and determination of this application.
 - iii. That this honourable court be pleased to stay the execution of the judgment of the Honourable CW Ndumia delivered on October 7, 2022 in Civil Suit Number E2235 of 2022 Milimani between the parties herein pending the hearing and determination of the intended appeal.
 - iv. That this honourable court do issue an order for security in respect of the judgment of the honourable court in Small Claims Civil Suit Number E2235 of 2022 Milimain between



the parties herein in the form of a bank guarantee which shall be issued by the appellants/ applicants underwriters bank in favour of this honourable court.

- v. That this application be heard *inter partes* on such date and time as this honourable court may direct.
- vi. That the costs of this application be in the cause.
2. The applicants filed the affidavit sworn by Kelvin Ngure in support of the application. When served with the application, the respondent filed the replying affidavit he swore to oppose the same.
3. I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits. I have also considered the oral submissions of learned counsels. The main order sought by the applicants is that for stay of execution of the decree of the trial court pending appeal. It is the submission of the applicants that judgment was pronounced against them by the Small Claims Court on October 7, 2022 *vide* Milimani SCCC No E2235 of 2022 and that the respondent has commenced execution proceedings.
4. It is argued by the applicant that unless an order for stay is granted they would suffer substantial loss in that the respondent is not in a financial position to refund the decretal sum if the appeal turns successful.
5. They averred that the respondent is a person of no known means of income. The applicant offered to provide a bank guarantee for the decretal sum as security for the due performance of the decree.
6. The respondent urged this court to dismiss the applicants' motion arguing that the same is a gimmick to delay the conclusion of the matter.
7. It is also argued that the application is frivolous and an abuse of the court process.
8. The applicants also sought for an extension of time to file an appeal out of time claiming that the delay to lodge the appeal within time was as a result of their advocate failing to obtain a copy of the judgment in time to advice them on the way forward.
9. In response, the respondent averred that the application for extension of time is an afterthought on the part of the applicants and is meant to delay his enjoyment of the proceeds of his judgment.
10. The principles to be considered in determining an application for stay of execution of a decree pending appeal are threefold. First, is that an application for stay should be filed without unreasonable delay. In the instant matter, judgment was delivered on October 7, 2022. The instant application was filed on November 7, 2022. It is apparent that the motion was filed without unreasonable delay. It is a delay of a day.
11. Secondly, an applicant must show the substantial loss he would suffer if the order for stay is denied. In the instant application the applicants aver that the respondent is not in a financial position to refund the decretal sum if the appeal succeeds. The respondent did not deem it fit to controvert the applicants' assertion.
12. I am therefore satisfied that the applicants have demonstrated the substantial loss they would suffer if the order for stay is denied.
13. The final consideration is the requirement for the provision of security for the due performance of the decree. The applicants stated in their application that they are willing to provide a bank guarantee for the decretal amount. However, the applicants' advocate offered orally before court that the applicants are willing to deposit the decretal sum.



14. Having considered the two proposals, I am convinced that the later oral offer is reasonable. The applicants averred that it took time for their advocate to be supplied with a copy of the judgment hence it was not possible to get instructions on the way forward. The respondent did not address this court over this issue.
15. Where an applicant seeks for extension of time to file an appeal out of time, one is required to show sufficient cause. I am satisfied that the reason advanced by the applicants is reasonable and acceptable hence sufficient.
16. In the end, the motion dated November 7, 2022 is allowed thus giving rise to issuance of the following orders:
 - i. The applicants are granted leave of 30 days to file an appeal out of time.
 - ii. An order for stay of execution of the decree of the trial court pending appeal is granted on condition that the applicants should deposit the decretal sum of Kshs 461,154/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this matter within 45 days from the date hereof. In default, the order for stay automatically lapses and the respondent will be at liberty to execute.
 - iii. Mention on February 8, 2023 to confirm the filing of the record of appeal and for further orders and directions in the hearing of the appeal.
 - iv. Costs of the motion to abide by the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
21ST DAY OF DECEMBER, 2022.**

JK SERGON

JUDGE

In the presence of:

..... for the plaintiff.

..... for the 1st defendant.

..... for the 2nd defendant.

