



**Osman & another v Mwarialie (Civil Appeal E201 of 2018)
[2022] KEHC 16671 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E201 OF 2018
OA SEWE, J
DECEMBER 20, 2022**

BETWEEN

NUHU ABDI OSMAN 1ST APPELLANT

ALHUSNAIN MOTORS LIMITED 2ND APPELLANT

AND

SAUMU HAMADI MWARIALIE RESPONDENT

RULING

1. The respondent herein, Saumu Hamadi Mwarialie, sued the two appellants before the Senior Resident Magistrate's Court at Msambweni claiming special and general damages for injuries suffered in a road traffic accident. The lower court (Hon Sandra Ogot, SRM) found in the respondent's favour and awarded her a total sum of Kshs 828,584/= together with interest and costs. A decree and a certificate of costs were accordingly issued and execution effected by way of proclamation of attachment. This was after warrants of attachment and sale dated June 9, 2022 were issued to M/s Mugema Auctioneers.
2. On the June 14, 2022, the appellant filed the instant application under order 42 rules 4, 6 and 7 of the [Civil Procedure Rules](#), among other provisions of the law, seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. the court be pleased to enlarge time to furnish a proper amended bank guarantee with the lower court, in due satisfaction of the conditions of stay pending determination of this appeal;



- e. In the alternative to prayer 4 above, the court be pleased to enlarge time to amend the error and certify the bank guarantee herein attached addressed to the deputy registrar, Mombasa as a proper bank guarantee in due satisfaction of the lower court conditions of stay in this appeal;
 - f. That the court be pleased to grant stay of execution of the judgment and/or decree issued in Msambweni SRMCC No 41 of 2019 pending the hearing and determination of this appeal;
 - g. That the costs of the application be in the cause.
3. The application was premised on the grounds that judgment was entered in the respondent's favour by the lower court on October 15, 2021; and that, as a precondition for stay of execution pending appeal, the appellants were ordered to furnish a bank guarantee as security for the due performance of the decree. It was further averred that, although the appellants complied with the orders of the lower court, the initial bank guarantee supplied had errors, in so far as it was addressed to the High Court at Meru. A replacement bank guarantee was drawn in favour of the deputy registrar, Mombasa, instead of the senior resident magistrate, Msambweni. It was therefore the contention of the appellants that, due to the lengthy bank process; a process that was out of their control, they were unable to correct the errors in the second bank guarantee in good time. In the premises, it was the assertion of the appellants that, unless stay of execution is granted and the warrants of attachment recalled and cancelled, the respondent may proceed and levy execution, thereby rendered the appeal otiose.
 4. The application was supported by the two affidavits sworn by Advocate Mirembe of M/s Kimondo Gahoka Advocates, who has conduct of this matter. He annexed the pertinent documents to his affidavits to buttress his assertions. The annexures include copies of the initial bank guarantee (annexure "EM 2"), and the subsequent bank guarantee (annexure "EM 3"). Thus, Mr Mirembe reiterated the appellants' averment that, unless stay of execution is granted and the warrants of attachment recalled and cancelled, the respondent may levy execution thus rendering the appeal nugatory. He pointed out that the lower court had in fact extended time for correction of the bank guarantee, but that, due to the lengthy bank process that was out of the appellants' control, they were unable to rectify the errors in the said bank guarantee. He therefore asserted that it is in the interest of justice that the application be allowed.
 5. In her response to the application, the respondent relied on her replying affidavit filed on June 21, 2022, in which she deposed that the application is a blatant abuse of the court process and therefore ought to be dismissed with costs. At paragraph 5 of her replying affidavit, the respondent averred that the appellant has been given numerous opportunities by way of extension of time to comply with the conditions for stay of execution given by the lower court, and yet was unable to fully comply. She added that the scales of justice dictate that she be allowed to enjoy the fruits of her judgment without any further delay; granted that as of June 9, 2022, the decretal sum had grown to *Kshs* 973,749/=.
 6. Upon directions being given that the application be canvassed by way of written submissions, Mr Mirembe filed his written submissions on July 1, 2022. He relied on *Elizabeth Kavere & Another v Lilian Atbo & Another [2020] eKLR* in urging the court to find that it has the discretion to recall and lift the warrants of attachment issued by the lower court. On stay of execution, counsel placed reliance on HCCC No 22 of 2017: *Focin Motorcycle Co Limited v Ann Wambui Wangui & Another* to demonstrate that the appellant stands to suffer substantial loss unless the orders sought are granted. He likewise prayed for costs of the application.
 7. On his part, Mr Mungai for the respondent opted to rely entirely on the averments set out in the respondent's replying affidavit sworn on June 20, 2022; which I have summarized herein above. Thus, the issues emerging for determination are:



- a. Whether the appellant has made out a good case for stay of execution; and if so,
 - b. whether it is in order to recall and set aside the warrants of attachment and sale issued by the lower court.
8. It is now trite that a successful litigant is entitled to the fruits of his litigation; and therefore that, barring sufficient cause, no impediments should be placed in the way of a decree holder who is simply seeking to reap the fruits of his/her judgment. In *Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] KLR 63* this principle was aptly expressed thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

9. The foregoing notwithstanding, order 42 rule 6(1) of the *Civil Procedure Rules*, recognizes that:

“... the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside...”

10. Thus, there is no gainsaying that the court has the discretion to grant stay of execution, in appropriate cases, should a justification be made to warrant the exercise of such discretion. And, to guide the exercise of discretion in this regard, order 42 rule 6(2) of the *Civil Procedure Rules*, stipulates that:

(2) No order for stay of execution shall be made under subrule (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.”

11. In addition to the prerequisites set out in order 42 rule 2 of the *Civil Procedure Rules*, the Court of Appeal explained, in *Butt v Rent Restriction Tribunal [1982] KLR 417*, that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way as not to prevent the appeal, if successful from being nugatory...The court will grant stay where special circumstances of the case so require...”

12. With the foregoing in mind, I have given consideration to the question whether the appellant has made out a good case for stay of execution. From the documents annexed to the appellants’ supporting and



further affidavits, it is not in dispute that as early as February 2, 2022, the appellants obtained an order from the lower court staying execution pending appeal, the order was conditional on the appellants providing security in the sum of Kshs 833,645 inclusive of costs within 45 days from the date of the order. The documents further show that, thereafter a bank guarantee dated April 4, 2022 was provided by Family Bank on behalf of Directline Assurance Company Ltd, as the insurers of the appellants for the aforesaid sum, save that it was erroneously addressed to the deputy registrar, High Court, Meru. The appellants annexed copies of two other bank guarantees (annexure “EM-3” to the supporting affidavit and annexures “EM-1” and “EM-3” to the appellants’ further affidavit to confirm that, in spite of spirited efforts by their counsel to have the errors corrected, the bank only got it right in the 4th instance.

13. It is manifest then that the appellants are not personally to blame for the delay in complying with the orders of the lower court. That alone is sufficient cause for granting the orders sought. The second reason is the apprehension by the appellants that they risk suffering substantial loss for the reason that the respondent may not be in a position to refund the decretal sum in the event of a successful appeal if paid up front. In his written submissions counsel for the appellants underscored the fact that the respondent’s source of income is unknown. In essence, it was the contention of the appellants that the respondent is a person of straw.

14. That being the stance taken by the appellants the burden of proof was on the respondent to demonstrate that she is indeed capable of refunding the decretal sum if paid. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*, the Court of Appeal held:

“...This court has said before and it would bear repeating that while the legal 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 the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, chapter 80 Laws of Kenya...”

15. It matters not that the decree is a money decree; for in Civil Application No Nai 322 of 2006: *Kenya Hotel Properties Ltd v Willesden Properties Ltd*, the Court of Appeal pointed out that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

16. I am therefore satisfied that the appellants have made out a good case for stay of execution pending appeal. That being the case, I find it superfluous to issue an order for the recall and/or cancellation of the warrants of attachment and sale issued by the lower court. The effect of stay of execution is to halt, as it were, any steps hitherto taken in execution of the lower court’s decree. M/s Mugema Auctioneers have no alternative but to return the warrants to the issuing court without taking any further steps in prolongation of the execution process.



17. In the result, I find merit in the plaintiff's application dated June 13, 2022. The same is hereby allowed and orders granted as hereunder:

a. That stay of execution of the judgment and/or decree issued in Msambweni SRMCC No 41 of 2019 be and is hereby granted pending the hearing and determination of this appeal on condition that the appellants deposit a Bank Guarantee in the sum of Kshs 973,749/= addressed to the Senior Resident Magistrate, Msambweni Law Courts, within 30 days from the date hereof.

b. That the costs of the application to abide the appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF DECEMBER, 2022.

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OLGA SEWE

JUDGE

